GENERAL STATUTES OF NORTH CAROLINA

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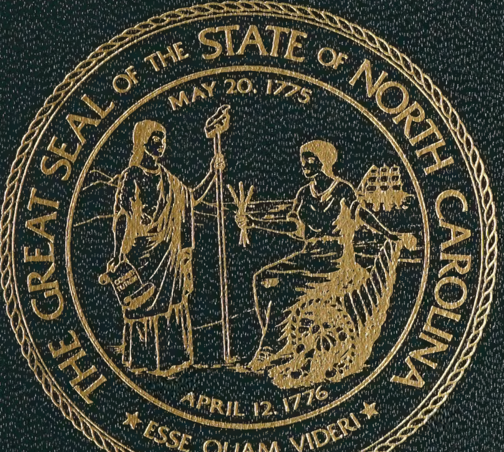
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GENERAL STATUTES OF NORTH CAROLINA

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Volume 1

Chapters 1 to 105

CONTAINING GENERAL LAWS OF NORTH CAROLINA
ENACTED BY THE GENERAL ASSEMBLY

Prepared under the Supervision of
THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA
by
the Editorial Staff of the Publishers

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Preface

This Volume contains the general laws of a permanent nature enacted by the General Assembly at the 2008 Regular Session, which are within Chapters 2008-1 through 2008-229, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

Roy Cooper
Attorney General

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Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 2008 Regular Session affecting Chapters 2008-1 through 2008-229.

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted on LEXIS through September 19, 2008. These cases will be printed in the following reporters:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1 of the General Statues. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 of the General Statutes for the complete User's Guide.

Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R.	Potter's Revisal (1821,1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

December 2008

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2008 Interim Supplement to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

Roy Cooper
Attorney General of North Carolina

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§ 1-2. Actions.

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Cited in In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

§ 1-3. Special proceedings.

CASE NOTES

Applied in In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

SUBCHAPTER II. LIMITATIONS.

Article 3.

Limitations, General Provisions.

§ 1-15. Statute runs from accrual of action.

CASE NOTES

II. Malpractice.

II. MALPRACTICE.

Malpractice Claim Barred. —
Client's professional negligence claim against an attorney was barred by the statute of repose, G.S. 1-15(c), because the client brought his professional malpractice action nearly seven years after the attorney's last act; because the attorney voluntarily dismissed without prejudice the client's claims in October 1997, the last opportunity for him to act on the claims occurred in October 1998, and the client brought his professional malpractice action in May 2006. Goodman v. Holmes & McLaurin, — N.C. App. —, 665 S.E.2d 526, 2008 N.C. App. LEXIS 1622 (2008).

Motion to Dismiss Denied. — Because the face of the complaint did not clearly reveal that plaintiff borrower's claims against defendant attorney and law firm accrued before January 30, 2004 (the cut-off date under the three-year statute of limitations), the attorney and law firm's request to dismiss the remaining claims based on the statute of limitations was denied. Higgins v. Spence & Spence, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 13096 (E.D.N.C. Feb. 21, 2008).

§ 1-26. New promise must be in writing.

CASE NOTES

II. Acknowledgment or New Promise.

II. ACKNOWLEDGMENT OR NEW PROMISE.

Acknowledgment or Promise Held Insufficient. —
Client was entitled to summary judgment based on the statute of limitations under G.S. 1-52(1) because a business consultant failed to show that the client in its e-mails to the consultant manifested a definite and unqualified intention to pay a contractual debt under G.S. 1-26 so that the time for the consultant to collect the contractual debt was extended by the e-mails. Andrus v. IQMax, Inc., — N.C. App. —, 660 S.E.2d 107, 2008 N.C. App. LEXIS 900 (2008).

Article 4.

Limitations, Real Property.

§ 1-38. Seven years' possession under color of title.

CASE NOTES

I. In General.
II. Possession, Generally.

I. IN GENERAL.

Cited in Pegg v. Jones, — N.C. App. —, 653 S.E.2d 229, 2007 N.C. App. LEXIS 2457 (2007).

II. POSSESSION, GENERALLY.

Possession for Over a Century. — Where defendant State of North Carolina and the North Carolina Diocese had possessed the property in question for over a century, to the extent plaintiffs' allege that defendants held the property under color of title, plaintiffs' claim was barred by the applicable seven year statutory period. Majeed v. North Carolina, 520 F. Supp. 2d 720, 2007 U.S. Dist. LEXIS 74441 (E.D.N.C. Oct. 4, 2007).

§ 1-40. Twenty years adverse possession.

CASE NOTES

I. In General.
II. Possession, Generally.
III. Hostile or Adverse Nature of Possession.

I. IN GENERAL.

G.S. 1-40 Inapplicable to Easement. — Defendant property owners were entitled to partial summary judgment in plaintiff property owners' action, which asked for a preliminary and permanent injunction prohibiting defendants from obstructing or interfering with plaintiffs' right to a thirty-foot easement, because (1) G.S. 1-50(a)(3) was the applicable statute of limitations, not G.S. 1-40, because an injury to an incorporeal hereditament was at issue, rather than a continuous trespass or a prescriptive easement to property held in fee; and (2) the parties agreed that all encroachments, except the fences installed in 2004 and 2005, were planted or installed approximately nine to eleven years before the commencement of plaintiffs' action. Pottle v. Link, — N.C. App. —, 654 S.E.2d 64, 2007 N.C. App. LEXIS 2557 (2007).

Limitations for Ejectment Actions. — Where defendant State of North Carolina and the North Carolina Diocese had possessed the property in question for over a century, to the extent plaintiffs' allege that defendants held the property under color of title, plaintiffs' claim was barred by the applicable seven year statutory period, and even if plaintiffs alleged that defendants do not hold title at all, the 20 year statute of limitations period for actions to recover property held in adverse possession still barred plaintiffs' claim. Majeed v. North Carolina, 520 F. Supp. 2d 720, 2007 U.S. Dist. LEXIS 74441 (E.D.N.C. Oct. 4, 2007).

II. POSSESSION, GENERALLY.

Evidence Held Insufficient. — Possessor of real property did not acquire title to the property through adverse possession under G.S. 1-40 because competent evidence supported the finding that he failed to satisfy the required 20 year time period under G.S. 1-40 even though his late parents, who were predecessors in interest, occupied the property as tenants with a life estate. Pegg v. Jones, — N.C. App. —, 653 S.E.2d 229, 2007 N.C. App. LEXIS 2457 (2007).

III. HOSTILE OR ADVERSE NATURE OF POSSESSION.

Permissive Use. — Where neighbors' driveway and shrubbery encroached onto adjacent property, the neighbors could not establish a claim for adverse possession, because they did not possess the disputed tract in a hostile manner for a continuous 20-year period since their use of the disputed tract was permissive following a conversation with the owner, who gave the neighbors permission to use the disputed tract. Jones v. Miles, — N.C. App. —, 658 S.E.2d 23, 2008 N.C. App. LEXIS 545 (Mar. 18, 2008).

Once possession becomes hostile, a grant of permission from the true owner will not defeat such hostility if the possessor either rejects the grant of permission or otherwise takes some affirmative step to put the true owner on notice that the possessor's use of the land remains hostile. However, a true owner's grant of permission will defeat a possessor's hostile use if the possessor takes no further action to reassert the possessor's claim over the land; in such cases, the possessor has not put the true owner on notice that the possessor still intends to claim the disputed land as the possessor's own. Jones v. Miles, — N.C. App. —, 658 S.E.2d 23, 2008 N.C. App. LEXIS 545 (Mar. 18, 2008).

§ 1-45.1. No adverse possession of property subject to public trust rights.

CASE NOTES

Cited in Hyatt v. Town of Lake Lure, — N.C. App. —, 663 S.E.2d 320, 2008 N.C. App. LEXIS 1322 (2008).

ARTICLE 5.

Limitations, Other Than Real Property.

§ 1-50. Six years.

CASE NOTES

III. Incorporeal Hereditaments.
IV. Defective Condition of Improvements to Real Property.

III. INCORPOREAL HEREDITAMENTS.

Subsection (3) Applicable to Easement. — Defendant property owners were entitled to partial summary judgment in plaintiff property owners' action, which asked for a preliminary and permanent injunction prohibiting defendants from obstructing or interfering with plaintiffs' right to a thirty-foot easement, because (1) G.S. 1-50(a)(3) was the applicable statute of limitations, not G.S. 1-40, because an injury to an incorporeal hereditament was at issue, rather than a continuous trespass or a prescriptive easement to property held in fee; and (2) the parties agreed that all encroachments, except the fences installed in 2004 and 2005, were planted or installed approximately nine to eleven years before the commencement of plaintiffs' action. Pottle v. Link, — N.C. App. —, 654 S.E.2d 64, 2007 N.C. App. LEXIS 2557 (2007).

IV. DEFECTIVE CONDITION OF IMPROVEMENTS TO REAL PROPERTY.

Action Barred. — Trial court properly granted a roofing company's motion under N.C. R. Civ. P. 12(b)(6) to dismiss a homeowner's action alleging breach of warranty because the homeowner's claim for monetary damages was barred by the six-year statute of repose pursuant to G.S. 1-50(a)(5)a; the complaint was filed approximately seven years after substantial completion of the improvement. Roemer v. Preferred Roofing, Inc., — N.C. App. —, 660 S.E.2d 920, 2008 N.C. App. LEXIS 1094 (June 3, 2008).

§ 1-52. Three years.

CASE NOTES

- I. In General.
- II. Contracts.
  - D. Actions Held Barred.
  - E. Actions Not Barred.
- IV. Liability Created by Statutes.
- VIII. Sureties of Executors, etc.
- XI. Fraud or Mistake.
  - C. When Cause Accrues.
  - D. Discovery of Fraud or Mistake.
  - E. Actions Held Barred.
- XIII. Accrual of Cause of Action for Personal Injury or Property Damage.

I. IN GENERAL.

Cited in Pottle v. Link, — N.C. App. —, 654 S.E.2d 64, 2007 N.C. App. LEXIS 2557 (2007).

II. CONTRACTS.

D. Actions Held Barred.

Claims Were Time-Barred. — Lessee's claim for water damage to his business property was barred by the statute of limitations in G.S. 1-52(16) because damage to his property ought to reasonably have become apparent well before the three-year period; evidence showed that building that he leased began to leak in the mid-1990's and leaked for several years. In re Brokers, Inc., — Bankr. —, 2008 Bankr. LEXIS 742 (Bankr. M.D.N.C. Mar. 4, 2008).

Time Limitation Barred Relief. — In a quiet title action instituted in 2006, the trial court did not err by ruling that the one-year statute of limitations set out in G.S. 43-26 had expired when defendants filed their motion to set aside a 1979 judgment and, therefore, barred their motion. Adams Creek Assocs. v. Davis, — N.C. App. —, 652 S.E.2d 677, 2007 N.C. App. LEXIS 2302 (2007).

Action on New Promise. — Client was entitled to summary judgment based on the statute of limitations under G.S. 1-52(1) because a business consultant failed to show that the client in its e-mails to the consultant manifested a definite and unqualified intention to pay a contractual debt under G.S. 1-26 so that the time for the consultant to collect the contractual debt was extended by the e-mails. Andrus v. IQMax, Inc., — N.C. App. —, 660 S.E.2d 107, 2008 N.C. App. LEXIS 900 (2008).

Insurance Contract. — In an action in which an insured alleged that an insurer failed to pay the full amount due under a commercial insurance policy for damage to the insured's property, the insured's breach of contract action was time-barred under G.S. 1-52(1) because the insured's complaint was filed more than three years after the insurer advised the insured that the insured's claim for further payment was rejected due to the insured's failure to document its claim properly. Amatulli & Sons, LLC v. Great N. Ins.

Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 1589 (W.D.N.C. Jan. 8, 2008).

Insureds' counterclaims for reformation of contract, negligent failure to procure insurance, and misrepresentation in a declaratory judgment action brought by an insurer to determine the parties' rights under an insurance policy were barred because the insureds failed to file their counterclaims within the applicable three-year statute of limitations under G.S. 1-52(5) and 1-52(9). State Farm Mut. Auto. Ins. Co. v. Gaylor, — N.C. App. —, 660 S.E.2d 104, 2008 N.C. App. LEXIS 821 (2008).

E. Actions Not Barred.

Motion to Dismiss Denied. — Because the face of the complaint did not clearly reveal that plaintiff borrower's claims against defendant attorney and law firm accrued before January 30, 2004 (the cut-off date under the three-year statute of limitations), the attorney and law firm's request to dismiss the remaining claims based on the statute of limitations was denied. Higgins v. Spence & Spence, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 13096 (E.D.N.C. Feb. 21, 2008).

IV. LIABILITY CREATED BY STATUTES.

Teacher Tenure Action. — Teacher's claim for declaratory judgment under G.S. 115C-325(c)(2) was time-barred by the three year statute of limitations under G.S. 1-52(2) because the teacher did not timely file his claim and the continuing wrong doctrine did not apply. Hicks v. Wake County Bd. of Educ., — N.C. App. —, 653 S.E.2d 236, 2007 N.C. App. LEXIS 2422 (2007).

Charter School Actions. — Three-year statute of limitations of G.S. 1-52(2) applied to the charter schools' suit against the public school system for the alleged improper funding of public education because the statute concerning charter school funding, G.S. 115C-238.29H, did not contain an express limitations period. In that regard, most of the charter schools' actions were not time barred because the causes of action did not accrue until the fiscal year ended and a determination could be made about whether the charter schools had received proper funding. Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 655 S.E.2d 850, 2008 N.C. App. LEXIS 225 (2008).

VIII. SURETIES OF EXECUTORS, ETC.

Constructive Fraud Claim Against a Trustee. — Claim of constructive fraud against a trustee based upon a breach of fiduciary duty was not time-barred by the three-year statute of limitations under G.S. 1-52 because the claim fell under the ten-year statute of limitations contained in G.S. 1-56. Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

XI. FRAUD OR MISTAKE.

C. When Cause Accrues.

Or from When Fraud or Mistake Should Have Been Discovered. — Since the two clients did not discover for two years the attorney's breach of fiduciary duty and conversion, the statute of limitations for the state bar filing an action for reimbursement for compensation it paid to the two clients because of the attorney's misconduct did not start running, pursuant to G.S. 1-52(9), until the fraud was discovered. Since the state filed its action within two years of that time, its fraudulent conduct action was timely filed. N.C. State Bar v. Gilbert, — N.C. App. —, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

D. Discovery of Fraud or Mistake.

Claims Arising Out of Alleged Forgery During Procurement of Insurance. — It was error to dismiss the insured's negligence, fraud, constructive fraud, breach of contract, breach of covenant of good faith and fair dealing with punitive damages, unfair and deceptive trade practices, and breach of fiduciary duty claims as untimely under G.S. 1-56, 1-52(1), (5), and (9), and § 75-16.2, as the claims accrued when the insured was denied underinsured motorist (UIM) coverage since: (1) the insured reasonably should have discovered the alleged fraud or negligence committed by the insurer and the agent in allegedly forging the insured's name on a rejection of UIM coverage form when the insured was denied UIM coverage, (2) the insured signed the policy in 1998, and was injured in a car accident in October 2000, (3) the insured filed suit in November 2005, (4) the insured was first informed that the policy did not include UIM coverage in February 2003, and (5) the insured would not have acquired any contractual right to such coverage if it existed until November 2004, when the insured exhausted the other driver's policy. Piles v. Allstate Ins. Co., — N.C. App. —, 653 S.E.2d 181, 2007 N.C. App. LEXIS 2449 (2007).

E. Actions Held Barred.

Re-Filed Suit Barred by Statute of Limitations After Initial Defective Service. — Defective service in the alleged accident victims' original negligence action under G.S. 1A-1 and N.C. R. Civ. P. 4 resulted in the victims' subsequent refiled action, despite the voluntary dismissal by the victims of the original action under G.S. 1A-1 and N.C. R. Civ. P. 41(a) being brought after the statute of limitations under G.S. 1-52(16) ran. Camara v. Gbarbera, — N.C.

App. —, 662 S.E.2d 920, 2008 N.C. App. LEXIS 1325 (July 15, 2008).

XIII. ACCRUAL OF CAUSE OF ACTION FOR PERSONAL INJURY OR PROPERTY DAMAGE.

Action Held Barred. — Because an estate administrator was not served until after the statute of limitations in G.S. 1-52(16) had expired, and because there was no indication of any subterfuge or delay by the administrator that prevented the driver from timely amending a driver's personal injury complaint, pursuant to G.S. 1A-1, N.C. R. Civ. P. 15(c), the driver's amended complaint did not relate back to the date of the original filing of the complaint. Reece v. Smith, — N.C. App. —, 655 S.E.2d 911, 2008 N.C. App. LEXIS 191 (Feb. 5, 2008).

§ 1-53. Two years.

Within two years —

(1) An action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied. Unless otherwise provided by law, if the preceding sentence of this subsection would bar commencement of a cause of action arising out of a contract to improve real property: (i) such an action may be brought no later than 90 days after substantial completion, provided proper notice of the claim has been given if required by contract, or (ii) if prior to substantial completion the contract was terminated by either party, such an action may be brought no later than 90 days after the date of termination of the contract. As used in this subdivision, "substantial completion" has the same meaning as in G.S. 1-50(a)(5)c. This subdivision shall not apply to actions based upon bonds, notes and interest coupons or when a different period of limitation is prescribed by this Article.

(2) An action to recover the penalty for usury, including an action regarding the financing of usurious points, usurious fees, or other usurious charges; the two-year period shall accrue with each payment made and accepted on the loan.

(3) The forfeiture of all interest for usury.

(4) Actions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under G.S. 28A-18-2; the cause of action shall not accrue until the date of death. Provided that, whenever the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) or 1-52(16), no action for his death may be brought. (1874-5, c. 243; 1876-7, c. 91, s. 3; Code, ss. 756, 3836; 1895, c. 69; Rev., s. 396; C.S., s. 442; 1931, c. 231; 1937, c. 359; 1945, c. 774; 1951, c. 246, s. 2; 1979, c. 654, s. 3; 1981, c. 777, s. 3; 2007-351, s. 1; 2008-139, s. 1.)

Editor's Note. — Session Laws 2008-139, s. 2, provides that the amendments to this section by s. 1 of the act are applicable to actions filed on or after July 28, 2008, and do not revive claims previously barred under G.S. 1-53(1).

Effect of Amendments. —
Session Laws 2008-139, s. 1, effective July 28, 2008, in subdivision (1) added the second and third sentence. See Editor's note for applicability.

CASE NOTES

II. Contractual Obligations of Local Governmental Units.

II. CONTRACTUAL OBLIGATIONS OF LOCAL GOVERNMENTAL UNITS.

Teacher Tenure Action. —
Statute of limitations under G.S. 1-53(1) was not applicable to a teacher's claim for declaratory judgment against a board of education because the claim was not based upon any contract with the board of education, but rather was based on a statutory liability created by G.S. 115C-325(c)(2). Hicks v. Wake County Bd. of Educ., — N.C. App. —, 653 S.E.2d 236, 2007 N.C. App. LEXIS 2422 (2007).

Claims Barred. — Employee contract claims were time barred because she filed her complaint asserting claims arising out of a city's termination of her employment more than two years after her right to benefits under the retirement plan vested. Tripp v. City of Winston-Salem, — N.C. App. —, 655 S.E.2d 890, 2008 N.C. App. LEXIS 193 (Feb. 5, 2008).

§ 1-54. One year.

CASE NOTES

II. Actions for Penalty or Forfeiture.

II. ACTIONS FOR PENALTY OR FORFEITURE.

Applicability of Subdivision (2). — State could add a claim against a shareholder, contingent on the State's subsequent ability to demonstrate that the shareholder and a corporation were alter egos. The State made the necessary showings at the pleading stage to establish that the corporation was operated as a mere instrumentality of the shareholder; therefore, G.S. 1-54(2)'s one-year statute of limitations was tolled as to the shareholder, and the addition of the shareholder as a party related back and did not violate N.C. R. Civ. P. 15(c). State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. —, 666 S.E.2d 107, 2008 N.C. LEXIS 687 (2008).

§ 1-54.1. Two months.

CASE NOTES

Cited in Laurel Valley Watch, Inc. v. Mt. Enters. of Wolf Ridge, LLC, — N.C. App. —, 665 S.E.2d 561, 2008 N.C. App. LEXIS 1629 (2008).

Article 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, 10 years.

CASE NOTES

II. Actions to Which Section Applies.
V. Actions Held Not Barred.

II. ACTIONS TO WHICH SECTION APPLIES.

Constructive Fraud Based on Breach of Fiduciary Duty. — Claim of constructive fraud against a trustee based upon a breach of fiduciary duty was not time-barred by the three-year statute of limitations under G.S. 1-52 because the claim fell under the ten-year statute of limitations contained in G.S. 1-56. Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

V. ACTIONS HELD NOT BARRED.

Claims Arising Out of Alleged Forgery During Procurement of Insurance. — It was error to dismiss the insured's negligence, fraud, constructive fraud, breach of contract, breach of covenant of good faith and fair dealing with punitive damages, unfair and deceptive trade practices, and breach of fiduciary duty claims as untimely under G.S. 1-56, 1-52(1), (5), and (9), and § 75-16.2, as the claims accrued when the insured was denied underinsured motorist (UIM) coverage since: (1) the insured reasonably should have discovered the alleged fraud or negligence committed by the insurer and the agent in allegedly forging the insured's name on a rejection of UIM coverage form when the insured was denied UIM coverage, (2) the insured signed the policy in 1998, and was injured in a car accident in October 2000, (3) the insured filed suit in November 2005, (4) the insured was first informed that the policy did not include UIM coverage in February 2003, and (5) the insured would not have acquired any contractual right to such coverage if it existed until November 2004, when the insured exhausted the other driver's policy. Piles v. Allstate Ins. Co., — N.C. App. —, 653 S.E.2d 181, 2007 N.C. App. LEXIS 2449 (2007).

SUBCHAPTER IIIA. JURISDICTION.

Article 6A.

Jurisdiction.

§ 1-75.4. Personal jurisdiction, grounds for generally.

A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j), Rule 4(j1), or Rule 4(j3) of the Rules of Civil Procedure under any of the following circumstances:

(1) Local Presence or Status. — In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
  a. Is a natural person present within this State; or
  b. Is a natural person domiciled within this State; or
  c. Is a domestic corporation; or
  d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

(2) Special Jurisdiction Statutes. — In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction.

(3) Local Act or Omission. — In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

(4) Local Injury; Foreign Act. — In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
  a. Solicitation or services activities were carried on within this State by or on behalf of the defendant;
  b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade; or
  c. Unsolicited bulk commercial electronic mail was sent into or within this State by the defendant using a computer, computer network, or the computer services of an electronic mail service provider in contravention of the authority granted by or in violation of the policies set by the electronic mail service provider. Transmission of commercial electronic mail from an organization to its members shall not be deemed to be unsolicited bulk commercial electronic mail.

(5) Local Services, Goods or Contracts. — In any action which:
  a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
  b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for

the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or

c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or

d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or

e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.

(6) Local Property. — In any action which arises out of:

a. A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this State; or

b. A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this State at the time the defendant acquired possession or control over it; or

d. A claim related to a loan made in this State or deemed to have been made in this State under G.S. 24-2.1, regardless of the situs of the lender, assignee, or other holder of the loan note and regardless of whether the loan payment or fee is received through a loan servicer, provided that: (i) the loan was made to a borrower who is a resident of this State, (ii) the loan is incurred by the borrower primarily for personal, family, or household purposes, and (iii) the loan is secured by a mortgage or deed of trust on real property situated in this State upon which there is located or there is to be located a structure or structures designed principally for occupancy of from one to four families.

(7) Deficiency Judgment on Local Foreclosure or Resale. — In any action to recover a deficiency judgment upon an obligation secured by a mortgage, deed of trust, conditional sale, or other security instrument executed by the defendant or his predecessor to whose obligation the defendant has succeeded and the deficiency is claimed either:

a. In an action in this State to foreclose such security instrument upon real property, tangible personal property, or an intangible represented by an indispensable instrument, situated in this State; or

b. Following sale of real or tangible personal property or an intangible represented by an indispensable instrument in this State under a power of sale contained in any security instrument.

(8) Director or Officer of a Domestic Corporation. — In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer.

(9) Taxes or Assessments. — In any action for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority of this State after the date of ratification of this act.

(10) Insurance or Insurers. — In any action which arises out of a contract of insurance as defined in G.S. 58-1-10 made anywhere between the plaintiff or some third party and the defendant and in addition either:
   a. The plaintiff was a resident of this State when the event occurred out of which the claim arose; or
   b. The event out of which the claim arose occurred within this State, regardless of where the plaintiff resided.

(11) Personal Representative. — In any action against a personal representative to enforce a claim against the deceased person represented, whether or not the action was commenced during the lifetime of the deceased, where one or more of the grounds stated in subdivisions (2) to (10) of this section would have furnished a basis for jurisdiction over the deceased had he been living.

(12) Marital Relationship. — In any action under Chapter 50 that arises out of the marital relationship within this State, notwithstanding subsequent departure from the State, if the other party to the marital relationship continues to reside in this State. (1967, c. 954, ss. 2, 10; 1969, c. 803; 1981, c. 815, s. 4; 1983, c. 231; 1995, c. 389, s. 1; 1999-212, s. 1; 2007-351, s. 2; 2008-187, s. 1.)

Effect of Amendments. — Session Laws 2008-187, s. 1, effective August 7, 2008, made a minor stylistic change in subdivision (6)c.

CASE NOTES

III. Cases in Which Minimum Contacts Requirement Met.
IV. Cases in Which Minimum Contacts Requirement Not Met.
V. Local Presence or Status.
IX. Cases Decided Under Prior Law.
   C. Solicitation of Business in State.

III. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT MET.

Piercing the Corporate Veil. — In a supplier's suit against a purchasing company, a related company, and a chief executive officer, personal jurisdiction existed over the related company because the supplier's complaint sufficiently stated a basis for a claim of piercing the corporate veil based on allegations that (1) defendants violated certain corporate laws and formalities, (2) individual defendants exercised control over the finances, policies, and business practices of both corporate defendants, and (3) assets were diverted from the purchasing company to the related company, leaving the purchasing company inadequately capitalized. Saft Am., Inc. v. Plainview Batteries, Inc., — N.C. App. —, 659 S.E.2d 39, 2008 N.C. App. LEXIS 694 (2008).

In a buyer's suit against a seller and manufacturer, based on the sale of an allegedly defective motor coach, personal jurisdiction was properly exercised over the seller, a Georgia limited liability company, under G.S. 1-75.4(1)(d) because the seller made numerous telephone calls to the buyer at her North Carolina residence to negotiate and close the deal, the seller mailed the contract to the buyer at her North Carolina residence, and the buyer signed the sales contract in North Carolina. Scholl v. Sagon RV Supercenter, LLC, 249 F.R.D. 230, 2008 U.S. Dist. LEXIS 18941 (W.D.N.C. 2008).

Contacts Held Sufficient. —

Exercise of personal jurisdiction over a president and a chief executive officer of a corporation was proper, as their conduct within and without North Carolina induced an investor to pay $1,000,000 in loan proceeds to another corporation, from which their affiliates obtained benefits of about $239,000, and allowed them to obtain increased benefits through a share exchange; the contacts with North Carolina supported the exertion of "specific" jurisdiction, and the exercise of personal jurisdiction did not violate the Due Process Clause. A claim that the actions they took while acting as agents of corporate entities did not "count" as part of the determination of jurisdiction was rejected. Brown v. Refuel Am., Inc., — N.C. App. —, 652 S.E.2d 389, 2007 N.C. App. LEXIS 2242 (2007).

Buyers' assertion of jurisdiction over the sellers complied with due process; North Carolina had a "manifest interest" in providing the buyer a convenient forum for redressing injuries inflicted by the seller, an out-of-state merchant, and there was no evidence in the record to suggest that it was more convenient for the parties to try the matter in Georgia than in North Carolina. Baker v. Lanier Marine Liquidators, Inc., — N.C. App. —, 654 S.E.2d 41, 2007 N.C. App. LEXIS 2571 (2007).

Seller was subject to jurisdiction under North Carolina's long-arm statute, where the seller personally coordinated the delivery of the boat to the buyer, located in North Carolina, through an independent third party, and the buyer transferred $9,812 from North Carolina to the seller, in Georgia, for payment of the boat. Baker v. Lanier Marine Liquidators, Inc., — N.C. App. —, 654 S.E.2d 41, 2007 N.C. App. LEXIS 2571 (2007).

Wire transfer sent from plaintiff buyer in North Carolina to defendant seller in Georgia for payment of a boat constituted a "thing of value" shipped from the state by the buyer to the seller on the seller's order or direction pursuant to G.S. 1-75.4(5)(d). Baker v. Lanier Marine Liquidators, Inc., — N.C. App. —, 654 S.E.2d 41, 2007 N.C. App. LEXIS 2571 (2007).

Finance company had minimum contacts in North Carolina for purposes of G.S. 1-75.4 as the company purposefully availed itself of the privilege of conducting activities within North Carolina as the company engaged in a consistent and continuous two-year interaction with a seller in reference to the sale of furniture from the seller to a buyer, which included numerous communications, "frequent" payments for the furniture purchased by the buyer, and the alleged attempted sale of the seller's furniture without payment. Rossetto United States, Inc. v. Greensky Fin., LLC, — N.C. App. —, 662 S.E.2d 909, 2008 N.C. App. LEXIS 1227 (2008).

IV. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT NOT MET.

Electronic Communications Over The Internet. —

In a buyer's suit against a seller and manufacturer, based on the sale of an allegedly defective motor coach, personal jurisdiction based on the seller's advertising over the Internet and participation in a national dealer referral service were not sufficient to exercise personal jurisdiciton over the seller under G.S. 1-75.4(1)(d). Scholl v. Sagon RV Supercenter, LLC, 249 F.R.D. 230, 2008 U.S. Dist. LEXIS 18941 (W.D.N.C. 2008).

Personal jurisdiction did not exist in North Carolina courts as to an internet poster in Georgia because the alleged victim in North Carolina failed to establish that the internet poster posted the allegedly defamatory material at bulletin board discussions on the internet with the intent to direct the content to a North Carolina audience. Dailey v. Popma, — N.C. App. —, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (June 17, 2008).

Corporate Officers. — In a supplier's suit against a purchasing company, a related company, and a chief executive officer (CEO), personal jurisdiction did not exist over the CEO, because the supplier wholly failed to allege any act the CEO committed occurred within the CEO's individual capacity. Saft Am., Inc. v. Plainview Batteries, Inc., — N.C. App. —, 659 S.E.2d 39, 2008 N.C. App. LEXIS 694 (2008).

Minimum Contacts Not Found. —

In an action filed by the State against a foreign corporation under G.S. 66-291, the trial court properly dismissed the action for lack of personal jurisdiction, because: (1) the State's conclusory allegation was insufficient to establish an alter ego theory of liability for personal jurisdiction purposes; (2) there was no evidence of any act or omission by the foreign corporation within North Carolina in the record; and (3) the trial court specifically found that the foreign corporation was not in the State of North Carolina when it received the alleged fraudulent funds from the North Carolina corporation. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. App. —, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008).

Furniture company (LLC) did not have minimum contacts in North Carolina for purposes of G.S. 1-75.4 as: (1) the LLC passively received a shipment of furniture from a seller, intended for a buyer; (2) the LLC allegedly made one phone call to the seller in North Carolina; and (3) the LLC attempted to sell the furniture on the Internet. Rossetto United States, Inc. v. Greensky Fin., LLC, — N.C. App. —, 662 S.E.2d 909, 2008 N.C. App. LEXIS 1227 (2008).

V. LOCAL PRESENCE OR STATUS.

Substantial Activities in State Not Shown. —

Because a student did not assert that a school president performed any actions in North Carolina or that she purposefully availed herself of the privilege of conducting activities within North Carolina and invoked the benefits and protections of the laws of North Carolina, and the president stated she was a Florida resident, the North Carolina court did not have personal jurisdiction over the president. Eaker v. Gower, — N.C. App. —, 659 S.E.2d 29, 2008 N.C. App. LEXIS 691 (2008).

IX. CASES DECIDED UNDER PRIOR LAW.

C. Solicitation of Business in State.

Contract Evidenced by Telegraph and Mail Communication. —
Patent holder's patent infringement action against a key-cutting machine manufacturer was dismissed for lack of personal jurisdiction pursuant to G.S. 1-75.4(1)(d) and the due process clause because, although the manufacturer sold its key-cutting machine in North Carolina via its representative, the manufacturer did not have an established place of business in North Carolina, its representative was an independent, manufacturing representative who purchased the manufacturer's products in Illinois and sold them in North Carolina, the representative was not an employee of the manufacturer, and the manufacturer had no control over the representative. Kaba Ilco, Inc. v. HPC, Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 34279 (E.D.N.C. Apr. 25, 2008).

§ 1-75.10. Proof of service of summons, defendant appearing in action.

(a) Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

(1) Personal Service or Substituted Personal Service. —

a. If served by the sheriff of the county or the lawful process officer in this State where the defendant was found, by the officer's certificate thereof, showing place, time and manner of service; or

b. If served by any other person, his affidavit thereof, showing place, time and manner of service; his qualifications to make service under Rule 4(a) or Rule 4(j3) of the Rules of Civil Procedure; that he knew the person served to be the party mentioned in the summons and delivered to and left with him a copy; and if the defendant was not personally served, he shall state in such affidavit when, where and with whom such copy was left. If such service is made outside this State, the proof thereof may in the alternative be made in accordance with the law of the place where such service is made.

(2) Service of Publication. — In the case of publication, by the affidavit of the publisher or printer, or his foreman or principal clerk, showing the same and specifying the date of the first and last publication, and an affidavit of mailing of a copy of the complaint or notice, as the case may require, made by the person who mailed the same.

(3) Written Admission of Defendant. — The written admission of the defendant, whose signature or the subscription of whose name to such admission shall be presumptive evidence of genuineness.

(4) Service by Registered or Certified Mail. — In the case of service by registered or certified mail, by affidavit of the serving party averring:

a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;

b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and

c. That the genuine receipt or other evidence of delivery is attached.

(5) Service by Designated Delivery Service. — In the case of service by designated delivery service, by affidavit of the serving party averring all of the following:

a. That a copy of the summons and complaint was deposited with a designated delivery service as authorized under G.S. 1A-1, Rule 4, delivery receipt requested.

b. That it was in fact received as evidenced by the attached delivery receipt or other evidence satisfactory to the court of delivery to the addressee.

c. That the delivery receipt or other evidence of delivery is attached.

(6) Service by Signature Confirmation. — In the case of service by signature confirmation as provided by the United States Postal Service, by affidavit of the serving party averring all of the following:

a. That a copy of the summons and complaint was deposited in the post office for mailing by signature confirmation.

b. That it was in fact received as evidenced by the attached proof of delivery obtained from the United States Postal Service, or other evidence satisfactory to the court of delivery to the addressee.

c. That the copy of the signature confirmation or other evidence of delivery is attached.

(b) As used in subdivision (5) of subsection (a) of this section, “delivery receipt” includes a facsimile receipt and a printout of an electronic receipt. (1967, c. 954, s. 2; 1969, c. 895, s. 14; 1973, c. 643; 1979, c. 525, s. 2; 1981, c. 540, ss. 9, 10; 2001-379, s. 2.3; 2005-221, s. 3; 2008-36, s. 4.)

Effect of Amendments. — Session Laws 2008-36, s. 4, effective October 1, 2008, and applicable to receipts given on or after that date, designated the previously existing provisions as subsection (a); in subdivision (a)(5), inserted “all of the following” at the end of the introductory language; in subdivision (a)(5)c., substituted “delivery receipt” for “genuine receipt”; made minor stylistic changes throughout; and added subsection (b).

CASE NOTES

Cited in Ruiz v. Mecklenburg Utils., Inc., — N.C. App. —, 657 S.E.2d 432, 2008 N.C. App. LEXIS 418 (2008).

§ 1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction.

CASE NOTES

Review Denied Based On Failure to File Petition For Writ of Certiorari. — In an action to enforce a mechanic’s lien, defendants’ challenge to the denial of a motion to stay or dismiss failed because defendants did not file a petition for a writ of certiorari as required by subsection (c) of G.S. 1-75.12. Park East Sales, LLC v. Clark-Langley, Inc., 186 N.C. App. 198, 651 S.E.2d 235, 2007 N.C. App. LEXIS 2120 (2007).

SUBCHAPTER IV. VENUE.

Article 7.

Venue.

§ 1-77. Where cause of action arose.

CASE NOTES

III. Against Public Officers, etc.

III. AGAINST PUBLIC OFFICERS, ETC.

Hospital Not Agency of County. — Hospital was not entitled to a change of venue in a medical malpractice action under G.S. 1-77(2) since statutory revisions diminished ties between the hospital and a county after a prior judicial decision which determined that the hospital’s predecessor was an agency of the county for purposes of venue; the hospital held no county bonds, the hospital did not benefit from county taxes, the hospital followed antidiscrimination policies, and the hospital's bylaws identified the hospital as a private, nonprofit corporate hospital. Odom v. Clark, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1554 (Aug. 19, 2008).

§ 1-83. Change of venue.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Odom v. Clark, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1554 (Aug. 19, 2008).

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

Article 9.

Prosecution Bonds.

§ 1-109. Bond required of plaintiff for costs.

CASE NOTES

Cited in Vaden v. Dombrowski, — N.C. App. —, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007).

§ 1-110. Suit as an indigent; counsel; suits filed pro se by prison inmates.

CASE NOTES

Abuse of Discretion Found. — Trial court improperly abused its discretion to dismiss an inmate's complaint against a sheriff and a lieutenant, finding it frivolous pursuant to G.S. 1-110(b). The inmate, by alleging that the sheriff and lieutenant failed to follow a court order or took actions detrimental to the inmate's health, could have a cause of action if the inmate's allegations were proven. Gray v. Bryant, — N.C. App. —, 658 S.E.2d 537, 2008 N.C. App. LEXIS 606 (Apr. 1, 2008).

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

Article 19.

Trial.

§ 1-181. Requests for special instructions.

CASE NOTES

But Judge Must Give a Properly Requested Relevant Instruction. —

Trial court committed error in refusing to give defendant's jury instruction that stated that defendant had to know the age of the victims in order to be convicted of aiding and abetting statutory rape. Since that offense involved an element of knowledge, the instruction should have been given because it was both a correct statement of the law and supported by the evidence, which meant defendant was entitled to give the instruction pursuant to G.S. 1A-1-51, N.C. R. Civ. P. 51(b) and G.S. 1-181. State v. Bowman, — N.C. App. —, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 26.

Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.

CASE NOTES

I. In General.
II. Scope of Article.

I. IN GENERAL.

Cited in Wake Cares, Inc. v. Wake County Bd. of Educ., — N.C. App. —, 660 S.E.2d 217, 2008 N.C. App. LEXIS 872 (2008).

II. SCOPE OF ARTICLE.

No Waiver of Sovereign Immunity. — Trial court erred in denying state agencies' motion to dismiss a corporation's complaint, seeking a declaratory judgment that an E-Procurement fee was a tax not enacted by the legislature in violation of N.C. Const., Art. II, § 23 and a refund of the taxes under G.S. 105-267 because the corporation's claims were barred by the defense of sovereign immunity; sovereign immunity is not waived by either the Declaratory Judgment Act, G.S. 1-253 et seq., or G.S. 105-267. Petroleum Traders Corp. v. State, — N.C. App. —, 660 S.E.2d 662, 2008 N.C. App. LEXIS 1003 (2008).

§ 1-254. Courts given power of construction of all instruments.

CASE NOTES

Standing Found. —

Parents of students alleged sufficient standing to allow their claims under the Declaratory Judgment Act, G.S. 1-254, because they were directly affected by a Board of Education's plan to convert traditional calendar schools to mandatory year round schools. While some of the students were re-assigned to attend traditional calendar schools, the students could still be assigned to year-round schools in the future; therefore, an actual controversy existed, and a declaratory judgment as to the authority of the Board and the rights of the parents and students would terminate and afford relief from the uncertainty, insecurity, and controversy currently existing. Wake Cares, Inc. v. Wake County Bd. of Educ., — N.C. App. —, 660 S.E.2d 217, 2008 N.C. App. LEXIS 872 (2008).

Exhaustion of Administrative Remedies Not Required. — Claims for declaratory relief under G.S. § 1-254 made by parents of students were not barred for failure to exhaust administrative remedies because the parents challenged the validity of a Board of Education's plan to use year-round schools to alleviate overcrowding, which did not fall within the scope of G.S. 115C-369. None of the factors specified in G.S. 115C-369(c) for consideration by the Board in making a decision under the statute addressed the issues regarding the validity of the plan. Wake Cares, Inc. v. Wake County Bd. of Educ., — N.C. App. —, 660 S.E.2d 217, 2008 N.C. App. LEXIS 872 (2008).

Cited in Laurel Valley Watch, Inc. v. Mt. Enters. of Wolf Ridge, LLC, — N.C. App. —, 665 S.E.2d 561, 2008 N.C. App. LEXIS 1629 (2008).

§ 1-263. Costs.

CASE NOTES

Award Proper. — Trial court did not abuse its discretion in ordering the lottery objectors to pay litigation costs pursuant to G.S. 1-263 regarding their unsuccessful declaratory judgment action seeking a determination that the state's lottery law was enacted in violation of constitutional requirements set forth in N.C. Const., Art. II, § 23. The lottery objectors delayed initiating litigation for more than three months after the law was enacted and the state lottery commission had started setting up lottery operations. Heatherly v. State, — N.C. App. —, 658 S.E.2d 11, 2008 N.C. App. LEXIS 530 (Mar. 18, 2008).

SUBCHAPTER IX. APPEAL.

Article 27.

Appeal.

§ 1-271. Who may appeal.

CASE NOTES

I. In General.
II. Parties Held Entitled to Appeal.
III. Parties Held Not Entitled to Appeal.

I. IN GENERAL.

Applied in Greene v. Royster, — N.C. App. —, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007).

II. PARTIES HELD ENTITLED TO APPEAL.

Construction With Other Laws. — Husband had standing to appeal under G.S. 35A-1115 the clerk of the trial court's decision that the wife was incompetent since the husband was an interested party entitled to notice of the incompetency proceeding. Although the county social services agency alleged that G.S. 1-271 and G.S. 1-301.2 applied and controlled whether the husband had standing, G.S. 35A-1115 spoke more specifically to incompetency proceedings, while G.S. 1-271 involved appeals in cases "prescribed in this Chapter," and G.S. 1-301.2(a) specifically addressed special proceedings. In re Winstead, — N.C. App. —, 657 S.E.2d 411, 2008 N.C. App. LEXIS 417 (2008).

III. PARTIES HELD NOT ENTITLED TO APPEAL.

Consumer Was Not Party Aggrieved. — Consumer was not entitled by law to file an appeal under N.C.R. App. P. 3(a) because he lacked standing to appeal a North Carolina court's refusal to grant full faith and credit to an Illinois judge's settlement of a class action against a merchant where the consumer was not a "party aggrieved" by the denial. The consumer presumably received his settlement from the merchant in the Illinois case and was in compliance with that judge's order directing him to dismiss his North Carolina lawsuit; his rights were not directly or injuriously affected merely because the merchant remained open to claims from other consumers. Moody v. Sears Roebuck & Co., — N.C. App. —, 664 S.E.2d 569, 2008 N.C. App. LEXIS 1324 (2008).

§ 1-277. Appeal from superior or district court judge.

CASE NOTES

I. In General.
II. From What Decisions, etc., Appeal Lies.
  B. Interlocutory Orders.
    1. In General.

        2. Substantial Right.
    D. Jurisdiction.
V. Illustrative Cases.
    A. Appellant Held Entitled to Appeal.
        3. Summary Judgment.

I. IN GENERAL.

G.S. 1-277 limited appeals to judicial orders or determinations actually made by the trial judge; therefore, because the trial judge heard defendant's motion in limine pretrial, but decided to defer ruling upon the motion until the appropriate time during the trial, but defendant did not attempt to introduce the evidence during trial and the judge did not rule on the motion in limine, defendant did not properly preserve the issue for review. State v. Howell, — N.C. App. —, 662 S.E.2d 922, 2008 N.C. App. LEXIS 1312 (July 15, 2008).

Applied in Brown v. Refuel Am., Inc., — N.C. App. —, 652 S.E.2d 389, 2007 N.C. App. LEXIS 2242 (2007); Eaker v. Gower, — N.C. App. —, 659 S.E.2d 29, 2008 N.C. App. LEXIS 691 (2008); Rossetto United States, Inc. v. Greensky Fin., LLC, — N.C. App. —, 662 S.E.2d 909, 2008 N.C. App. LEXIS 1227 (2008); Michael v. Huffman Oil Co., — N.C. App. —, 661 S.E.2d 1, 2008 N.C. App. LEXIS 823 (2008).

Cited in State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. App. —, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008).

II. FROM WHAT DECISIONS, ETC., APPEAL LIES.

B. Interlocutory Orders.

1. In General.

Appeal of Order Denying Motion for Partial Summary Judgment Was Interlocutory. —
As the trial court granted summary judgment only to a town, not the other defendants, and did not certify the court's order under N.C. R. Civ. P. 54(b), and plaintiff did not voluntarily dismiss her claims against the other defendants or argue that her appeal affected a substantial right, she was not entitled to appeal the trial court's interlocutory order under G.S. 7A-27(b). Hyatt v. Town of Lake Lure, — N.C. App. —, 663 S.E.2d 320, 2008 N.C. App. LEXIS 1322 (2008).

Interlocutory Denial of Motion to Dismiss Reviewed Pursuant to Writ of Certiorari. — Motion to dismiss an interlocutory appeal of the denial of healthcare providers' motion to dismiss an administrator's wrongful death complaint was denied because the healthcare providers' petition for a writ of certiorari was granted. Reid v. Cole, — N.C. App. —, 652 S.E.2d 718, 2007 N.C. App. LEXIS 2355 (2007).

Review of Interlocutory Order by Writ of Certiorari. — Court denied an estate administrator's motion to dismiss the healthcare providers' appeal from a denial of their motion to dismiss a wrongful death complaint because, even if the notice of appeal was untimely filed, the healthcare providers petitioned for a writ of certiorari that was granted. Reid v. Cole, — N.C. App. —, 653 S.E.2d 164, 2007 N.C. App. LEXIS 2321 (2007).

2. Substantial Right.

Governmental Immunity. —
Appeal by a county, the county department of social services (DSS), DSS supervisory employees, and social workers of a trial court's order denying their motions under G.S. 1A-1, N.C. R. Civ. P. 12(b)(6), to dismiss a father's claims against them in their official capacities were properly before the court of appeals because they asserted that they were not liable for the death of the father's son on the ground that the public duty doctrine provided immunity. Christmas v. Cabarrus County, — N.C. App. —, 664 S.E.2d 649, 2008 N.C. App. LEXIS 1532 (2008).

Order Compelling Payment of Funds. —
Trial court's order requiring a county Department of Social Services (DSS) to pay a dependent's mortgage and make repairs on the mortgaged premises affected a substantial right of the DSS, entitling it to interlocutory review of the order, as the case affected more than just money since it affected the DSS's right to choose how to dispose of its funds that it received in its capacity as a representative payee for the dependent and its right to use its discretion as representative payee. In re J.G., — N.C. App. —, 652 S.E.2d 266, 2007 N.C. App. LEXIS 2252 (2007).

Immediate Appeal of Motion to Compel Not Required. — Surety waived any right to arbitrate the subcontractor's action on the payment bonds because, although the surety was not required under G.S. 1-277(a) to immediately appeal the denial of its motion to compel, the surety prejudiced the subcontractor and waived the right to arbitrate by failing to appeal or take exception to the order and actively litigating the dispute by seeking multiple extensions, engaging in discovery, and participating in a full bench trial. Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co., — N.C. App.

—, 665 S.E.2d 505, 2008 N.C. App. LEXIS 1628 (2008).

Substantial Right Held Not Affected, Precluding Immediate Appeal. —

Because there was a question of fact as to whether defendants followed the applicable standard of care, they were not entitled to qualified immunity under G.S. 122C-210.1 on plaintiff's wrongful death claims as a matter of law; accordingly, the denial of their motion for summary judgment did not deprive them of a substantial right, and their appeal was dismissed as interlocutory. Snyder v. Learning Servs. Corp., — N.C. App. —, 653 S.E.2d 548, 2007 N.C. App. LEXIS 2454 (2007).

Defendant seller's assignment of error regarding the court's denial of its motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(6) was premature, and therefore not appealable. Baker v. Lanier Marine Liquidators, Inc., — N.C. App. —, 654 S.E.2d 41, 2007 N.C. App. LEXIS 2571 (2007).

Substantial Right Held Affected. —

Trial court orders from which the plaintiffs appealed affected a substantial right and were immediately appealable because the plaintiffs demonstrated that the denial of an immediate appeal created the potential for inconsistent verdicts resulting from two trials on the same factual issues. Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008).

Trial court's partial summary judgment order that two insurers were obligated to defend an insured in an underlying litigation was immediately appealable under G.S. 1-277 and 7A-27(d) and G.S. 1A-1, N.C. R. Civ. P. 54(b) because the judgment affected a substantial right that might have been lost absent an immediate appeal. Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield L.L.C., — N.C. App. —, 664 S.E.2d 317, 2008 N.C. App. LEXIS 873 (2008).

Trial court's order denying defendant's motion to dismiss based upon collateral estoppel affected a substantial right, was immediately appealable, and was properly before the court. Because the prior action resulted in a final judgment on the merits, the present action presented the possibility of a result inconsistent with the prior trial court's decision. Turner v. Hammocks Beach Corp., — N.C. App. —, 664 S.E.2d 634, 2008 N.C. App. LEXIS 1547 (2008).

Order denying a taxpayer's motion to dismiss an administrative summons requesting documents was appealable because it was an intermediate order that involved the merits and affected the final judgment in that if the motion had been granted, the trial court would not have issued the order to comply with the summons. Even if the appeal was not from a final judgment, the appeal of a discovery order asserting a statutory or a common-law privilege affected a substantial right. In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

D. Jurisdiction.

Subsection (b) Applies to Jurisdictional Power. —

Because the plaintiff's claim against one of the defendants was dismissed as a result of the trial court's decision that the court lacked personal jurisdiction over the defendant, the plaintiff had a right under G.S. 1-277(b) to an immediate appeal of that order. Dailey v. Popma, — N.C. App. —, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (June 17, 2008).

V. ILLUSTRATIVE CASES.

A. Appellant Held Entitled to Appeal.

3. Summary Judgment.

Public Official Immunity and Denial of Summary Judgment Motion. — Denial of defendants' motion for summary judgment which was based on defendants' assertion of public official immunity affected a substantial right and was subject to immediate review. Free Spirit Aviation, Inc. v. Rutherford Airport Auth., — N.C. App. —, 664 S.E.2d 8, 2008 N.C. App. LEXIS 1494 (Aug. 5, 2008).

§ 1-278. Interlocutory orders reviewed on appeal from judgment.

CASE NOTES

While protective order denied plaintiff access to certain evidence, it did not resolve any substantive legal issues related to his negligence claim, nor did it deny him his right to pursue his negligence claim, or to prove his negligence claim through introduction of other evidence and examination of witnesses; therefore, the protective order did not involve the merits and necessarily affect the judgment. The court lacked jurisdiction under either N.C. R. App. P. 3(d) or G.S. 1-278 to consider whether the trial court erred by granting defendants' motion for a protective order. Yorke v. Novant Health, Inc., — N.C. App. —, 666 S.E.2d 127, 2008 N.C. App. LEXIS 1620 (2008).

Interlocutory Order Concerning an Ad-

ministrative Summons. — Order denying a taxpayer's motion to dismiss an administrative summons requesting documents was appealable because it was an intermediate order that involved the merits and affected the final judgment in that if the motion had been granted, the trial court would not have issued the order to comply with the summons. Even if the appeal was not from a final judgment, the appeal of a discovery order asserting a statutory or a common-law privilege affected a substantial right. In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

Directed Verdict Order Reviewable. — Defendants did not dispute that plaintiff objected to the trial court's directed verdict order at trial, or that the directed verdict order was interlocutory and not immediately appealable, and the court further concluded that because the directed verdict order wholly denied plaintiff one of his theories of recovery, namely, res ipsa loquitur, the order involved the merits and necessarily affected the judgment. Therefore, the court had jurisdiction to review the trial court's directed verdict order pursuant to G.S. 1-278. Yorke v. Novant Health, Inc., — N.C. App. —, 666 S.E.2d 127, 2008 N.C. App. LEXIS 1620 (2008).

§ 1-290. How judgment for personal property stayed.

CASE NOTES

Cited in Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

§ 1-291. How judgment directing conveyance stayed.

CASE NOTES

Cited in Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

§ 1-292. How judgment for real property stayed.

CASE NOTES

No Authority to Set Bond. — Because the trial court's judgment did not direct the sale or delivery of possession of real property, the trial court erred in setting an appeal bond under G.S. 1-292. Jones v. Robbins, — N.C. App. —, 660 S.E.2d 118, 2008 N.C. App. LEXIS 901 (2008).

Cited in Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

§ 1-293. Docket entry of stay.

CASE NOTES

Failure to Comply with Requirements for Stay. — Trial court did not err by failing to order a stay of execution on a money judgment because the appellant took no action following an insufficient deposit with the clerk of court and, therefore, did not proceed in accordance with G.S. 1-293. Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

§ 1-294. Scope of stay; security limited for fiduciaries.

CASE NOTES

Appellate Courts Don't Create Jurisdiction for Trial Courts. — While the interests of judicial economy would clearly be better served by allowing the trial court to enter an order on attorney's fees and then having the matter come up to the appellate courts as a single appeal, the appellate court could not create jurisdiction for the trial court to enter an award of attorney's fees in violation of G.S. 1-294. In re Will of Harts, — N.C. App. —, 664 S.E.2d 411, 2008 N.C. App. LEXIS 1491 (2008).

Cited in Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

§ 1-295. Undertaking in one or more instruments; served on appellee.

CASE NOTES

Cited in Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

ARTICLE 27A.

Appeals and Transfers from the Clerk.

§ 1-301.2. Transfer or appeal of special proceedings; exceptions.

CASE NOTES

Construction With Other Laws. — Husband had standing to appeal pursuant to G.S. 35A-1115 the clerk of the trial court's decision that the wife was incompetent. The husband was an interested party because the husband was entitled to notice of the competency proceeding and that statute applied to grant the husband standing because it was more specific than G.S. 1-301.2, which applied to appeals involved in special proceedings. In re Winstead, — N.C. App. —, 657 S.E.2d 411, 2008 N.C. App. LEXIS 417 (2008).

§ 1-301.3. Appeal of estate matters determined by clerk.

CASE NOTES

"Aggrieved Party." — Husband did not have standing under G.S. 35A-1115 to appeal the decision of the assistance clerk of the trial court's decision appointing the daughter as the wife's general guardian, despite the husband filing an application for letters of general guardianship, because that statute applied only to competency proceedings. However, the husband had standing to appeal the decision pursuant to G.S. 1-301.3(c) as an aggrieved party since the husband had sought appointment as the general guardian and had not been selected. In re Winstead, — N.C. App. —, 657 S.E.2d 411, 2008 N.C. App. LEXIS 417 (2008).

SUBCHAPTER X. EXECUTION.

ARTICLE 29B.

Execution Sales.

Part 2. Procedure for Sale.

§ 1-339.52. Posting and publishing notice of sale of real property.

CASE NOTES

Cited in St. Regis of Onslow County, N.C. Owners Ass'n v. Johnson, — N.C. App. —, 663 S.E.2d 908, 2008 N.C. App. LEXIS 1468 (Aug. 5, 2008).

§ 1-339.54. Notice to judgment debtor of sale of real property.

CASE NOTES

Statutory requirements for notice of an execution sale were met, etc.

Trial court properly denied a condominium owner's motion to set aside an execution sale, the order confirming the sale, and the sheriff's deed pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b) because the sheriff complied with G.S. 1-339.54(2)a by sending the notice of the sale via registered mail more than 30 days prior to the sale of the property to the owner's last known address; because the owner was not located in the county, he was not entitled to have a copy of the notice served on him personally pursuant to G.S. 1-339.54(1). St. Regis of Onslow County, N.C. Owners Ass'n v. Johnson, — N.C. App. —, 663 S.E.2d 908, 2008 N.C. App. LEXIS 1468 (Aug. 5, 2008).

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

Article 33.

Special Proceedings.

§ 1-393. Chapter and Rules of Civil Procedure applicable to special proceedings.

CASE NOTES

Administrative Proceedings Under G.S. 105-258 Governed by Rules of Civil Procedure. — Because G.S. 105-258 is a civil action, the statute is subject to the rules of civil procedure, except to the extent the statute prescribes a different procedure. In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

Article 35.

Attachment.

Part 2. Procedure to Secure Attachment.

§ 1-440.11. Affidavit for attachment; amendment.

CASE NOTES

II. Form and Sufficiency of Affidavit.

II. FORM AND SUFFICIENCY OF AFFIDAVIT.

Examples of Defective Statement. —

Affidavits for prejudgment attachment was insufficient under G.S. 1-440.11(a) because it alleged that a chiropractor fraudulently operated a medical practice by recruiting medical doctors to serve as paper owners, placing himself and other non-medical personnel in charge, and overcharging insurers and billing for unnecessary services, but the affidavits did not establish that defendants had secreted or imminently would secrete property from the state. Allstate Ins. Co. v. Weir, 531 F. Supp. 2d 674, 2008 U.S. Dist. LEXIS 2510 (E.D.N.C. 2008).

ARTICLE 36.

Claim and Delivery.

§ 1-472. Claim for delivery of personal property.

CASE NOTES

Cited in Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

§ 1-475. Plaintiff's undertaking.

CASE NOTES

Applied in Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

§ 1-478. Defendant's undertaking for replevy.

CASE NOTES

Applied in Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 45C.

Revised Uniform Arbitration Act.

§ 1-569.1. Definitions.

CASE NOTES

Cited in Faison & Gillespie v. Lorant, — N.C. App. —, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

§ 1-569.19. Award.

CASE NOTES

Cited in Faison & Gillespie v. Lorant, — N.C. App. —, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

§ 1-569.20. Change of award by arbitrator.

CASE NOTES

Cited in Faison & Gillespie v. Lorant, — N.C. App. —, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

§ 1-569.21. Remedies; fees and expenses of arbitration proceeding.

CASE NOTES

Prejudgment Interest. — In striking the prejudgment interest awarded by an arbitrator, a trial court erroneously concluded that the arbitrator exceeded his authority under G.S. 1-596.24(a)(2) of North Carolina's Revised Uniform Arbitration Act (RUAA); in confirming the arbitrator's decision on appeal, the reviewing court found that by inviting the arbitrator to award discretionary relief it deemed just and proper, coupled with incorporation of rules under the RUAA, including the remedies provided under G.S. 1-569.21(c), and incorporations of the rules of the American Arbitration Association, the parties permitted the arbitrator to award remedies it deemed just and appropriate under the circumstances, and the arbitrator's award did not exceed the authority expressly conferred on him by the parties' private arbitration agreement. Faison & Gillespie v. Lorant, — N.C. App. —, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

§ 1-569.22. Confirmation of award.

CASE NOTES

Cited in Faison & Gillespie v. Lorant, — N.C. App. —, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

§ 1-569.23. Vacating award.

CASE NOTES

Applied in Faison & Gillespie v. Lorant, — N.C. App. —, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

§ 1-569.24. Modification or correction of award.

CASE NOTES

Prejudgment Interest. — In striking the prejudgment interest awarded by an arbitrator, a trial court erroneously concluded that the arbitrator exceeded his authority under G.S. 1-596.24(a)(2) of North Carolina's Revised Uniform Arbitration Act (RUAA); in confirming the arbitrator's decision on appeal, the reviewing court found that by inviting the arbitrator to award discretionary relief it deemed just and proper, coupled with incorporation of rules under the RUAA, including the remedies provided under G.S. 1-569.21(c), and incorporations of the rules of the American Arbitration Association, the parties permitted the arbitrator to award remedies it deemed just and appropriate under the circumstances, and the arbitrator's award did not exceed the authority expressly conferred on him by the parties' private arbitration agreement. Faison & Gillespie v. Lorant, — N.C. App. —, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

§ 1-569.28. Appeals.

CASE NOTES

Failure to Appeal Denial of Motion to Compel Arbitration. — Surety waived any right to arbitrate the subcontractor's action on the payment bonds because, although the surety was not required under G.S. 1-277(a) to immediately appeal the denial of its motion to compel, the surety prejudiced the subcontractor and waived the right to arbitrate by failing to appeal or take exception to the order and actively litigating the dispute by seeking multiple extensions, engaging in discovery, and participating in a full bench trial. Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co., — N.C. App. —, 665 S.E.2d 505, 2008 N.C. App. LEXIS 1628 (2008).

§ 1-569.31. Short title.

CASE NOTES

Cited in Faison & Gillespie v. Lorant, — N.C. App. —, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

Chapter 1A.

Rules of Civil Procedure.

Article 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule
4. Process.

Article 4.

Parties.

Rule
23. Class actions.

§ 1A-1. Rules of Civil Procedure.

CASE NOTES

Applied in Harrell v. Bowen, 362 N.C. 142, 655 S.E.2d 350, 2008 N.C. LEXIS 26 (2008); Williams v. Cathy, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 43491 (W.D.N.C. June 2, 2008); Gregory v. W.A. Brown & Sons, — N.C. App. —, 664 S.E.2d 589, 2008 N.C. App. LEXIS 1543 (2008); S.B. Simmons Landscaping & Excavating, Inc. v. Boggs, — N.C. App. —, 665 S.E.2d 147, 2008 N.C. App. LEXIS 1537 (2008).

ARTICLE 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

CASE NOTES

II. Commencement By Issuance of Summons.

II. COMMENCEMENT BY ISSUANCE OF SUMMONS.

Unbroken Chain of Summonses Needed. — Because plaintiff failed to serve defendants with process within the time allowed and did not create an unbroken chain of summonses referring back to the original summons as required by N.C. R. Civ. P. 3 and 4, her action was properly dismissed as time-barred under G.S. 1-52. Robertson v. Price, — N.C. App. —, 652 S.E.2d 352, 2007 N.C. App. LEXIS 2240 (2007).

Rule 4. Process.

(a) *Summons — Issuance; who may serve.* — Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons. Outside this State, such proper person shall be anyone who is not a party and is not less than 21 years of age or anyone duly authorized to serve summons by the law of the place where service is to be made. Upon request of the plaintiff separate or additional summons shall be issued against any defendants. A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so. The date the summons bears shall be prima facie evidence of the date of issue.

(b) *Summons — Contents.* — The summons shall run in the name of the State and be dated and signed by the clerk, assistant clerk, or deputy clerk of the court in the county in which the action is commenced. It shall contain the title of the cause and the name of the court and county wherein the action has been commenced. It shall be directed to the defendant or defendants and shall notify each defendant to appear and answer within 30 days after its service upon him and further that if he fails so to appear, the plaintiff will apply to the court for the relief demanded in the complaint. It shall set forth the name and address of plaintiff's attorney, or if there be none, the name and address of plaintiff. If a request for admission is served with the summons, the summons shall so state.

(c) *Summons — Return.* — Personal service or substituted personal service of summons as prescribed by Rule 4(j)(1) a and b must be made within 60 days after the date of the issuance of summons. When a summons has been served upon every party named in the summons, it shall be returned immediately to the clerk who issued it, with notation thereon of its service.

Failure to make service within the time allowed or failure to return a summons to the clerk after it has been served on every party named in the summons shall not invalidate the summons. If the summons is not served within the time allowed upon every party named in the summons, it shall be returned immediately upon the expiration of such time by the officer to the clerk of the court who issued it with notation thereon of its nonservice and the reasons therefor as to every such party not served, but failure to comply with this requirement shall not invalidate the summons.

(d) *Summons — Extension; endorsement, alias and pluries.* — When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:

(1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Return of the summons so endorsed shall be in the same manner as the original process. Such endorsement may be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or

(2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

Provided, in tax and assessment foreclosures under G.S. 47-108.25 and G.S. 105-374, the first endorsement may be made at any time within two years after the issuance of the original summons, and subsequent endorsements may thereafter be made as in other actions; or an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action.

Provided, for service upon a defendant in a place not within the United States, the first endorsement may be made at any time within two years after the issuance of the original summons, and subsequent endorsements may thereafter be made at least once every two years; or an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action if sued out within two years of the last preceding summons in the chain of summonses or within two years of the last prior endorsement.

Provided, further, the methods of extension may be used interchangeably in any case and regardless of the form of the preceding extension.

(e) *Summons — Discontinuance.* — When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in

Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

(f) *Summons — Date of multiple summonses.* — If the plaintiff shall cause separate or additional summonses to be issued as provided in Rule 4(a), the date of issuance of such separate or additional summonses shall be considered the same as that of the original summons for purposes of endorsement or alias summons under Rule 4(d).

(g) *Summons — Docketing by clerk.* — The clerk shall keep a record in which he shall note the day and hour of issuance of every summons, whether original, alias, pluries, or endorsement thereon. When the summons is returned, the clerk shall note on the record the date of the return and the fact as to service or non-service.

(h) *Summons — When proper officer not available.* — If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.

(h1) *Summons — When process returned unexecuted.* — If a proper officer returns a summons or other process unexecuted, the plaintiff or his agent or attorney may cause service to be made by anyone who is not less than 21 years of age, who is not a party to the action, and who is not related by blood or marriage to a party to the action or to a person upon whom service is to be made. This subsection shall not apply to executions pursuant to Article 28 of Chapter 1 or summary ejectment pursuant to Article 3 of Chapter 42 of the General Statutes.

(i) *Summons — Amendment.* — At any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued.

(j) *Process — Manner of service to exercise personal jurisdiction.* — In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:

(1) Natural Person. — Except as provided in subdivision (2) below, upon a natural person by one of the following:
  a. By delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.
  b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
  c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.
  d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and

complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

e. By mailing a copy of the summons and of the complaint by signature confirmation as provided by the United States Postal Service, addressed to the party to be served, and delivering to the addressee.

(2) *Natural Person under Disability.* — Upon a natural person under disability by serving process in any manner prescribed in this section (j) for service upon a natural person and, in addition, where required by paragraph a or b below, upon a person therein designated.

a. Where the person under disability is a minor, process shall be served separately in any manner prescribed for service upon a natural person upon a parent or guardian having custody of the child, or if there be none, upon any other person having the care and control of the child. If there is no parent, guardian, or other person having care and control of the child when service is made upon the child, then service of process must also be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

b. If the plaintiff actually knows that a person under disability is under guardianship of any kind, process shall be served separately upon his guardian in any manner applicable and appropriate under this section (j). If the plaintiff does not actually know that a guardian has been appointed when service is made upon a person known to him to be incompetent to have charge of his affairs, then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

(3) The State. — Upon the State by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or to a deputy or assistant attorney general; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the Attorney General or to a deputy or assistant attorney general, delivering to the addressee, and obtaining a delivery receipt. As used in this subdivision, "delivery receipt" includes an electronic or facsimile receipt.

(4) An Agency of the State. —

a. Upon an agency of the State by personally delivering a copy of the summons and of the complaint to the process agent appointed by the agency in the manner hereinafter provided; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to said process agent; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the process agent, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

b. Every agency of the State shall appoint a process agent by filing with the Attorney General the name and address of an agent upon whom process may be served.

c. If any agency of the State fails to comply with paragraph b above, then service upon such agency may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General, or to a deputy or assistant attorney general; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the Attorney General or to a deputy or assistant attorney general, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

d. For purposes of this rule, the term "agency of the State" includes every agency, institution, board, commission, bureau, department, division, council, member of Council of State, or officer of the State government of the State of North Carolina, but does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.

(5) Counties, Cities, Towns, Villages and Other Local Public Bodies. —

a. Upon a city, town, or village by personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its mayor, city manager or clerk; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the mayor, city manager, or clerk, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

b. Upon a county by personally delivering a copy of the summons and of the complaint to its county manager or to the chairman, clerk or any member of the board of commissioners for such county; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its county manager or to the chairman, clerk, or any member of this board of commissioners for such county; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the county manager or to the chairman, clerk, or any member of the board of commissioners of that county, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

c. Upon any other political subdivision of the State, any county or city board of education, or other local public district, unit, or body of any kind (i) by personally delivering a copy of the summons and of the complaint to an officer or director thereof, (ii) by personally delivering a copy of the summons and of the complaint to an agent or attorney-in-fact authorized by appointment or by statute to be served or to accept service in its behalf, (iii) by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent, or attorney-in-fact as specified in (i) and (ii), or (iv) by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, agent, or attorney-in-fact as specified in (i) and (ii), delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

d. In any case where none of the officials, officers or directors specified in paragraphs a, b and c can, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, such court or judge may grant an order that service upon the party sought to be served may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or any deputy or assistant attorney general of the State of North Carolina; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or any deputy or assistant attorney general of the State of North Carolina; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the Attorney General or any deputy or assistant attorney general of the State of North Carolina, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

(6) Domestic or Foreign Corporation. — Upon a domestic or foreign corporation by one of the following:

a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office.

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.

d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

(7) Partnerships. — Upon a general or limited partnership:

a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to any general partner or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, delivering to the addressee, and obtaining a delivery receipt; or by leaving copies thereof in the office of such general partner, attorney-in-fact or agent with the person who is apparently in charge of the office. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

b. If relief is sought against a partner specifically, a copy of the summons and of the complaint must be served on such partner as provided in this section (j).

(8) Other Unincorporated Associations and Their Officers. — Upon any unincorporated association, organization, or society other than a partnership by one of the following:

a. By delivering a copy of the summons and of the complaint to an officer, director, managing agent or member of the governing body of the unincorporated association, organization or society, or by leaving copies thereof in the office of such officer, director, managing agent or member of the governing body with the person who is apparently in charge of the office.

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent or member of the governing body to be served as specified in paragraphs a and b.

d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, agent, or member of the governing body to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

(9) Foreign States and Their Political Subdivisions, Agencies, and Instrumentalities. — Upon a foreign state or a political subdivision, agency, or instrumentality thereof, pursuant to 28 U.S.C. § 1608.

(j1) *Service by publication on party that cannot otherwise be served.* — A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. Except in actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending. If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(a)(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

The notice of service of process by publication shall (i) designate the court in which the action has been commenced and the title of the action, which title may be indicated sufficiently by the name of the first plaintiff and the first defendant; (ii) be directed to the defendant sought to be served; (iii) state either that a pleading seeking relief against the person to be served has been filed or has been required to be filed therein not later than a date specified in the notice; (iv) state the nature of the relief being sought; (v) require the defendant being so served to make defense to such pleading within 40 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of the first publication of notice, or the date when the complaint is required to be filed, whichever is later, and notify the defendant that upon his failure to do so the party seeking service of process by publication will apply to the court for the relief sought; (vi) in cases of attachment, state the information required by G.S. 1-440.14; (vii) be subscribed by the party seeking service or his attorney and give the post-office address of such party or his attorney; and (viii) be substantially in the following form:

NOTICE OF SERVICE OF PROCESS BY PUBLICATION
STATE OF NORTH CAROLINA ____________ COUNTY

In the ____________ Court

[Title of action or special proceeding] [To Person to be served]:
Take notice that a pleading seeking relief against you (has been filed) (is required to be filed not later than __________, ____) in the above-entitled (action) (special proceeding). The nature of the relief being sought is as follows: (State nature.)

You are required to make defense to such pleading not later than (__________, ____) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the _________ day of __________, ____

____________ (Attorney) (Party)
____________ (Address)

(j2) Proof of service. — Proof of service of process shall be as follows:

(1) Personal Service. — Before judgment by default may be had on personal service, proof of service must be provided in accordance with the requirements of G.S. 1-75.10(a)(1).

(2) Registered or Certified Mail, Signature Confirmation, or Designated Delivery Service. — Before judgment by default may be had on service by registered or certified mail, signature confirmation, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. 1-75.10(a)(4), 1-75.10(a)(5), or 1-75.10(a)(6), as appropriate. This affidavit together with the return receipt, copy of the proof of delivery provided by the United States Postal Service, or delivery receipt, signed by the person who received the mail or delivery if not the addressee raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the addressee's dwelling house or usual place of abode. In the event the presumption described in the preceding sentence is rebutted by proof that the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein, the statute of limitation may not be pleaded as a defense if the action was initially commenced

within the period of limitation and service of process is completed within 60 days from the date the service is declared invalid. Service shall be complete on the day the summons and complaint are delivered to the address. As used in this subdivision, "delivery receipt" includes an electronic or facsimile receipt provided by a designated delivery service.

(3) Publication. — Before judgment by default may be had on service by publication, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by publication, information, if any, regarding the location of the party served which was used in determining the area in which service by publication was printed and proof of service in accordance with G.S. 1-75.10(a)(2).

(j3) *Service in a foreign country.* — Unless otherwise provided by federal law, service upon a defendant, other than an infant or an incompetent person, may be effected in a place not within the United States:

(1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

a. In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

b. As directed by the foreign authority in response to a letter rogatory or letter of request; or

c. Unless prohibited by the law of the foreign country, by

1. Delivery to the individual personally of a copy of the summons and the complaint and, upon a corporation, partnership, association or other such entity, by delivery to an officer or a managing or general agent;

2. Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) By other means not prohibited by international agreement as may be directed by the court.

Service under subdivision (2)c.1. or (3) of this subsection may be made by any person authorized by subsection (a) of this Rule or who is designated by order of the court or by the foreign court.

On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, by the order of the court, or by the law of the foreign country.

Proof of service by mail shall include an affidavit or certificate of addressing and mailing by the clerk of court.

(j4) *Process or judgment by default not to be attacked on certain grounds.* — No party may attack service of process or a judgment of default on the basis that service should or could have been effected by personal service rather than service by registered or certified mail. No party that receives timely actual notice may attack a judgment by default on the basis that the statutory requirement of due diligence as a condition precedent to service by publication was not met.

(j5) *Personal jurisdiction by acceptance of service.* — Any party personally, or through the persons provided in Rule 4(j), may accept service of process by notation of acceptance of service together with the signature of the party accepting service and the date thereof on an original or copy of a summons, and such acceptance shall have the same force and effect as would exist had the process been served by delivery of copy and summons and complaint to the person signing said acceptance.

(j6) *Service by electronic mailing not authorized.* — Nothing in subsection (j) of this section authorizes the use of electronic mailing for service on the party to be served.

(k) *Process — Manner of service to exercise jurisdiction in rem or quasi in rem.* — In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for the exercise of jurisdiction in rem or quasi in rem as provided in G.S. 1-75.8, the manner of service of process shall be as follows:

(1) Defendant Known. — If the defendant is known, he may be served in the appropriate manner prescribed for service of process in section (j), or, if otherwise appropriate section (j1); except that the requirement for service by publication in (j1) shall be satisfied if made in the county where the action is pending and proof of service is made in accordance with section (j2).

(2) Defendant Unknown. — If the defendant is unknown, he may be designated by description and process may be served by publication in the manner provided in section (j1), except that the requirement for service by publication in (j1) shall be satisfied if made in the county where the action is pending and proof of service is made in accordance with section (j2). (1967, c. 954, s. 1; 1969, c. 895, ss. 1-4; 1971, c. 962; c. 1156, s. 2; 1975, cc. 408, 609; 1977, c. 910, ss. 1-3; 1981, c. 384, s. 3; c. 540, ss. 1-8; 1983, c. 679, ss. 1, 2; 1989, c. 330; c. 575, ss. 1, 2; 1995, c. 275, s. 1; c. 389, ss. 2, 3; c. 509, s. 135.1(e), (f); 1997-469, s. 1; 1999-456, s. 59; 2001-379, ss. 1, 2, 2.1, 2.2; 2005-221, ss. 1, 2; 2008-36, ss. 1-3, 5.)

Effect of Amendments. — Session Laws 2008-36, ss. 1, 2, 3, and 5, effective October 1, 2008, and applicable to receipts given on or after that date, in subdivision (j)(1), substituted "subdivision (2)" for "subsection (2)" in the introductory paragraph, in sub-subdivision (j)(1)d., added the last sentence, and in sub-subdivision (j)(1)e., deleted the former last sentence, which read: "Nothing in this sub-subdivision authorizes the use of electronic mailing for service on the party to be served."; in subdivision (j)(3) and sub-subdivisions (j)(4)a., (j)(4)c., (j)(5)a. through (j)(5)d., (j)(6)d., (j)(7)a., and (j)(8)d., added the last sentence; rewrote subdivision (j)(9); in subdivision (j1), in the last sentence of the first paragraph, substituted "G.S. 1-75.10(a)(2)" for "G.S. 1-75.10(2)"; in subdivision (j2)(1), substituted "G.S. 1-75.10(a)(1)" for "G.S. 1-75.10(1); in subdivision (j2)(2), substituted "G.S. 1-75.10(a)(4), 1-75.10(a)(5), or 1-75.10(a)(6)" for "G.S. 1-75.10(4), 1-75.10(5), or 1-75.10(6)" in the first sentence, substituted "receipt, copy of the proof of delivery provided by the United States Postal Service, or delivery receipt" for "or delivery receipt or copy of the proof of delivery provided by the United States Postal Service" in the second sentence, and added the last sentence; in subdivision (j2)(3), substituted "G.S. 1-75.10(a)(2)" for "G.S. 1-75.10(2)"; and added subsection (j6).

CASE NOTES

I. In General.
II. Personal Service on Natural Persons.
  A. In General.
  C. Service by Registered or Certified Mail.
IV. Service on Corporations.
VII. Discontinuance and Extensions.

I. IN GENERAL.

Failure to Serve Summons in Original Action Bars Subsequent Action. — Defective service in the alleged accident victims' original negligence action under G.S. 1A-1 and N.C. R. Civ. P. 4 resulted in the victims' subsequent refiled action, despite the voluntary dismissal by the victims of the original action under G.S. 1A-1 and N.C. R. Civ. P. 41(a) being brought after the statute of limitations under G.S. 1-52(16) ran. Camara v. Gbarbera, — N.C. App. —, 662 S.E.2d 920, 2008 N.C. App. LEXIS 1325 (July 15, 2008).

Five Day Time Limit for Issuance of Summons Under Section (a). —

Because plaintiff submitted copies of original summonses that were issued on the day that plaintiff's complaint was originally filed, there was no merit to defendants' argument that jurisdiction was never conferred due to failure to obtain summonses within five days as required by G.S. 1A-1, N.C. R. Civ. P. 4(a). Patterson v. Brown, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 9312 (W.D.N.C. Jan. 23, 2008).

Cited in In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

II. PERSONAL SERVICE ON NATURAL PERSONS.

A. In General.

Absent valid service of process, etc.

Because summonses were not signed or dated by the clerk of court, pursuant to G.S. 1A-1, N.C. R. Civ. P. 4(a), and did not contain an official stamp indicating that the summonses had been filed, the trial court lacked jurisdiction over the juvenile file and the parent in a G.S. 7B-406(a) termination of parental rights action. In re K.J.L., — N.C. App. —, 665 S.E.2d 504, 2008 N.C. App. LEXIS 1514 (2008).

C. Service by Registered or Certified Mail.

Affidavit by Spouse on Service Sufficient in Divorce Action. — District court properly acquired personal jurisdiction over a defending wife in a divorce action based on the husband's affidavit of service by certified mail and attachments thereto with the wife's signature appearing thereon that the summons and complaint were personally served upon the wife. Wilson v. Wilson, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1479 (Aug. 5, 2008).

IV. SERVICE ON CORPORATIONS.

To Whom Process May Be Delivered for Service on Corporation. —

Service against defendant employer was not effected sufficiently since the manager that accepted service was not in fact an appropriate agent to receive service (the manager did not have the broad executive responsibilities expected of an agent designated to receive service, nor did she serve as an officer or a managing or general agent of the employer). McDaniel v. Greyhound Lines, Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 58299 (W.D.N.C. July 7, 2008).

Process Held Sufficient to Show Suit Against Corporation. —

Accident victim obtained jurisdiction over a utility because service was properly established under G.S. 1A-1, N.C. R. Civ. P. 4(j2)(2), by the victim's sending the summons and complaint to the utility's registered agent, and receiving back the signed delivery receipt. Further, nothing in an affidavit filed by the utility overcame the presumption created by the rule. Ruiz v. Mecklenburg Utils., Inc., — N.C. App. —, 657 S.E.2d 432, 2008 N.C. App. LEXIS 418 (2008).

VII. DISCONTINUANCE AND EXTENSIONS.

Chain of Summonses. —

Because plaintiff failed to serve defendants with process within the time allowed and did not create an unbroken chain of summonses referring back to the original summons as required by N.C. R. Civ. P. 3 and 4, her action was properly dismissed as time-barred under G.S. 1-52. Robertson v. Price, — N.C. App. —, 652 S.E.2d 352, 2007 N.C. App. LEXIS 2240 (2007).

Discontinuance on Failure to Secure Extension of Time for Service. —

Dismissal of a passenger's claim against an estate based on a decedent's ownership of an auto involved in an accident was proper because the claim against the driver was a claim against an agent, and, since the driver was named as a party, proper service was required; since the summons as to the driver was allowed to lapse and the statute of limitations had since run, the driver had no liability to impute to the estate. Therefore, neither the driver nor the estate could have been determined judicially to have been negligent, and the passenger's cause of action against the estate failed. Atkinson v. Lesmeister, 186 N.C. App. 442, 651 S.E.2d 294, 2007 N.C. App. LEXIS 2203 (2007).

Issuance of New Summons. —

While the original summons was not yet dormant, because the second summons did not conform with the requirements of N.C. R. Civ. P. 4(d), the original action was discontinued, and the trial court's subject matter jurisdiction was reinvoked. Because the parents were properly served with newly issued summons, commencing new actions and reinvoking the trial court's subject matter jurisdiction as of their respective dates of issuance, the contention that the court lacked subject matter jurisdiction over the parties in the termination of parental rights hearing due to ineffective service was without merit. In re D.B., — N.C. App. —, 652 S.E.2d 56, 2007 N.C. App. LEXIS 2257 (2007).

Removal to Federal Court Provided Opportunity to Correct Deficiencies in Service. — Although plaintiff's attempt to effect service on defendants, a county, county officials, and a prison health services corporation, by leaving copies of a complaint and summonses on the desks of administrative assistants who worked for the county did not comply with G.S. 1A-1, N.C. R. Civ. P. 4(j)(1)(b), (5)(b), (5)(c), (6)(a), and (6)(b), upon removal, 28 U.S.C.S. § 1448 provided plaintiff an opportunity to correct any deficiencies in service prior to removal because at the time of removal, plaintiff's action was not subject to dismissal insofar as plaintiff still had an opportunity to revive the summonses by seeking a reissuance prior to the expiration of the 90-day period set forth in G.S. 1A-1, N.C. R. Civ. P. 4(d). Patterson v. Brown, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 9312 (W.D.N.C. Jan. 23, 2008).

Rule 5. Service and filing of pleadings and other papers.

CASE NOTES

Service Upon Attorney Representing Party in Another Matter Insufficient. — The trial court abused its discretion in denying a seller's motion to set the preliminary injunction aside because the seller never received notice of the buyer's intention to seek a preliminary injunction; the lack of notice affected the seller's substantial rights, and the seller's purported attorney of record did not represent the seller in the instant action, thus making service on the attorney insufficient to provide notice to the seller. Perry v. Baxley Dev., Inc., — N.C. App. —, 655 S.E.2d 460, 2008 N.C. App. LEXIS 88 (2008).

Rule 6. Time.

CASE NOTES

I. In General.

I. IN GENERAL.

Adequate Notice of Hearing. — Trial court did not abuse its discretion in hearing the motions filed by the wife in a breach of separation agreement proceeding because the husband's counsel had adequate notice under G.S. 1A-1, N.C. R. Civ. P. 6(d) of the hearing for the motions and failed to demonstrate excusable neglect for failure to appear for the hearing. Carpenter v. Carpenter, — N.C. App. —, 659 S.E.2d 762, 2008 N.C. App. LEXIS 692 (2008).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; motions.

CASE NOTES

II. Pleadings.

II. PLEADINGS.

Permission to File Reply to Affirmative Defenses. — Allegations of affirmative defenses were deemed denied or avoided, so normally a reply was not necessary to protect the plaintiff's rights; there was no inequity in the procedure used by the trial court in entering judgment on the pleadings in a lender's claim for a deficiency judgment against guarantors. If the lender believed a reply to the guarantors' affirmative defenses was necessary, the lender could have sought permission to file a reply to the affirmative defenses, and, in any event, the lender brought its defenses to the attention of the trial court by way of its response to the guarantors' motion, its trial brief, and its arguments before the trial court. Carolina Bank v. Chatham Station, Inc., 186 N.C. App. 424, 651 S.E.2d 386, 2007 N.C. App. LEXIS 2195 (2007).

Rule 8. General rules of pleadings.

CASE NOTES

I. In General.
III. Affirmative Defenses.

I. IN GENERAL.

Cited in Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008).

III. AFFIRMATIVE DEFENSES.

Pleading of Affirmative Defense Not Required. — Because a husband neither disputed a property contract nor brought any new claim of his own, it would not have been appropriate for the wife to specifically plead an affirmative defense under G.S. 1A-1, N.C. R. Civ. P. 8(c); accordingly, the property contract was improperly disregarded by the trial court. Street v. Street, — N.C. App. —, 664 S.E.2d 69, 2008 N.C. App. LEXIS 1488 (2008).

Affirmative Defenses Deemed Denied. — Allegations of affirmative defenses were deemed denied or avoided, so normally a reply was not necessary to protect the plaintiff's rights; there was no inequity in the procedure used by the trial court in entering judgment on the pleadings in a lender's claim for a deficiency judgment against guarantors. If the lender believed a reply to the guarantors' affirmative defenses was necessary, the lender could have sought permission to file a reply to the affirmative defenses, and, in any event, the lender brought its defenses to the attention of the trial court by way of its response to the guarantors' motion, its trial brief, and its arguments before the trial court. Carolina Bank v. Chatham Station, Inc., 186 N.C. App. 424, 651 S.E.2d 386, 2007 N.C. App. LEXIS 2195 (2007).

Rule 9. Pleading special matters.

CASE NOTES

I. In General.
III. Fraud, Duress, Mistake, etc.
VII. Pleading and Practice.

I. IN GENERAL.

Cited in Higgins v. Spence & Spence, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 13096 (E.D.N.C. Feb. 21, 2008); N.C. State Bar v. Gilbert, — N.C. App. —, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

III. FRAUD, DURESS, MISTAKE, ETC.

Plaintiff's pleadings were sufficient, etc.

It was error to dismiss an insured's fraud and constructive fraud claims for failure to plead with sufficient particularity under G.S. 1A-1, N.C. R. Civ. P. 9(b), since the insured outlined the fiduciary relationship the insured had with an agent, and through the agent, with an insurer, and put forward allegations of forgery and deception that culminated in the denial of the insured's claim for underinsured motorist coverage. Piles v. Allstate Ins. Co., — N.C. App. —, 653 S.E.2d 181, 2007 N.C. App. LEXIS 2449 (2007).

Allegations Held Insufficient Under Section (b). —

Because a potential property purchaser did not allege the time nor place where an individual's and company's purported fraudulent representations to the purchaser occurred, and the allegations did not state with particularity the content of the purported fraudulent representations, the complaint did not sufficiently set out a fraud claim and had to be dismissed. S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, — N.C. App. —, 659 S.E.2d 442, 2008 N.C. App. LEXIS 703 (2008).

VII. PLEADING AND PRACTICE.

Medical Malpractice Complaint. —

Where an estate administratrix sued a hospital, asserting claims based on a decedent's fall from a hospital bed, the hospital was properly granted summary judgment because the complaint did not include certification under N.C. R. Civ. P. 9(j), which was required because the original complaint was for medical malpractice since the administratrix chose to base the complaint on the lack of restraints on decedent and the decision to apply restraints was a professional service. Sturgill v. Ashe Mem'l Hosp., Inc., — N.C. App. —, 652 S.E.2d 302, 2007 N.C. App. LEXIS 2256 (2007).

Expert could not reasonably be expected to qualify as an expert witness as required by G.S. 1A-1, N.C. R. Civ. P. 9(j), and did not qualify as an expert witness under G.S. 8C-1, N.C. R. Evid. 702(b) or (c) as: (1) the expert was a board certified obstetrician, (2) doctor one was a board certified emergency room physician and doctor two was a board certified trauma surgeon, (3) both doctors were acting within their capacities as specialists in treating a decedent as a trauma patient, (4) both doctor one and doctor two were properly deemed as specialists under Rule 702, and (5) the expert was not certified as either an emergency room physician or a trauma surgeon, nor did the expert practice in either of these areas. Knox v. Univ. Health Sys. of E. Carolina, Inc., — N.C. App. —, 652 S.E.2d 722, 2007 N.C. App. LEXIS 2363 (2007).

In a medical malpractice suit against an oral surgeon, the trial court erred by striking the patient's standard of care witness because (1) the expert fulfilled the "performance of the procedure" and "prior experience" requirements since the expert was licensed to perform oral surgery and performed the surgical extraction of molars, (2) the expert was a general dentist who specialized in the practice of oral surgery, and (3) the expert possessed sufficient familiarity with the city of Charlotte and the practice of dentistry therein. Roush v. Kennon, — N.C. App. —, 656 S.E.2d 603, 2008 N.C. App. LEXIS 216 (2008).

Wrongful Death Complaint. — Because there was a question of fact as to whether defendant rehabilitation center and its chief operating officer followed the applicable standard of care, they were not entitled to qualified immunity under G.S. 122C-210.1 on plaintiff's wrongful death claims as a matter of law; plaintiff alleged facts that defendants had violated accepted professional judgment, practice and standards, an investigative report from the North Carolina Division of Facility Services found that the facility had failed to adequately supervise plaintiff's brother, and plaintiff's complaint was certified by an expert under N.C. R. Civ. P. 9(j) that the medical care outlined in the complaint did not comply with the applicable standard of care. Snyder v. Learning Servs. Corp., — N.C. App. —, 653 S.E.2d 548, 2007 N.C. App. LEXIS 2454 (2007).

Rule 11. Signing and verification of pleadings.

CASE NOTES

I. In General.

I. IN GENERAL.

Lack of Signature Did Not Deprive Court of Jurisdiction Where Petition Was Verified. — Trial court did not lack subject matter jurisdiction over the juvenile petition that the caseworker filed in the termination of parental rights case regarding the father even though the caseworker did not sign the juvenile petition; the caseworker verified the petition, which was sufficient to confer jurisdiction, and in any event, would have been allowed to amend the petition by signing it if not signing it was a problem. In re D.D.F., — N.C. App. —, 654 S.E.2d 1, 2007 N.C. App. LEXIS 2447 (2007).

Trial courts cannot abdicate their duties and responsibilities under G.S. 1A-1, N.C. R. Civ. P. 11 to a private attorney. Dalenko v. Collier, — N.C. App. —, 664 S.E.2d 425, 2008 N.C. App. LEXIS 1500 (2008).

Review of Sanctions. —

An abuse of discretion could not be found where a party did not offer evidence in support of the party's motion for sanctions. N.C. State Bar v. Gilbert, — N.C. App. —, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

Sanctions Imposed Without Jury Trial. — Trial court does not violate a person's right to a trial by imposing G.S. 1A-1, N.C. R. Civ. P. 11 sanctions without a jury. Dalenko v. Collier, — N.C. App. —, 664 S.E.2d 425, 2008 N.C. App. LEXIS 1500 (2008).

Sanctions Were Not Appropriate. —

Where a student's due process and equal protection suit against a county board of education was barred by res judicata, sanctions were inappropriate because (1) the trial court mischaracterized the student's claim, (2) the student's attorneys performed a reasonable inquiry into the facts, and (3) at the time the complaint was filed, no case had specifically held that a dismissal on grounds of sovereign immunity was a final adjudication on the merits barring subsequent actions. Herring v. Winston-Salem/Forsyth County Bd. of Educ., — N.C. App. —, 656 S.E.2d 307, 2008 N.C. App. LEXIS 231 (2008).

Sanctions Held Appropriate. —

Sanctioning the father in the form of an attorney's fee award to the mother was proper because the father's allegations against the mother did not rise to the level of legal sufficiency needed to allege criminal contempt in court. Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008).

Judge sufficiently satisfies requirement for findings in support of imposing sanctions when the order finds as fact that the amount of attorney's fees awarded to defendant was appropriate based upon the amount of work required by the case and the experience of defendant's attorneys. Dalenko v. Collier, — N.C. App. —, 664 S.E.2d 425, 2008 N.C. App. LEXIS 1500 (2008).

G.S. 1A-1, N.C. R. Civ. P. 11 sanctions are properly imposed after the trial court finds that plaintiff's claims are frivolous and have no basis in law or fact and that plaintiff's claims are barred by the doctrine of collateral estoppel. Dalenko v. Collier, — N.C. App. —, 664 S.E.2d 425, 2008 N.C. App. LEXIS 1500 (2008).

Trial court, after the dismissal of the tenant's complaint for failure to state a cause of action, properly granted the landlord attorney's fees and costs under G.S. 1A-1, N.C. R. Civ. P. 11(a) because the tenant's claims against the landlord were not warranted by existing law and were filed with an improper purpose. Ward v. Jett Props., LLC, — N.C. App. —, 663 S.E.2d 862, 2008 N.C. App. LEXIS 1490 (Aug. 5, 2008).

Applied in Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

Cited in Morris v. Moore, 186 N.C. App. 431, 651 S.E.2d 594, 2007 N.C. App. LEXIS 2207 (2007); Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008); Mason v. Dwinnell, — N.C. App. —, 660 S.E.2d 58, 2008 N.C. App. LEXIS 908 (2008).

Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading.

CASE NOTES

- I. In General.
- V. Personal Jurisdiction.
- IX. Failure to State Claim.
  - A. In General.
  - B. Conversion of Motion to Dismiss to Summary Judgment Motion.
- XI. Motion for Judgment on the Pleadings.
- XIII. Motion to Strike.

I. IN GENERAL.

Denial of Motion to Dismiss Pro Se Complaint Held Proper. — Trial court did not err in denying healthcare providers' motion to dismiss an estate's wrongful death complaint, which was signed, pro se, by the administrator of the estate. Reid v. Cole, — N.C. App. —, 653 S.E.2d 164, 2007 N.C. App. LEXIS 2321 (2007).

Standard of Review. — Under the appellate standard of review as to G.S. 1A-1, N.C. R. Civ. P. 12(b)(2) motions, an appellate court had to take defendant's assertions as true because defendant provided an affidavit which presented evidence, and plaintiff submitted no evidence opposing the defendant's showing. Dailey v. Popma, — N.C. App. —, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (June 17, 2008).

Applied in Ellison v. Gambill Oil Co., 186 N.C. App. 167, 650 S.E.2d 819, 2007 N.C. App. LEXIS 2123 (2007); Morris v. Moore, 186 N.C. App. 431, 651 S.E.2d 594, 2007 N.C. App. LEXIS 2207 (2007); Marriott v. Chatham County, — N.C. App. —, 654 S.E.2d 13, 2007 N.C. App. LEXIS 2430 (2007); Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs, — N.C. App. —, 656 S.E.2d 296, 2008 N.C. App. LEXIS 230 (2008); Craven v. Cope, — N.C. App. —, 656 S.E.2d 729, 2008 N.C. App. LEXIS 266 (2008); Steward v. Green, — N.C. App. —, 657 S.E.2d 719, 2008 N.C. App. LEXIS 423 (2008); Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008); Eaker v. Gower, — N.C. App. —, 659 S.E.2d 29, 2008 N.C. App. LEXIS 691 (2008); Nucor Corp. v. Prudential Equity Group, LLC, — N.C. App. —, 659 S.E.2d 483, 2008 N.C. App. LEXIS 713 (2008); Gress v. Rowboat Co., — N.C. App. —, 661 S.E.2d 278, 2008 N.C. App. LEXIS 1074 (2008); Moore v. Nationwide Mut. Ins. Co., — N.C. App. —, 664 S.E.2d 326, 2008 N.C. App. LEXIS 1171 (2008); Rossetto United States, Inc. v. Greensky Fin., LLC, — N.C. App. —, 662 S.E.2d 909, 2008 N.C. App. LEXIS 1227 (2008); Hyatt v. Town of Lake Lure, — N.C. App. —, 663 S.E.2d 320, 2008 N.C. App. LEXIS 1322 (2008); In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008);

Ward v. Jett Props., LLC, — N.C. App. —, 663 S.E.2d 862, 2008 N.C. App. LEXIS 1490 (Aug. 5, 2008); Turner v. Hammocks Beach Corp., — N.C. App. —, 664 S.E.2d 634, 2008 N.C. App. LEXIS 1547 (2008); Odell v. Legal Bucks, LLC, — N.C. App. —, 665 S.E.2d 767, 2008 N.C. App. LEXIS 1619 (2008).

Cited in Standley v. Town of Woodfin, 186 N.C. App. 134, 650 S.E.2d 618, 2007 N.C. App. LEXIS 2121 (2007); Atkinson v. Lesmeister, 186 N.C. App. 442, 651 S.E.2d 294, 2007 N.C. App. LEXIS 2203 (2007); Greene v. Royster, — N.C. App. —, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007); Crawford v. Mintz, — N.C. App. —, 653 S.E.2d 222, 2007 N.C. App. LEXIS 2455 (2007); Snyder v. Learning Servs. Corp., — N.C. App. —, 653 S.E.2d 548, 2007 N.C. App. LEXIS 2454 (2007); Reece v. Smith, — N.C. App. —, 655 S.E.2d 911, 2008 N.C. App. LEXIS 191 (Feb. 5, 2008); Herring v. Winston-Salem/Forsyth County Bd. of Educ., — N.C. App. —, 656 S.E.2d 307, 2008 N.C. App. LEXIS 231 (2008); Price & Price Mech. of N.C., Inc. v. Miken Corp., — N.C. App. —, 661 S.E.2d 775, 2008 N.C. App. LEXIS 1130 (June 17, 2008); Wake Cares, Inc. v. Wake County Bd. of Educ., — N.C. App. —, 660 S.E.2d 217, 2008 N.C. App. LEXIS 872 (2008); Heatzig v. MacLean, — N.C. App. —, 664 S.E.2d 347, 2008 N.C. App. LEXIS 1480 (2008); Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008); State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. —, 666 S.E.2d 107, 2008 N.C. LEXIS 687 (2008); Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008); Heatzig v. MacLean, — N.C. App. —, 664 S.E.2d 347, 2008 N.C. App. LEXIS 1480 (2008)

V. PERSONAL JURISDICTION.

Personal Jurisdiction Not Established. —

In an action filed by the State against a foreign corporation under G.S. 66-291, the trial court properly dismissed the action for lack of personal jurisdiction, because: (1) the State's conclusory allegation was insufficient to establish an alter ego theory of liability for personal jurisdiction purposes; (2) there was no evidence of any act or omission by the foreign corporation within North Carolina in the record; and (3) the trial court specifically found that the foreign corporation was not in the State of North Carolina when it received the alleged fraudulent funds from the North Carolina corporation. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. App. —, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008).

IX. FAILURE TO STATE CLAIM.

A. In General.

Failure to Allege Waiver of Immunity. — Trial court erred in denying state agencies' motion to dismiss a corporation's complaint, seeking a declaratory judgment that an E-Procurement fee was a tax not enacted by the legislature in violation of N.C. Const., Art. II, § 23 and a refund of the taxes under G.S. 105-267 because the corporation's claims were barred by the defense of sovereign immunity; the North Carolina Supreme Court's holding that sovereign immunity could not prevent a plaintiff from asserting a claim alleging a violation of his rights under the Declaration of Rights of the North Carolina Constitution was limited to alleged violations of personal rights and did not extend to the corporation's complaint because N.C. Const., Art. II, § 23 did not articulate any rights, only procedures to be followed. Petroleum Traders Corp. v. State, — N.C. App. —, 660 S.E.2d 662, 2008 N.C. App. LEXIS 1003 (2008).

B. Conversion of Motion to Dismiss to Summary Judgment Motion.

When Motion to Dismiss Converted to Summary Judgment Motion. —

Because the trial court clearly considered matters outside the pleadings, the trial court properly treated defendants' G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion to dismiss as a motion for summary judgment under G.S. 1A-1, N.C. R. Civ. P. 56. Barbee v. Johnson, — N.C. App. —, 660 S.E.2d 135, 2008 N.C. App. LEXIS 887 (2008).

Because the superior court considered matters outside the pleadings when the court heard an insurer's motion to dismiss the insureds' counterclaims, the appellate court reviewed the superior court's grant of the insurer's motion to dismiss as the grant of a motion for summary judgment. State Farm Mut. Auto. Ins. Co. v. Gaylor, — N.C. App. —, 660 S.E.2d 104, 2008 N.C. App. LEXIS 821 (2008).

XI. MOTION FOR JUDGMENT ON THE PLEADINGS.

When 12(b)(6) Motion Converted to Motion for Judgment on the Pleadings. — Because the trial court could apply G.S. 1A-1, N.C. R. Civ. P. 12(c) sua sponte, it did not err in considering exhibits appended to the answer and converting the G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion to a G.S. 1A-1, N.C. R. Civ. P. 12(c) motion. S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, — N.C. App. —, 659 S.E.2d 442, 2008 N.C. App. LEXIS 703 (2008).

Grant of Motion Held Error. —

Because the trial court improperly struck the husband's answer, the trial court's allowance of the wife's motion for judgment on the pleadings under G.S. 1A-1, N.C. R. Civ. P. 12(c) also was error. Carpenter v. Carpenter, — N.C. App. —, 659 S.E.2d 762, 2008 N.C. App. LEXIS 692 (2008).

XIII. MOTION TO STRIKE.

Motion to Strike Inappropriate for Failure to Timely File Answer. — Trial court erred in granting the wife's motion to strike the husband's pleadings because failure to timely file an answer was not grounds for striking a pleading under G.S. 1A-1, N.C. R. Civ. P. 12(f) and the answer that the husband did file raised matters that could have had a possible bearing on the litigation. Carpenter v. Carpenter, — N.C. App. —, 659 S.E.2d 762, 2008 N.C. App. LEXIS 692 (2008).

Rule 13. Counterclaim and crossclaim.

CASE NOTES

I. In General.
II. Counterclaims.

I. IN GENERAL.

Applied in Outlaw v. Johnson, — N.C. App. —, 660 S.E.2d 550, 2008 N.C. App. LEXIS 907 (2008).

II. COUNTERCLAIMS.

Article 11 of Chapter 7B Contains Exclusive Procedures Used in Counterclaim for Termination of Parental Rights. — Given both the statement of legislative intent in G.S. 7B-1100(1) and the specificity of the procedures in G.S. 7B-100 et seq., Article 11 of Chapter 7B provides the exclusive procedures to be used in a termination of parental rights proceeding; a defendant therefore cannot rely on G.S. 1A-1, N.C. R. Civ. P. 13 as the basis for a counterclaim for termination of parental rights. In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

G.S. 7B-1100 et seq. does not provide a procedure through which a party may counterclaim for termination of parental rights in response to a complaint for child visitation; rather, Article 11 contemplates that a termination petition should be brought in a separate action. In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

Because G.S. 7B-1100 et seq. provided the exclusive procedures for a termination of parental rights proceeding and contemplated that a termination petition be brought in a separate action, the trial court lacked subject matter jurisdiction over a termination of parental rights action brought as a counterclaim to a visitation action; although the trial court had tried to rectify the error by having summonses issued under G.S. 7B-1106(a), the issuance of a summons alone did not vest a trial court with subject matter jurisdiction over an action that was never properly commenced. In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

Rule 15. Amended and supplemental pleadings.

CASE NOTES

I. In General.
II. Amendments to Conform to Evidence.
III. Relation Back of Amendments.

I. IN GENERAL.

Rule Inapplicable in Action to Terminate Parental Rights. — Because the trial court erred in allowing the county department of social services to amend the petitions to terminate a mother's parental rights to conform to the evidence, the original petitions failed to put the mother on notice that G.S. 7B-1111(a)(2) would be a possible ground to support termination, and G.S. 1A-1, N.C. R. Civ. P. 15(b) did not apply, the termination order was reversed. In re B.L.H., — N.C. App. —, 660 S.E.2d 255, 2008 N.C. App. LEXIS 831 (2008).

Shareholder was not a New Party. — State could add a claim against a shareholder, contingent on the State's subsequent ability to demonstrate that the shareholder and a corporation were alter egos. The State made the necessary showings at the pleading stage to establish that the corporation was operated as a mere instrumentality of the shareholder; therefore, G.S. 1-54(2)'s one-year statute of limitations was tolled as to the shareholder, and the addition of the shareholder as a party related back and did not violate N.C. R. Civ. P. 15(c). State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. —, 666 S.E.2d 107, 2008 N.C. LEXIS 687 (2008).

Discretion of Court. —

Trial court did not abuse the court's discretion by allowing the public administrators' complaints and the trustees cross-claims against a trustee to be amended because: (1) the administrators filed the amended complaints with the written consent of the trustees; (2) the administrators filed a motion to amend their complaint, seeking leave of court to file the amended complaint, although such motion was filed after the amended complaint; and (3) the trustee did not argue that the trustee was prejudiced by the filing of the amended complaints and cross-claims. Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

Applied in Marriott v. Chatham County, — N.C. App. —, 654 S.E.2d 13, 2007 N.C. App. LEXIS 2430 (2007); Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008).

II. AMENDMENTS TO CONFORM TO EVIDENCE.

Absent Objection to Variance, Pleadings Deemed Amended. —

Trial court did not err in ruling on an issue concerning the validity of a foreclosure action because, although the issue was not set forth in the complaint, plaintiff mortgage company offered evidence to the trial court regarding the issue to which defendant grantee did not object; thus, the trial court properly considered the matter pursuant to N.C. R. Civ. P. 15(b). Citifinancial Mortg. Co. v. Gray, — N.C. App. —, 652 S.E.2d 321, 2007 N.C. App. LEXIS 2316 (2007).

III. RELATION BACK OF AMENDMENTS.

Relation Back Denied. —

Because an estate administrator was not served until after the statute of limitations in G.S. 1-52(16) had expired, and because there was no indication of any subterfuge or delay by the administrator that prevented the driver from timely amending the complaint, pursuant to G.S. 1A-1, N.C. R. Civ. P. 15(c), the driver's amended complaint did not relate back to the date of the original filing of the complaint. Reece v. Smith, — N.C. App. —, 655 S.E.2d 911, 2008 N.C. App. LEXIS 191 (Feb. 5, 2008).

Article 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in In re L.B., — N.C. App. —, 653 S.E.2d 240, 2007 N.C. App. LEXIS 2456 (2007).

Rule 19. Necessary joinder of parties.

CASE NOTES

I. In General.

I. IN GENERAL.

Who Are Necessary Parties. —

Lien holders were not necessary parties under G.S. 1A-1, N.C. R. Civ. P. 19 in a county's suit seeking injunctive relief under G.S. § 113A-64.1, as even during a foreclosure suit, lien holders were not necessary parties. Durham County v. Graham, — N.C. App. —, 663 S.E.2d 467, 2008 N.C. App. LEXIS 1505 (Aug. 5, 2008).

Although under G.S. 113A-64.1, a county had independent statutory authority to require the operators of a landfill to fix any excess disturbances they might have caused, and under G.S. 113A-64.1, the county's suit seeking injunctive relief did not require the inclusion of any other party besides the operators, a lender that currently owned the property was a necessary party under G.S. 1A-1, N.C. R. Civ. P. 19 as if the lender was not joined as a party, its right to determine the legal use of its property might be abrogated. Durham County v. Graham, — N.C. App. —, 663 S.E.2d 467, 2008 N.C. App. LEXIS 1505 (Aug. 5, 2008).

City was not a necessary party under G.S. 1A-1, N.C. R. Civ. P. 19 in a county's suit seeking injunctive relief under G.S. § 113A-64.1, even though the operators of a landfill would have to petition the City for a zoning grant to comply with an injunction, as if the City denied such a petition, the operators could then argue before the trial court that they were unable to comply; the City had no interest in the property, although it might later become an interested party. Durham County v. Graham, — N.C. App. —, 663 S.E.2d 467, 2008 N.C. App. LEXIS 1505 (Aug. 5, 2008).

Dispute As To Restrictive Covenants In A Development. — In a recreational amenity owner's action to collect amenity fees from homeowners' associations in a development, all property owners in the development were not necessary parties within the meaning of N.C. R. Civ. P. 19(a) because only the owner could enforce the covenant to pay an amenity fee, and the extinguishment of the restrictive covenant would not deprive the other property owners of any property right. Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, — N.C. App. —, 652 S.E.2d 378, 2007 N.C. App. LEXIS 2269 (2007).

Rule 23. Class actions.

(a) *Representation.* — If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

(b) *Secondary action by shareholders.* — In an action brought to enforce a secondary right on the part of one or more shareholders or members of a corporation or an unincorporated association because the corporation or association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath.

(c) *Dismissal or compromise.* — A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs.

(d) *Tax Class Actions.* — In addition to all of the requirements set out in this rule, a class action seeking the refund of a State tax paid due to an alleged unconstitutional statute may be brought and maintained only as provided in G.S. 105-241.18. (1967, c. 954, s. 1; 2008-107, s. 28.28(a).)

Editor's Note. — Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5, is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.28(a), effective October 1, 2008, and applicable to actions filed on or after that date, added subsection (d).

CASE NOTES

I. In General.

I. IN GENERAL.

Permissible Application of Rule. —

Requirements of G.S. 1A-1, N.C. R. Civ. P. 23(c) do not apply to pre-certification class-action complaints. A trial court errs in concluding that a named plaintiff in an action that had not yet been certified as a class action was required to obtain judicial approval under Rule 23(c) before obtaining a voluntary dismissal of his class-action complaint. Moody v. Sears Roebuck & Co., — N.C. App. —, 664 S.E.2d 569, 2008 N.C. App. LEXIS 1324 (2008).

Party or parties representing the class must be such as will fairly ensure adequate representation, etc.

Property owners could not represent a potential class of landowners who owned land on a line between two counties in 1992 when the line was redrawn because they did not own such property in 1992, and they could not adequately represent the class for purposes of G.S. 1A-1, N.C. R. Civ. P. 23(a). Meadows v. Iredell County, — N.C. App. —, 653 S.E.2d 925, 2007 N.C. App. LEXIS 2564 (2007).

Notice to Members of Class Required. — Because plaintiffs' case was certified as a class action, the plaintiffs did not have the power to voluntarily dismiss any of the plaintiffs' claims under G.S. 1A-1, N.C. R. Civ. P. 41 without notice to class members as required by G.S. 1A-1, N.C. R. Civ. P. 23(c). Kitchin v. Halifax County, — N.C. App. —, 665 S.E.2d 760, 2008 N.C. App. LEXIS 1624 (2008).

Collateral Review. — After a foreign court had fully addressed a domestic court's due process notice concerns and the matter had been fully and fairly litigated and finally decided, review of the issues on their merits is foreclosed. However, in a class action consumer's motion for voluntary dismissal, the trial court erred when the court failed to conduct a broad collateral review of a foreign court's settlement of a class action suit that encompassed the matter before the trial court. Moody v. Sears Roebuck & Co., — N.C. App. —, 664 S.E.2d 569, 2008 N.C. App. LEXIS 1324 (2008).

Voluntary Dismissal of Class Action. — When a plaintiff seeks voluntary dismissal of a pre-certification class-action complaint, a trial court should engage in a limited inquiry to determine: (a) whether the parties have abused the class-action mechanism for personal gain; and (b) whether dismissal will prejudice absent putative class members; if the trial court finds that neither of these concerns is present, the plaintiff is entitled to a voluntary dismissal. If the trial court finds that one or both of these concerns are present, the court retains discretion to hold a certification hearing, certify the class if appropriate, and order that notice be given to class members; the parties may then again seek dismissal subject to the trial court's approval under G.S. 1A-1, N.C. R. Civ. P. 23(c). Moody v. Sears Roebuck & Co., — N.C. App. —, 664 S.E.2d 569, 2008 N.C. App. LEXIS 1324 (2008).

Cited in Rowlette v. State, — N.C. App. —, 656 S.E.2d 619, 2008 N.C. App. LEXIS 284 (2008).

Rule 24. Intervention.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

ARTICLE 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

CASE NOTES

I. In General.
II. Scope of Discovery Generally.
V. Protective Orders.

I. IN GENERAL.

Remand for In Camera Inspection Required. — Remand was necessary for a trial court to review documents in camera and determine whether some of the documents were in fact privileged because, from the record, the appellate court was unable to determine whether the withheld materials were created in anticipation of litigation. In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

Cited in Yorke v. Novant Health, Inc., — N.C. App. —, 666 S.E.2d 127, 2008 N.C. App. LEXIS 1620 (2008).

II. SCOPE OF DISCOVERY GENERALLY.

Safeguards to Protect Discovered Information. —

Trial court's decision not to conduct an in camera review of all of the decedent's substance abuse treatment records was proper because the clear purpose of the trial court's order was to enable the health care providers to have access to information useful in developing their defense. Given that the records ordered to be disclosed were reasonably calculated to lead to the discovery of evidence relevant to the issues of emotional distress and damages and such records would only be disclosed under seal, the trial court complied with 42 C.F.R. § 2.64(e)(1). Spangler v. Olchowski, — N.C. App. —, 654 S.E.2d 507, 2007 N.C. App. LEXIS 2575 (2007).

Documents Furnished by Applicants for Hospital Privileges. — In a medical negligence suit, a doctor's application for hospital privileges was not exempt from discovery under G.S. 131E-95, which applied to information generated by a medical review committee, because the allegedly privileged information was not generated by a committee, but was provided by the doctor to the hospital in his application for privileges. Cunningham v. Cannon, — N.C. App. —, 654 S.E.2d 24, 2007 N.C. App. LEXIS 2529 (2007).

Public Consent Order Issued by Board of Medical Examiners is Discoverable. — As a doctor entered into a consent order with a board of medical examiners knowing it would become a public record, the order was not protected by G.S. 90-21.22 and was discoverable in a medical negligence suit. Cunningham v. Cannon, — N.C. App. —, 654 S.E.2d 24, 2007 N.C. App. LEXIS 2529 (2007).

In a medical malpractice case, because information contained in board of medical examiners' consent order and a doctor's application for hospital privileges provided information related to the doctor's history of drug and alcohol abuse, it was discoverable under N.C. R. Civ. P. 26. Cunningham v. Cannon, — N.C. App. —, 654 S.E.2d 24, 2007 N.C. App. LEXIS 2529 (2007).

V. PROTECTIVE ORDERS.

Protection of Social Security Number. — The trial court did not abuse its discretion because its order compelling discovery of an employee's social security number fell squarely within the exemption for court orders in both G.S. 132-1.10, and the original Federal Privacy Act of 1974. The trial court took measures to minimize the potential loss of privacy resulting from the disclosure of the social security number, requiring that all records be purged upon the completion of the lawsuit pursuant to G.S. 1A-1, N.C. R. Civ. P. 26(c). Fulmore v. Howell, — N.C. App. —, 657 S.E.2d 437, 2008 N.C. App. LEXIS 429 (2008).

Rule 32. Use of depositions in court proceedings.

CASE NOTES

Reading Aloud Verbatim Transcript of Employee Deposition. — Grant of new trial was improper under G.S. 1A-1, N.C. R. Civ. P. 59(a)(8) and 61 since by having a former employee read aloud the verbatim transcript of the employee's deposition, a patron had the full benefit of the prior inconsistent statements that the patron sought to introduce by having the jury view a videotaped deposition; a conclusion that the videotaped deposition was admissible to contradict the employee's testimony as a witness and that excluding the videotape amounted to an error of law was erroneous. Harrell v. Sagebrush of N.C., LLC, — N.C. App. —, 663 S.E.2d 444, 2008 N.C. App. LEXIS 1319 (2008).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

Rule 37. Failure to make discovery; sanctions.

CASE NOTES

Sanction Discretionary. — In a workers' compensation case, the North Carolina Industrial Commission did not err by not holding the employer in contempt for its failure to comply with a previous order and by not making specific findings on the issue of civil contempt because civil contempt is a completely discretionary sanction, thus, even if the Commission made explicit findings that all of the conditions outlined in G.S. 5A-21(a) were satisfied, it still would not have been required to sanction the employer. Bolick v. Freight Sys., — N.C. App. —, 654 S.E.2d 793, 2008 N.C. App. LEXIS 81 (2008).

Default Judgment not Applicable to Annulment Proceeding. — Default judgment was incorrectly entered pursuant to G.S. 1A-1, N.C. R. Civ. P. 37, due to a purported wife's failure to comply with the trial court's discovery orders in an annulment proceeding because a judgment for annulment could not be entered by default under G.S. 50-10(a). Hawkins v. Hawkins, — N.C. App. —, 664 S.E.2d 616, 2008 N.C. App. LEXIS 1520 (2008).

Trial court erred as the court based all of the court's findings relevant to an annulment of a marriage between a decedent and a caretaker upon the allegations of the guardian's complaint, which the trial court deemed admitted because the court struck the caretaker's answer, even though G.S. 50-10(a) required that the allegations of the complaint were "deemed to be denied" even in the absence of an answer; although the trial court had discretion to render a judgment of default for failure to comply with an order made pursuant to G.S. 1A-1 and N.C. R. Civ. P. 37(b)(2) so long as that judgment was just, Rule 37 did not trump G.S. 50-10(a). Jones v. Wiseman (In re Estate of Hawkins), — N.C. App. —, 662 S.E.2d 693, 2008 N.C. App. LEXIS 1192 (2008).

Order Striking Defenses. —

Because a driver's attempts to cure his failure to attend his deposition; his affidavit explaining the misunderstanding, which was presented to the trial court at hearing; and the severity of the sanctions imposed, an order striking his defenses was manifestly unsupported by reason, and hence, an abuse of discretion. But, he remained liable for the costs and fees incurred due to his absence from the deposition. Moore v. Mills, — N.C. App. —, 660 S.E.2d 589, 2008 N.C. App. LEXIS 876 (2008).

Sanction Overturned Only for Abuse of Discretion. —

Trial court's order, under G.S. 1A-1, N.C. R. Civ. P. 37(b)(2), dismissing an internet company's counterclaims for the company's failure to comply with discovery was supported by reason and was therefore not an abuse of discretion. Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

ARTICLE 6.

Trials.

Rule 40. Assignment of cases for trial; continuances.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in In re R.L., — N.C. App. —, 652 S.E.2d 327, 2007 N.C. App. LEXIS 2314 (2007).

Rule 41. Dismissal of actions.

CASE NOTES

I. In General.
II. Voluntary Dismissal.
III. Involuntary Dismissal.
  A. In General.
IV. Costs.

I. IN GENERAL.

Applied in Vaden v. Dombrowski, — N.C. App. —, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007); Heatzig v. MacLean, — N.C. App. —, 664 S.E.2d 347, 2008 N.C. App. LEXIS 1480 (2008); Goodman v. Holmes & McLaurin, — N.C. App. —, 665 S.E.2d 526, 2008 N.C. App. LEXIS 1622 (2008).

Cited in Herring v. Winston-Salem/Forsyth County Bd. of Educ., — N.C. App. —, 656 S.E.2d 307, 2008 N.C. App. LEXIS 231 (2008); Warner v. Brickhouse, — N.C. App. —, 658 S.E.2d 313, 2008 N.C. App. LEXIS 649 (Apr. 1, 2008); Dailey v. Popma, — N.C. App. —, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (June 17, 2008); Moody v. Sears Roebuck & Co., — N.C. App. —, 664 S.E.2d 569, 2008 N.C. App. LEXIS 1324 (2008).

II. VOLUNTARY DISMISSAL.

Voluntary Dismissal by Plaintiff After Grant of Partial Summary Judgment by Defendant. — Because defendants were granted partial summary judgment as to plaintiffs' personal injury claims, dismissal of plaintiffs' appeal was not warranted, as the appeal from the entry of partial summary judgment was no longer interlocutory following plaintiffs' voluntary dismissal of their remaining claims. Curl v. Am. Multimedia, Inc., — N.C. App. —, 654 S.E.2d 76, 2007 N.C. App. LEXIS 2558 (2007).

Filing of Voluntary Dismissal Was Not Done to Manipulate the Rules. — Because the procedural posture of the case, which included a voluntary dismissal as to a motel, did not cause the appellate court to believe that counsel was manipulating the Rules of Civil Procedure in an attempt to appeal an order that should not be appealable, the appellate court did not dismiss the appeal as interlocutory, where the trial court granted summary judgment based upon contributory negligence. Duval v. OM Hospitality, LLC, 186 N.C. App. 390, 651 S.E.2d 261, 2007 N.C. App. LEXIS 2190 (2007).

Re-filed Suit Barred By Statute of Limitations. —
Defective service in the alleged accident victims' original negligence action under G.S. 1A-1 and N.C. R. Civ. P. 4 resulted in the victims' subsequent refiled action, despite the voluntary dismissal by the victims of the original action under G.S. 1A-1 and N.C. R. Civ. P. 41(a) being brought after the statute of limitations under G.S. 1-52(16) ran. Camara v. Gbarbera, — N.C. App. —, 662 S.E.2d 920, 2008 N.C. App. LEXIS 1325 (July 15, 2008).

Medical Malpractice Complaint Had to Comply with G.S. 1A-1, N.C. R. Civ. P. 9(j). —
Plaintiff conceded that summary judgment was proper on plaintiff's Fair Credit Reporting Act (FCRA), 15 U.S.C.S. § 1681 et seq., claim; as for plaintiff's FCRA claim under 15 U.S.C.S. §§ 1681n and 1681o, plaintiff conceded that the two-year statute of limitations under 15 U.S.C.S. § 1681p barred her claim. Plaintiff also conceded that the savings provision of N.C. R.Civ. P. 41, G.S. 1A-1 did not extend the statute of limitations for her FCRA claim. Ross v. Wash. Mut. Bank, 566 F. Supp. 2d 468, 2008 U.S. Dist. LEXIS 51060 (E.D.N.C. 2008).

III. INVOLUNTARY DISMISSAL.

A. In General.

Dismissal with Prejudice Upheld. —
Dismissal of a passenger's claim against an estate based on a decedent's ownership of an auto involved in an accident was proper because the claim against the driver was a claim against an agent, and, since the driver was named as a party, proper service was required; since the summons as to the driver was allowed to lapse and the statute of limitations had since run, the driver had no liability to impute to the estate. Therefore, neither the driver nor the estate could have been determined judicially to have been negligent, and the passenger's cause of action against the estate failed. Atkinson v. Lesmeister, 186 N.C. App. 442, 651 S.E.2d 294, 2007 N.C. App. LEXIS 2203 (2007).

Dismissal Properly Denied. —
Trial court's findings supported the court's conclusion that a seawall built by a contractor was constructed in an unworkmanlike manner, which allowed soil and sand to pass through the fabric in the seawall and allowed erosion of an owner's land to occur. Therefore, the trial court did not err by denying the contractor's motion to dismiss the owner's breach of contract claim under N.C. R. Civ. P. 41(b). Matthews v. Davis, — N.C. App. —, 664 S.E.2d 16, 2008 N.C. App. LEXIS 1475 (Aug. 5, 2008).

IV. COSTS.

Expert Witness Costs Limited. — Even though about $170,000 was requested, a partial award of $1,726.25 for expert witness costs was not an abuse of discretion under G.S. 6-20 as expert witness fees were discretionary, "common law" costs that were not provided for in G.S. 7A-305(d); the trial judge, who presided over 20 days of trial, was in the best position to assess whether the costs were justified under G.S. 1A-1, N.C. R. Civ. P. 41(d). Bennett v. Equity Residential, — N.C. App. —, 665 S.E.2d 514, 2008 N.C. App. LEXIS 1609 (2008).

Rule 43. Evidence.

CASE NOTES

I. In General.
II. Form of Evidence.

I. IN GENERAL.

Cited in State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. App. —, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008).

II. FORM OF EVIDENCE.

Oral Testimony in Termination of Parental Rights. — Although a trial court considering a termination of parental rights petition can consider written reports, prior court order, and oral arguments by the attorneys involved in the case, some oral testimony needs to be taken by the court. In re A.M., — N.C. App. —, 665 S.E.2d 534, 2008 N.C. App. LEXIS 1632 (2008).

Rule 44. Proof of official record.

CASE NOTES

Cited in Orix Fin. Servs. v. Raspberry Logging, Inc., — N.C. App. —, 660 S.E.2d 609, 2008 N.C. App. LEXIS 1012 (2008).

Rule 45. Subpoena.

CASE NOTES

Award of Costs for Expert Witnesses Compelled to Appear and Testify. — Health care providers were entitled to an award of costs for expert witnesses that they called to appear and testify in the executors' medical malpractice action against the health care providers. Pursuant to G.S. 1A-1, N.C. R. Civ. P. 45(e)(1), the expert witnesses were compelled to attend because they had been served with subpoenas, and the award of costs did not also depend on the opposing party being served with the subpoena. Greene v. Hoekstra, — N.C. App. —, 657 S.E.2d 415, 2008 N.C. App. LEXIS 416 (2008).

Rule 46. Objections and exceptions.

CASE NOTES

I. In General.

I. IN GENERAL.

Plaintiff vigorously opposed defendant's motion for a protective order by filing an objection to defendants' motion, filing a motion to compel discovery of the disputed documents, and presenting his arguments during a trial court hearing. Therefore, at the time the ruling or order was made or sought, he made known to the trial court his objection to the action of the trial court and made known the action that he desired the trial court to take and his grounds for his position, G.S. 1A-1, R. 46(b). Yorke v. Novant Health, Inc., — N.C. App. —, 666 S.E.2d 127, 2008 N.C. App. LEXIS 1620 (2008).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

CASE NOTES

I. In General.
II. Directed Verdict.
  A. In General.
III. Judgment Notwithstanding The Verdict And New Trial.

I. IN GENERAL.

Motions Properly Denied. — Trial court did not err in denying an employer's motions for a directed verdict or judgment notwithstanding the verdict in a toxic workplace suit because the evidence on the issue of causation was sufficient to justify submission to the jury; the evidence showed that the facility had a history of leaks and moisture, that co-workers suffered injuries similar to that of the employee, and that the employee, who was in excellent health when he started working for the employer, suffered from irreversible vestibular dysfunction within less than two years. Cameron v. Merisel Props., — N.C. App. —, 652 S.E.2d 660, 2007 N.C. App. LEXIS 2318 (2007).

Because: (1) the Court of Appeals of North Carolina declined to add a fourth element to the landowners' burden of proof in the first part of the cartway proceeding; (2) the jury instruction on the element of the landowners' claim to establish the right to a cartway, requiring them to show that their land was being used for one of the purposes enumerated in the statute, conformed with the pattern jury instructions without the addition of the language suggested by the adjoining landowners and fairly and accurately stated the landowners' element of proof as to the use of their property; and (3) the instruction requested by the adjoining landowners gave undue emphasis to their claim the landowners' intended to use the land for future residential development, which, while not enumerated under the statute, did not defeat the landowners' right to a cartway, the trial court's orders denying both a directed verdict and a judgment notwithstanding the verdict were upheld on appeal. Jones v. Robbins, — N.C. App. —, 660 S.E.2d 118, 2008 N.C. App. LEXIS 901 (2008).

Applied in Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs, — N.C. App. —, 656 S.E.2d 296, 2008 N.C. App. LEXIS 230 (2008); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., — N.C. App. —, 665 S.E.2d 493, 2008 N.C. App. LEXIS 1555 (2008).

Cited in Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co., — N.C. App. —, 665 S.E.2d 505, 2008 N.C. App. LEXIS 1628 (2008).

II. DIRECTED VERDICT.

A. In General.

If There Is More Than a Scintilla of Evidence, Motion Should Be Denied. — Where an apartment owner's original condominium plans included a six-foot fence along the adjacent owner's property, but after the condominium project was abandoned, purportedly as a result of the city counsel, of which the adjacent property owner was a member, and the fence grew to ten feet, the evidence was sufficient to be submitted to the jury as there was more than a scintilla of evidence supporting each element of the adjacent owner's claim that the apartment owner erected a spite fence. Austin v. Bald II, L.L.C., — N.C. App. —, 658 S.E.2d 1, 2008 N.C. App. LEXIS 543 (Mar. 18, 2008).

Evidence Sufficient to Put Issue to Jury. — Because the cohabitant provided numerous benefits to the property owner, as, inter alia, she improved his property by helping to build a home, she also assisted him in improving his garage, she worked alongside him in his business, kept up his home, raised his child and grandchild, and relied on his promise that she would share in the results of their mutual efforts in the business and property ownership, she presented sufficient evidence to infer that the parties conducted their daily lives as a partnership; thus, the property owner was not entitled to a directed verdict under N.C. R. Civ. P. 50. Rhue v. Rhue, — N.C. App. —, 658 S.E.2d 52, 2008 N.C. App. LEXIS 542 (Mar. 18, 2008).

III. JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL.

Grant of Judgment N.O.V. Improper. — In a medical malpractice action, the grant of defendants' motion for judgment notwithstanding the verdict under N.C. R. Civ. P. 50(b) was erroneous because plaintiffs offered competent evidence of proximate causation where three experts testified that the patient would have had a better outcome if treated earlier and an MRI should have been ordered during the patient's first emergency room visit. Weaver v. Sheppa, 186 N.C. App. 412, 651 S.E.2d 395, 2007 N.C. App. LEXIS 2206 (2007).

It was error to grant the employer's motion for judgment notwithstanding the verdict as to punitive damages because there was sufficient evidence of malice, willful and wanton conduct, and manager participation to support the jury's punitive damages award to a terminated part-time department store employee based on, inter alia, the store manager's threat to "mess up" the employee's full-time job at a bank. Scarborough v. Dillard's Inc., — N.C. App. —, 655 S.E.2d 875, 2008 N.C. App. LEXIS 226 (2008).

Rule 51. Instructions to jury.

CASE NOTES

IV. Special Instructions.

IV. SPECIAL INSTRUCTIONS.

Failure to Give Proper Specific Instruction Aptly Tendered to Error. —

Trial court committed error in refusing to give defendant's jury instruction that stated that defendant had to know the age of the victims in order to be convicted of aiding and abetting statutory rape. Since that offense involved an element of knowledge, the instruction should have been given because it was both a correct statement of the law and supported by the evidence, which meant defendant was entitled to give the instruction pursuant to G.S. 1A-1-51, N.C. R. Civ. P. 51(b) and G.S. 1-181. State v. Bowman, — N.C. App. —, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

Rule 52. Findings by the court.

CASE NOTES

I. In General.
II. Findings and Conclusions, Generally.
III. Findings and Conclusions on Grant or Denial of Motions, Preliminary Injunctions, etc.

I. IN GENERAL.

Applied in Greene v. Royster, — N.C. App. —, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007); Pierce v. Pierce, — N.C. App. —, 655 S.E.2d 863, 2008 N.C. App. LEXIS 229 (2008); Dailey v. Popma, — N.C. App. —, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (June 17, 2008); Rossetto United States, Inc. v. Greensky Fin., LLC, — N.C. App. —, 662 S.E.2d 909, 2008 N.C. App. LEXIS 1227 (2008).

Cited in State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. App. —, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008); McQuillin v. Perez, — N.C. App. —, 657 S.E.2d 924, 2008 N.C. App. LEXIS 532 (Mar. 18, 2008); Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008).

II. FINDINGS AND CONCLUSIONS, GENERALLY.

Findings on Discretionary Rulings. —

When a trial court denied a surety's motion for relief from a bond forfeiture, the record did not support the surety's claim, on appeal, that the trial court "ignored" evidence that the district attorney had agreed to extradite the fugitive as to whom the bond was forfeited because the trial court specifically found that the surety stated that the surety entered into an agreement with the district attorney whereby the district attorney would extradite the fugitive if the surety paid the associated costs, and that no payment was forthcoming from the surety to the district attorney, nor were other arrangements for extradition made. State v. Bakri, 186 N.C. App. 467, 651 S.E.2d 266, 2007 N.C. App. LEXIS 2187 (2007).

III. FINDINGS AND CONCLUSIONS ON GRANT OR DENIAL OF MOTIONS, PRELIMINARY INJUNCTIONS, ETC.

Findings and Conclusions Generally Not Required on Motions Absent Request. —

Trial court did not err by failing to make findings of fact that the costs that the court taxed upon an accident victim were reasonable and necessary because such findings of fact were not requested by either party. Vaden v. Dombrowski, — N.C. App. —, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007).

Because there was no indication in the record that either party requested findings by the trial judge, it was proper that the trial court made no findings of fact when issuing the order denying defendant seller's motion to dismiss.

Baker v. Lanier Marine Liquidators, Inc., — N.C. App. —, 654 S.E.2d 41, 2007 N.C. App. LEXIS 2571 (2007).

It is not part of the function of the court on a motion for summary judgment to make findings of fact and conclusions of law, etc.

Trial court fulfilled its obligations under N.C. R. Civ. P. 52(a)(1) when it made specific findings of fact that a bonding company's efforts resulted in locating the defendant, but that the district attorney was ultimately responsible for returning the defendant to Union County. State v. Escobar, — N.C. App. —, 652 S.E.2d 694, 2007 N.C. App. LEXIS 2324 (2007).

Trial court was not required under G.S. 1A-1, N.C. R. Civ. P. 52(a) to make findings of fact in support of its summary judgment order, as Rule 52(a)(2) did not apply to a decision on a summary judgment motion because, if findings of fact were necessary to resolve an issue, summary judgment was improper. Cameron v. Bissette, — N.C. App. —, 661 S.E.2d 32, 2008 N.C. App. LEXIS 1017 (2008).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

CASE NOTES

I. In General.
II. Judgment on Multiple Claims or Involving Multiple Parties.

I. IN GENERAL.

Voluntary Dismissal by Plaintiff After Grant of Partial Summary Judgment by Defendant. — Because defendants were granted partial summary judgment as to plaintiffs' personal injury claims, dismissal of plaintiffs' appeal was not warranted, as the appeal from the entry of partial summary judgment was no longer interlocutory following plaintiffs' voluntary dismissal of their remaining claims. Curl v. Am. Multimedia, Inc., — N.C. App. —, 654 S.E.2d 76, 2007 N.C. App. LEXIS 2558 (2007).

Review of Interlocutory Order by Writ of Certiorari. — Court denied an estate administrator's motion to dismiss the healthcare providers' appeal from a denial of their motion to dismiss a wrongful death complaint because, even if the notice of appeal was untimely filed, the healthcare providers petitioned for a writ of certiorari that was granted. Reid v. Cole, — N.C. App. —, 653 S.E.2d 164, 2007 N.C. App. LEXIS 2321 (2007).

Executor's attempt to bring an equitable subrogation claim against a beneficiary for the first time on appeal pursuant to G.S. 1A-1, N.C. R. Civ. P. 54(c) was rejected, as the executor's reliance on said rule was misplaced. Horry v. Woodbury, — N.C. App. —, 659 S.E.2d 88, 2008 N.C. App. LEXIS 706 (2008).

Interlocutory Denial of Motion to Dismiss Reviewed Pursuant to Writ of Certiorari. — Motion to dismiss an interlocutory appeal of the denial of healthcare providers' motion to dismiss an administrator's wrongful death complaint was denied because the healthcare providers' petition for a writ of certiorari was granted. Reid v. Cole, — N.C. App. —, 652 S.E.2d 718, 2007 N.C. App. LEXIS 2355 (2007).

Applied in Hamby v. Profile Prods., L.L.C., 361 N.C. 630, 652 S.E.2d 231, 2007 N.C. LEXIS 1105 (2007); Birmingham v. H&H Home Consultants & Designs, Inc., — N.C. App. —, 658 S.E.2d 513, 2008 N.C. App. LEXIS 646 (Apr. 1, 2008); Dailey v. Popma, — N.C. App. —, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (June 17, 2008).

Cited in Hill v. West, — N.C. App. —, 657 S.E.2d 698, 2008 N.C. App. LEXIS 384 (2008); Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008); Stone v. State, — N.C. App. —, 664 S.E.2d 32, 2008 N.C. App. LEXIS 1485 (Aug. 5, 2008); Turner v. Hammocks Beach Corp., — N.C. App. —, 664 S.E.2d 634, 2008 N.C. App. LEXIS 1547 (2008).

II. JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

Appeal Is Permitted Where a Substantial Right Would Be Affected. —

Trial court's partial summary judgment order that two insurers were obligated to defend an insured in an underlying litigation was immediately appealable under G.S. 1-277 and 7A-27(d) and G.S. 1-1, N.C. R. Civ. P. 54(b) because the judgment affected a substantial right that might have been lost absent an immediate appeal. Harleysville Mut. Ins. Co. v.

Buzz Off Insect Shield L.L.C., — N.C. App. —, 664 S.E.2d 317, 2008 N.C. App. LEXIS 873 (2008).

Order denying a taxpayer's motion to dismiss an administrative summons requesting documents was appealable because it was an intermediate order that involved the merits and affected the final judgment in that if the motion had been granted, the trial court would not have issued the order to comply with the summons. Even if the appeal was not from a final judgment, the appeal of a discovery order asserting a statutory or a common-law privilege affected a substantial right. In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

Appeal from Judgment Adjudicating Fewer Than All Claims, Rights or Liabilities. —

As the trial court granted summary judgment only to a town, not the other defendants, and did not certify the court's order under N.C. R. Civ. P. 54(b), and plaintiff did not voluntarily dismiss her claims against the other defendants or argue that her appeal affected a substantial right, she was not entitled to appeal the trial court's interlocutory order under G.S. 7A-27(b). Hyatt v. Town of Lake Lure, — N.C. App. —, 663 S.E.2d 320, 2008 N.C. App. LEXIS 1322 (2008).

Judgment Held Appealable. —

In a business dispute involving asserted allegations of breach of a non-competition agreement and other claims, given the prolonged procedural history of the case, the number of claims and counterclaims, and the same set of operative facts underlying the entire case, an appellate court agreed with the trial court's determination that the claims that had been dismissed and those that remained were factually and legally intertwined such that proceeding to trial could have resulted in verdicts inconsistent with the earlier dismissals. Therefore, the trial court properly certified the case to the appellate court under N.C. R. Civ. P. 54(b). Kinesis Adver., Inc. v. Hill, — N.C. App. —, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008), Kinesis Adver., Inc. v. Hill, — N.C. App. —, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007).

Trial court's order dismissing only some of a client's claims against an attorney was not interlocutory, and the client's appeal of the order was properly before the court of appeals because the client voluntarily dismissed all of the claims that survived the trial court's order; therefore, the client's claims were no longer interlocutory, and any rationale for dismissing the appeal as interlocutory failed. Goodman v. Holmes & McLaurin, — N.C. App. —, 665 S.E.2d 526, 2008 N.C. App. LEXIS 1622 (2008).

Rule 55. Default.

CASE NOTES

I. In General.
II. Entry of Default.

I. IN GENERAL.

Cited in Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC, 362 N.C. 262, 658 S.E.2d 924, 2008 N.C. LEXIS 335 (2008).

II. ENTRY OF DEFAULT.

While obtaining a default judgment was normally a two-step process with entry of default before the clerk preceding the judgment, G.S. 1A-1, N.C. R. Civ. P. 55 did not prohibit both motions from being made in the same pleading. While it was the better practice to follow the normal procedure, under the facts of the case, there was no prejudice to the utility, which was sued by an accident victim, as the trial court considered setting aside the default judgment under the more lenient standard of G.S. 1A-1, N.C. R. Civ. P. 55(d), rather than G.S. 1A-1, N.C. R. Civ. P. 60(b), but found that relief was not warranted. Ruiz v. Mecklenburg Utils., Inc., — N.C. App. —, 657 S.E.2d 432, 2008 N.C. App. LEXIS 418 (2008).

Rule 56. Summary judgment.

CASE NOTES

I. In General.
III. Propriety of Summary Judgment.
    C. Cases in Which Summary Judgment Held Proper.

- D. Cases in Which Summary Judgment Held Improper.

IV. Burden on Motion for Summary Judgment.

V. Function of Trial Court.

VI. Evidence on Motion.

- A. In General.

I. IN GENERAL.

Conversion of § 1A-1, Rule 12(b)(6) and 12(c) Motions to Motions for Summary Judgment. —

Because the trial court clearly considered matters outside the pleadings, the trial court properly treated defendants' G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion to dismiss as a motion for summary judgment under G.S. 1A-1, N.C. R. Civ. P. 56. Barbee v. Johnson, — N.C. App. —, 660 S.E.2d 135, 2008 N.C. App. LEXIS 887 (2008).

Notice Requirement. —

In a wife's appeal of the absolute divorce, she failed to show that she did not receive adequate and proper notice of the hearing on the husband's motion for summary judgment since the husband's notice of hearing was adequate and proper in light of G.S. 1A-1, N.C. R. Civ. P. 56, as despite the fact that it failed to state the time of the hearing, it did state the date, location, and courtroom number and was served upon the wife at least 10 days prior to the hearing. Wilson v. Wilson, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1479 (Aug. 5, 2008).

Interlocutory Appeals. —

Because the granting of summary judgment did not dispose of the case as to all parties, as the injured person entered into a stipulation of dismissal without prejudice as to the motel, and the granting summary judgment as to contributory negligence completely disposed of the case, the judgment was not interlocutory as it disposed of the cause leaving nothing to be judicially determined between the parties in the trial court. Duval v. OM Hospitality, LLC, 186 N.C. App. 390, 651 S.E.2d 261, 2007 N.C. App. LEXIS 2190 (2007).

Applied in Park East Sales, LLC v. Clark-Langley, Inc., 186 N.C. App. 198, 651 S.E.2d 235, 2007 N.C. App. LEXIS 2120 (2007); Morris v. Moore, 186 N.C. App. 431, 651 S.E.2d 594, 2007 N.C. App. LEXIS 2207 (2007); Peerless Ins. Co. v. Genelect Servs., — N.C. App. —, 651 S.E.2d 896, 2007 N.C. App. LEXIS 2264 (2007); Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, — N.C. App. —, 652 S.E.2d 378, 2007 N.C. App. LEXIS 2269 (2007); Hicks v. Wake County Bd. of Educ., — N.C. App. —, 653 S.E.2d 236, 2007 N.C. App. LEXIS 2422 (2007) Macon County v. Town of Highlands, — N.C. App. —, 654 S.E.2d 17, 2007 N.C. App. LEXIS 2530 (2007); In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007); Digh v. Nationwide Mut. Fire Ins. Co., — N.C. App. —, 654 S.E.2d 37, 2007 N.C. App. LEXIS 2577 (2007); Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, — N.C. App. —, 655 S.E.2d 719, 2008 N.C. App. LEXIS 72 (2008); In re Will of Jones, — N.C. App. —, 655 S.E.2d 407, 2008 N.C. App. LEXIS 93 (2008); Holt v. Albemarle Reg'l Health Servs. Bd., — N.C. App. —, 655 S.E.2d 729, 2008 N.C. App. LEXIS 95 (2008); Jones v. Miles, — N.C. App. —, 658 S.E.2d 23, 2008 N.C. App. LEXIS 545 (Mar. 18, 2008); Lord v. Beerman, — N.C. App. —, 664 S.E.2d 331, 2008 N.C. App. LEXIS 1315 (2008); Hyatt v. Town of Lake Lure, — N.C. App. —, 663 S.E.2d 320, 2008 N.C. App. LEXIS 1322 (2008); Azar v. Presbyterian Hosp., — N.C. App. —, 663 S.E.2d 450, 2008 N.C. App. LEXIS 1313 (2008); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., — N.C. App. —, 665 S.E.2d 493, 2008 N.C. App. LEXIS 1555 (2008); Batts v. Lumbermen's Mut. Cas. Ins. Co., — N.C. App. —, 665 S.E.2d 578, 2008 N.C. App. LEXIS 1613 (2008); Odell v. Legal Bucks, LLC, — N.C. App. —, 665 S.E.2d 767, 2008 N.C. App. LEXIS 1619 (2008)

Cited in Cowell v. Gaston County, — N.C. App. —, 660 S.E.2d 915, 2008 N.C. App. LEXIS 1092 (June 3, 2008); CIM Ins. Corp. v. Cascade Auto Glass, Inc., — N.C. App. —, 660 S.E.2d 907, 2008 N.C. App. LEXIS 1066 (June 3, 2008); Wake Cares, Inc. v. Wake County Bd. of Educ., — N.C. App. —, 660 S.E.2d 217, 2008 N.C. App. LEXIS 872 (2008); Free Spirit Aviation, Inc. v. Rutherford Airport Auth., — N.C. App. —, 664 S.E.2d 8, 2008 N.C. App. LEXIS 1494 (Aug. 5, 2008)

III. PROPRIETY OF SUMMARY JUDGMENT.

C. Cases in Which Summary Judgment Held Proper.

Interpretation of a holographic will. — In a dispute arising out of a holographic will drafted by the first decedent's adoptive father, because the heirs of the second of two decedents, who was the first decedent's grantee, failed to present any evidence that the land described in a holographic will and deeded to a grantee, was the land that they were entitled to as that grantee's heirs, summary judgment was properly granted against them. Cameron v.

Bissette, — N.C. App. —, 661 S.E.2d 32, 2008 N.C. App. LEXIS 1017 (2008).

D. Cases in Which Summary Judgment Held Improper.

Because the language of the agreement is susceptible to differing yet, reasonable interpretations, the one broad, the other narrow, the contract was ambiguous and summary judgment was inappropriate. To resolve this ambiguity, the case was remanded to the superior court for the trier of fact to determine the intent of the parties. Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C., 362 N.C. 269, 658 S.E.2d 918, 2008 N.C. LEXIS 337 (2008).

IV. BURDEN ON MOTION FOR SUMMARY JUDGMENT.

But Must Demonstrate Existence of a Genuine Issue. —
Internet company failed to demonstrate a genuine issue of material fact for trial under G.S. 1A-1, N.C. R. Civ. P. 56(e), so the trial court did not err in granting summary judgment for a publishing company on the publishing company's claim for possession of computer servers that were in the internet company's possession. Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

Nonmovant Must Evince Existence of Triable Issue of Material Fact. —
Trial court did not err by granting summary judgment in favor of the defendants because, viewing the evidence in the light most favorable to the plaintiffs, there were no issues of material fact regarding the plaintiffs' claims. Furthermore, the plaintiffs offered only cursory legal support for the arguments but did not address how the evidence supported the elements of each of their claims. Kitchin v. Halifax County, — N.C. App. —, 665 S.E.2d 760, 2008 N.C. App. LEXIS 1624 (2008).

V. FUNCTION OF TRIAL COURT.

Nor to Make Findings of Facts and Conclusions of Law. —
When the trial court granted a motion for summary judgment, it was inappropriate for the trial court to set forth findings addressing issues upon which evidence was conflicting. Upon a motion for summary judgment it was no part of the trial court's function to decide issues of fact but solely to determine whether there was an issue of fact to be tried. Craddock v. Craddock, — N.C. App. —, 656 S.E.2d 716, 2008 N.C. App. LEXIS 273 (2008).

VI. EVIDENCE ON MOTION.

A. In General.

Effect of Prior Judicial Admissions by Party. — Vehicular passenger's prior testimony in two lawsuits, in which the passenger stated that the driver of another vehicle was at fault for an auto accident, unequivocally and unambiguously repudiated the allegations in the passenger's complaint and affidavit against the driver of the vehicle in which the passenger was riding. Therefore, the passenger's prior statements constituted judicial admissions by which the passenger was bound. Hash v. Estate of Henley, — N.C. App. —, 661 S.E.2d 52, 2008 N.C. App. LEXIS 1229 (2008).

Rule 58. Entry of judgment.

CASE NOTES

Oral Order Was Not Judgment For Civil Contempt Purposes. — When the trial court orally ordered defendants in a summary ejectment proceeding to pay a certain amount but did not reduce a judgment to writing as required by N.C. R. Civ. P. 58, it was error to hold defendants in civil contempt under G.S. 5A-21, as there was no properly entered judgment of the trial court at the time defendants were found in civil contempt. Carter v. Hill, 186 N.C. App. 464, 650 S.E.2d 843, 2007 N.C. App. LEXIS 2189 (2007).

Consent Presumed When Inadequate Objection to Order Out of Session. — Plaintiff filed an objection to the entry of a judgment out of session on April 20th, and the trial court found, on May 7th, that there was no objection. Because plaintiff did not raise that finding as error on appeal, the finding was binding on the appellate court; thus, plaintiff failed to lodge a timely objection to the entry of the order out of session, and her consent was presumed under G.S. 1A-1, N.C. R. Civ. P. 58. Dalenko v. Collier, — N.C. App. —, 664 S.E.2d 425, 2008 N.C. App. LEXIS 1500 (2008).

Applied in Baxter v. Danny Nicholson, Inc., — N.C. App. —, 661 S.E.2d 892, 2008 N.C. App. LEXIS 1149 (June 17, 2008).

Cited in Faison & Gillespie v. Lorant, — N.C. App. —, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007); Sellers v. Morton, — N.C. App. —, 661 S.E.2d 915, 2008 N.C. App. LEXIS 1167 (June 17, 2008); In re Will of Harts, — N.C. App. —, 664 S.E.2d 411, 2008 N.C. App. LEXIS 1491 (2008).

Rule 59. New trials; amendment of judgments.

CASE NOTES

I. In General.
III. Altering or Amending Judgments.

I. IN GENERAL.

Remand for Errors of Law. — When debtors' motion for attorney's fees, pursuant to G.S. 75-16.1, was denied, it was error for a trial court to grant attorney's fees pursuant to a reconsideration of the court's prior denial, under G.S. 1A-1, N.C. R. Civ. P. 60(b)(6), because the motion to reconsider raised alleged errors of law by claiming the trial court applied the wrong legal standard in denying the attorney's fees motion, and such errors could not properly be considered under a motion to reconsider, but, rather, had to be considered either on appeal or pursuant to a new trial motion under G.S. 1A-1, N.C. R. Civ. P. 59. Catawba Valley Bank v. Porter, — N.C. App. —, 655 S.E.2d 473, 2008 N.C. App. LEXIS 77 (2008).

Refusal to Award New Trial Upheld. — Trial court did not abuse its discretion in denying a realtor's motion for a new trial or to alter or amend the verdict because the jury's failure to follow the court's instructions did not render the verdict improper as the jury was clear that it was rejecting a company's liability and there was competent evidence to support the verdict that the company's vice president was not operating as an agent of the company. Strum v. Greenville Timberline, LLC, — N.C. App. —, 652 S.E.2d 307, 2007 N.C. App. LEXIS 2307 (2007).

Evidence supported punitive damages in a car buyer's fraud action against defendants, a dealership, its owners, and it employees, when defendants: (1) sold a buyer a car that was unfit for operation, in violation of state law by placing a VIN plate, the driver's door with the federal identification decal and an odometer from a newer car into a car sold to the buyer; (2) made considerable efforts to conceal facts of similar conduct; (3) were well-aware that they were selling unfit vehicles; (4) deliberately concealed information concerning their net worth; and (5) undaunted by the revocation of their motor vehicle dealers' license, reformed their business as a different corporate entity and continued to sell cars; and the jury was properly instructed about the reprehensibility of defendants' motives and conduct, their awareness of their conduct's probable consequences, their conduct's duration, the concealment, similar past conduct, and their profit from the conduct. That the jury concluded its deliberations quickly was hardly evidence of passion and prejudice per se to justify a new trial; thus, defendants were not entitled to a new trial under N.C. R. Civ. P. 59(a)(5), (6). Greene v. Royster, — N.C. App. —, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007).

Trial court did not abuse its discretion in denying defendant former employer's motion for a new trial based on excessive damages under N.C. R. Civ. P. 59, because the jury's award was below the damages estimate given by expert witnesses, whose testimony was competent on the issue of damages. Cameron v. Merisel Props., — N.C. App. —, 652 S.E.2d 660, 2007 N.C. App. LEXIS 2318 (2007).

In a personal injury action, the trial court erred in denying an employer's motion for a new trial. The trial court provided an incorrect instruction regarding the family-purpose doctrine which likely misled the jury; thus, this instruction was erroneous and the trial court's failure to grant a new trial constituted a substantial miscarriage of justice. Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

Scope of Review of Discretionary Ruling. — Where defendants, a car dealership, its owners, and its employees moved for a new trial on the ground that the jury manifestly disregarded the instructions of the court about punitive damages in a car buyer's fraud action, or alternatively, that the jury awarded excessive punitive damages under the influence of passion or prejudice pursuant to N.C. R. Civ. P. 59(a)(5) and (6), it was plain that the trial judge's discretionary order denying a new trial could be reversed on appeal only in those exceptional cases where an abuse of discretion was clearly shown. Abuse of discretion results where the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. Greene v. Royster, — N.C. App. —, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007).

Remand for New Trial on Damage Issues. — While the evidence presented at trial set forth with sufficient particularity the compensatory damages suffered by the property owners, the property owners failed to show damages arising from the claim of lien the contractors filed on their real property. Also, the trial court erred in denying the motion for a new trial on the issue of unfair and deceptive trade practices damages and since the contractors did not have an opportunity to present evidence on the issue of punitive damages, they were entitled to a new trial on punitive damages as well. Decker v. Homes, Inc./Construction Mgmt. & Fin. Group, — N.C. App. —, 654 S.E.2d 495, 2007 N.C. App. LEXIS 2524 (2007).

Contract Trials. — Judge's skepticism about contract trials, which was directed towards counsel for both parties, did not prevent a surety from having a fair trial under G.S. 1A-1, N.C. R. Civ. P. 59(a)(1) in a subcontractor's action on the payment bonds. Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co., — N.C. App. —, 665 S.E.2d 505, 2008 N.C. App. LEXIS 1628 (2008).

Applied in Hughes v. Rivera-Ortiz, — N.C. App. —, 653 S.E.2d 165, 2007 N.C. App. LEXIS 2372 (2007); Hines v. Wal-Mart Stores East, L.P., — N.C. App. —, 663 S.E.2d 337, 2008 N.C. App. LEXIS 1309 (2008); Harrell v. Sagebrush of N.C., LLC, — N.C. App. —, 663 S.E.2d 444, 2008 N.C. App. LEXIS 1319 (2008); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., — N.C. App. —, 665 S.E.2d 493, 2008 N.C. App. LEXIS 1555 (2008); Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008).

Cited in Weber, Hodges & Godwin Commer. Real Estate Servs., LLC v. Cook, 186 N.C. App. 288, 650 S.E.2d 834, 2007 N.C. App. LEXIS 2082 (2007); Kerr v. Long, — N.C. App. —, 657 S.E.2d 920, 2008 N.C. App. LEXIS 533 (Mar. 18, 2008); Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008); Clay v. Monroe, — N.C. App. —, 658 S.E.2d 532, 2008 N.C. App. LEXIS 645 (Apr. 1, 2008).

III. ALTERING OR AMENDING JUDGMENTS.

The trial court abused its discretion in denying a seller's motion to set the preliminary injunction aside because the seller never received notice of the buyer's intention to seek a preliminary injunction; the lack of notice affected the seller's substantial rights, and the seller's purported attorney of record did not represent the seller in the instant action, thus making service on the attorney insufficient to provide notice to the seller. Perry v. Baxley Dev., Inc., — N.C. App. —, 655 S.E.2d 460, 2008 N.C. App. LEXIS 88 (2008).

No Surprise Justifying New Trial. — Defense witness's identification of the type of blood pressure machine used on plaintiff did not come as a "surprise" to plaintiff, as he had been aware for some time that defense counsel had identified the machine at issue and that defense counsel had made the machine available for his inspection. Further, he received a spoliation instruction regarding any evidence intentionally withheld or destroyed by defendants, so, on these facts, there was no irregularity in his trial that would have served as a basis for a new trial under G.S. 1A-1, R. 59(a). Yorke v. Novant Health, Inc., — N.C. App. —, 666 S.E.2d 127, 2008 N.C. App. LEXIS 1620 (2008).

Rule 60. Relief from judgment or order.

CASE NOTES

- I. In General.
- III. Relief under Subsection (b).
  - A. In General.
  - B. Mistake, Inadvertence, Surprise and Excusable Neglect.
    - 1. In General.
  - E. Other Reasons Justifying Relief Under Subdivision (b)(6).
  - F. Void Judgments.

I. IN GENERAL.

Denial of Relief Proper. — Appellant's reliance on an oral motion for a trial judge to reconsider, pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b), a discovery order, which the appellant did not appeal, was misplaced because judgments involving misapplication of the law could be corrected only by appeal and Rule 60(b) motions could not be used as a substitute for appeal. Spangler v. Olchowski, — N.C. App. —, 654 S.E.2d 507, 2007 N.C. App. LEXIS 2575 (2007).

Motion Filed Within One Year After Judgment Entered by Court. — Because an adjudicated father filed his G.S. 1A-1, N.C. R. Civ. P. 60 motion within one year after a judgment, order, or proceeding was entered or taken by the district court, and not from the day that he executed an affidavit of parentage, the district court properly heard the motion. Guilford County ex rel. Hill v. Holbrook, — N.C. App. —, 660 S.E.2d 175, 2008 N.C. App. LEXIS 833 (2008).

Applied in Adams Creek Assocs. v. Davis, — N.C. App. —, 652 S.E.2d 677, 2007 N.C. App. LEXIS 2302 (2007); Ruiz v. Mecklenburg Utils., Inc., — N.C. App. —, 657 S.E.2d 432, 2008 N.C. App. LEXIS 418 (2008); Hawkins v. Hawkins, — N.C. App. —, 664 S.E.2d 616, 2008 N.C. App. LEXIS 1520 (2008).

Cited in Perry v. Baxley Dev., Inc., — N.C. App. —, 655 S.E.2d 460, 2008 N.C. App. LEXIS 88 (2008); Herring v. Winston-Salem/Forsyth County Bd. of Educ., — N.C. App. —, 656 S.E.2d 307, 2008 N.C. App. LEXIS 231 (2008); In re Winstead, — N.C. App. —, 657 S.E.2d 411, 2008 N.C. App. LEXIS 417 (2008); Kerr v. Long, — N.C. App. —, 657 S.E.2d 920, 2008 N.C. App. LEXIS 533 (Mar. 18, 2008); Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008); Dailey v. Popma, — N.C. App. —, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (June 17, 2008); Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008).

III. RELIEF UNDER SUBSECTION (B).

A. In General.

Relief Not Warranted. — Because a co-trustee failed to demonstrate that a judgment against her was due to excusable neglect where her attorney was allowed to withdraw, was procured by any fraud, misconduct, or misrepresentation, and the record demonstrated that the trial court's denial of the co-trustee's motion was not manifestly unsupported by reason, the relief under N.C. R. Civ. P. 60(b) was properly denied. Milton M. Croom Charitable Remainder Unitrust v. Hedrick, — N.C. App. —, 654 S.E.2d 716, 2008 N.C. App. LEXIS 73 (2008).

B. Mistake, Inadvertence, Surprise and Excusable Neglect.

1. In General.

Workers' Compensation Cases. —

North Carolina Industrial Commission erred in granting an employer's motion to dismiss an employee's appeal of the deputy commissioner's award denying his claim for additional benefits because the failure of the employee's attorney to file the appeal within the 15 day period required by G.S. 97-85 was excusable neglect due to the actions of the attorney's agent; based upon the lack of any Commission rules regarding the use of email to announce an award, which could have put the attorney on notice that an opinion and award could arrive by email, it was excusable neglect for the agent to conclude that the attorney had been sent a copy of the award via email and for her not to realize that the employee's right to appeal would depend upon her delivery of the email to the attorney. Egen v. Excalibur Resort Prof'l, — N.C. App. —, 663 S.E.2d 914, 2008 N.C. App. LEXIS 1469 (Aug. 5, 2008).

E. Other Reasons Justifying Relief Under Subdivision (b)(6).

Motions under subsection (b)(6) of this rule are not to be used as a substitute for appeal, etc.

When debtors' motion for attorney's fees, pursuant to G.S. 75-16.1, was denied, it was error for a trial court to grant attorney's fees pursuant to a reconsideration of the court's prior denial, under G.S. 1A-1, N.C. R. Civ. P. 60(b)(6), because the motion to reconsider raised alleged errors of law by claiming the trial court applied the wrong legal standard in denying the attorney's fees motion, and such errors could not properly be considered under a motion to reconsider, but, rather, had to be considered either on appeal or pursuant to a new trial motion under G.S. 1A-1, N.C. R. Civ. P. 59. Catawba Valley Bank v. Porter, — N.C. App. —, 655 S.E.2d 473, 2008 N.C. App. LEXIS 77 (2008).

Denial of Motion Upheld. —

Trial court properly denied a condominium owner's motion to set aside an execution sale, the order confirming the sale, and the sheriff's deed pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b) because the sheriff complied with G.S. 1-339.54(2)a by sending the notice of the sale via registered mail more than 30 days prior to the sale of the property to the owner's last known address; because the owner was not located in the county, he was not entitled to have a copy of the notice served on him personally pursuant to G.S. 1-339.54(1). St. Regis of Onslow County, N.C. Owners Ass'n v. Johnson, — N.C. App. —, 663 S.E.2d 908, 2008 N.C. App. LEXIS 1468 (Aug. 5, 2008).

F. Void Judgments.

A judgment is not void, etc.

Former husband was not entitled to relief under G.S. 1A-1, N.C. R. Civ. P. 60(b) from a divorce judgment as void based on allegations that his signature on pleadings that acted as an answer and an agreement to summary judgment was a forgery because: (1) the notary who notarized his signature, although she did not remember the husband, testified that her usual practice was to require identification and have the person whose signature she notarized sign before her; and (2) the former wife's attorney testified that the husband had contacted the attorney to see what was taking so long to get the divorce judgment done. Macher v. Macher, — N.C. App. —, 656 S.E.2d 282, 2008 N.C. App. LEXIS 219 (2008).

Rule 61. Harmless error.

CASE NOTES

Error alone will not justify reversal, etc. Former spouse had not demonstrated that the spouse was prejudiced by the trial court's allegedly improper reliance on a book of forms; while the trial court did reference a form prenuptial agreement to emphasize the lack of "hereafter acquired" language in the parties' prenuptial agreement, the trial court could have drawn the same comparison by relying on cases interpreting prenuptial or postnuptial agreements containing similar language. McIntyre v. McIntyre, — N.C. App. —, 654 S.E.2d 798, 2008 N.C. App. LEXIS 85 (2008).

The introduction of inadmissible evidence, etc.

Even if evidence of an Occupational Safety and Health Administration complaint was improperly admitted in a case in which a former employee sought to recover for injuries incurred based on his alleged exposure to a toxic workplace, such error did not require reversal as it would not have changed the outcome of the trial and was, therefore, harmless under N.C. R. Civ. P. 61. Cameron v. Merisel Props., — N.C. App. —, 652 S.E.2d 660, 2007 N.C. App. LEXIS 2318 (2007).

Failure to Show Prejudice. — Any assignment of error based on G.S. 1A, N.C. R. Civ. P. 61, was overruled because respondent-father failed to cite any finding made by the trial court "out of Court," and none appeared on the face of the record; thus, respondent-father had not shown how he was prejudiced. In re T.M., — N.C. App. —, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

No Error Committed. — Grant of new trial was improper under G.S. 1A-1, N.C. R. Civ. P. 59(a)(8) and 61 since by having a former employee read aloud the verbatim transcript of the employee's deposition, a patron had the full benefit of the prior inconsistent statements that the patron sought to introduce by having the jury view a videotaped deposition; a conclusion that the videotaped deposition was admissible to contradict the employee's testimony as a witness and that excluding the videotape amounted to an error of law was erroneous. Harrell v. Sagebrush of N.C., LLC, — N.C. App. —, 663 S.E.2d 444, 2008 N.C. App. LEXIS 1319 (2008).

Rule 62. Stay of proceedings to enforce a judgment.

CASE NOTES

Construction with Other Sections. —

Trial court did not err by failing to order a stay of execution on a money judgment because: (1) the appellant did not deposit with the clerk of court amounts specified for interest and costs and, therefore, did not satisfy the requirements of G.S. 1-289 to post a bond in the amount directed to be paid by the judgment; and (2) the appellant took no action following the insufficient deposit with the clerk of court and, therefore, did not proceed in accordance with G.S. 1-293. Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

Rule 63. Disability of a judge.

CASE NOTES

Successor Judge Did Not Abuse Discretion in Denying New Trial. — Under an exception to the general application of G.S. 1A-1, N.C. R. Civ. P. 63, the successor judge who did not try the subcontractor's action on the payment bonds and took the place of the retired judge did not abuse the judge's discretion in denying the surety's motion for a new trial based on a lack of jurisdiction. Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co., — N.C. App. —, 665 S.E.2d 505, 2008 N.C. App. LEXIS 1628 (2008).

ARTICLE 8.

Miscellaneous.

Rule 65. Injunctions.

CASE NOTES

I. In General.
II. Preliminary Injunctions.

I. IN GENERAL.

Applied in Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

II. PRELIMINARY INJUNCTIONS.

Notice and Hearing Required for Preliminary Injunction. —
The trial court abused its discretion in denying a seller's motion to set the preliminary injunction aside because the seller never received notice of the buyer's intention to seek a preliminary injunction; the lack of notice affected the seller's substantial rights, and the seller's purported attorney of record did not represent the seller in the instant action, thus making service on the attorney insufficient to provide notice to the seller. Perry v. Baxley Dev., Inc., — N.C. App. —, 655 S.E.2d 460, 2008 N.C. App. LEXIS 88 (2008).

Rule 68. Offer of judgment and disclaimer.

CASE NOTES

I. In General.

I. IN GENERAL.

Trial Court Did Not Err in Awarding Costs. — Although the creditors properly submitted an offer of judgment to the secured creditor before trial, which the secured creditor rejected, the trial court was not required to charge the court's post-offer costs to the secured creditor, even though the final judgment was less than the offer of judgment because, when the judgment award was combined with the costs awarded, as was required, a final judgment was reached in favor of the secured creditor in an amount which was more than the amount proffered in the offer of judgment. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

Cited in Wright v. Murray, — N.C. App. —, 651 S.E.2d 913, 2007 N.C. App. LEXIS 2308 (2007); Priest v. Safety-Kleen Sys., — N.C. App. —, 663 S.E.2d 351, 2008 N.C. App. LEXIS 1317 (2008).

Chapter 1C.

Enforcement of Judgments.

Article 17.

Uniform Enforcement of Foreign Judgments Act.

§ 1C-1701. Short title.

CASE NOTES

North Carolina Uniform Enforcement of Foreign Judgments Act Was Satisfied.. — Law firm complied with the North Carolina Uniform Enforcement of Foreign Judgments Act, G.S. 1C-1701 et seq., in seeking to enforce a Canadian judgment as: (1) a client resided in the county where the action was filed; (2) an authenticated foreign judgment was properly filed; (3) an affidavit was filed stating that the judgment was final and unsatisfied, the amount owed, and that notice was served; and (4) the firm was not required to prove that none of the client's defenses were valid. Maxwell Schuman & Co. v. Edwards, — N.C. App. —, 663 S.E.2d 329, 2008 N.C. App. LEXIS 1310 (2008).

§ 1C-1703. Filing and status of foreign judgments.

CASE NOTES

Applied in Maxwell Schuman & Co. v. Edwards, — N.C. App. —, 663 S.E.2d 329, 2008 N.C. App. LEXIS 1310 (2008).

§ 1C-1704. Notice of filing; service.

CASE NOTES

Applied in Maxwell Schuman & Co. v. Edwards, — N.C. App. —, 663 S.E.2d 329, 2008 N.C. App. LEXIS 1310 (2008).

§ 1C-1705. Defenses; procedure; stay.

CASE NOTES

Contesting Jurisdictional Issues. — Superior court properly determined that a New York judgment was not enforceable against a debtor because of a lack of personal jurisdiction over the debtor, and a creditor failed to challenge this conclusion of law. Hence, the superior court properly determined that the debtor rebutted the presumption that the North Carolina Courts should grant full faith and credit to the New York judgment. Orix Fin. Servs. v. Raspberry Logging, Inc., — N.C. App. —, 660 S.E.2d 609, 2008 N.C. App. LEXIS 1012 (2008).

Defendants Not Entitled to Stay to Enforce Texas Judgment. — Under G.S. 1C-1705(a), in order to stay North Carolina proceedings to enforce a Texas judgment, defendants had to show that a Texas court had stayed the judgment, or that an appeal was pending in the Texas court and defendants had posted a bond in North Carolina. As defendants did none of these things, they were not entitled to a stay. Mineola Cmty. Bank, S.S.B. v. Everson, — N.C. App. —, 652 S.E.2d 369, 2007 N.C. App. LEXIS 2306 (2007).

Applied in Maxwell Schuman & Co. v. Edwards, — N.C. App. —, 663 S.E.2d 329, 2008 N.C. App. LEXIS 1310 (2008).

ARTICLE 18.

North Carolina Foreign Money Judgments Recognition Act.

§ 1C-1801. Definitions.

CASE NOTES

Applied in Maxwell Schuman & Co. v. Edwards, — N.C. App. —, 663 S.E.2d 329, 2008 N.C. App. LEXIS 1310 (2008).

§ 1C-1802. Applicability of Article.

CASE NOTES

Applied in Maxwell Schuman & Co. v. Edwards, — N.C. App. —, 663 S.E.2d 329, 2008 N.C. App. LEXIS 1310 (2008).

§ 1C-1803. Recognition and enforcement.

CASE NOTES

Applied in Maxwell Schuman & Co. v. Edwards, — N.C. App. —, 663 S.E.2d 329, 2008 N.C. App. LEXIS 1310 (2008).

§ 1C-1804. Grounds for nonrecognition.

CASE NOTES

Portion of Foreign Judgment Void As Against Public Policy. — Canadian judgment could not be recognized under G.S. 1C-1804(b)(3) and (7) as to that portion that concerned an initial appeal in Canada as it was an impermissible contingency fee arrangement that violated North Carolina's public policy since a law firm told a client that if an initial appeal of a custody ruling was unsuccessful, the firm would waive the firm's attorneys fees; however, the fees and expenses associated with the action in the Canadian trial court, the fees and expenses associated with an appeal to Canada's highest court, and the expenses associated with prosecuting the initial appeal were not void on public policy grounds. Maxwell Schuman & Co. v. Edwards, — N.C. App. —, 663 S.E.2d 329, 2008 N.C. App. LEXIS 1310 (2008).

Chapter 1D.

Punitive Damages.

§ 1D-1. Purpose of punitive damages.

CASE NOTES

Entitlement to Punitive Damages. — Claim for punitive damages could not be asserted against a decedent's estate on the basis of his alleged egregiously wrongful acts in driving while intoxicated and causing an accident; because decedent could no longer be punished or deterred for whatever "egregiously wrongful acts" he may have committed before his death, plaintiff was precluded as a matter of law from asserting his claim for punitive damages. Harrell v. Bowen, 362 N.C. 142, 655 S.E.2d 350, 2008 N.C. LEXIS 26 (2008).

G.S. 1D-26 does not infer an obvious intent to have courts read "and" as a disjunctive in G.S. 1D-1, which governs all punitive damages claims; claims for punitive damages cannot be asserted against a decedent's estate on the basis of the decedent's alleged egregiously wrongful acts because adecedent cannot be punished or deterred for whatever egregiously wrongful act she may have committed before his death. State v. Moncree, — N.C. App. —, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008).

§ 1D-5. Definitions.

CASE NOTES

"Willful or Wanton Conduct". — It was error to grant the employer's motion for judgment notwithstanding the verdict as to punitive damages because there was sufficient evidence of malice, willful and wanton conduct, and manager participation to support the jury's punitive damages award to a terminated part-time department store employee based on, inter alia, the store manager's threat to "mess up" the employee's full-time job at a bank. Scarborough v. Dillard's Inc., — N.C. App. —, 655 S.E.2d 875, 2008 N.C. App. LEXIS 226 (2008).

G.S. 20-145 provided an exception to the speed limit rules for emergency vehicles. Inclusion of the word "wanton" in police pursuit cases was a shorthand reference to the "reckless disregard" limitation of G.S. 20-145 and did not refer to the definition of the word from a wholly unrelated statute —G.S. 1D-5(7), the punitive damages statute. Villepigue v. City of Danville, — N.C. App. —, 661 S.E.2d 12, 2008 N.C. App. LEXIS 904 (2008).

In a mother's wrongful death action, the trial court erred in granting a police department and police officers summary judgment on the mother's punitive damages claim because she alleged evidence sufficient to show that there was a genuine issue of material fact as to whether the conduct of the department and the officers was willful or wanton; that evidence was sufficient to allow a jury to decide, under G.S. 1D-5(7), that the department and officers acted recklessly, manifesting a reckless indifference to the rights of the mother and her daughter and that they acted with indifference to the rights and safety of others, which they knew or should have known was reasonably likely to result in injury, damage, or other harm. Cockerham-Ellerbee v. Town of Jonesville, — N.C. App. —, 660 S.E.2d 178, 2008 N.C. App. LEXIS 853 (2008).

Intent to Commit Constructive Fraud Found. — Punitive damages were properly awarded because the evidence was sufficient to establish the intent to commit constructive fraud under G.S. 1D-5(4) as the trustee refused to distribute the assets of the trusts, despite the plain language of the trusts requiring distribution upon an individual's death, for reasons unrelated to the trusts and the trustee continued to receive trustee fees during the period in which the trustee served as a trustee and, thus, benefitted from the failure to distribute the trust assets. Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

Applied in Austin v. Bald II, L.L.C., — N.C. App. —, 658 S.E.2d 1, 2008 N.C. App. LEXIS 543 (Mar. 18, 2008).

§ 1D-10. Scope of the Chapter.

CASE NOTES

Construction With Other Laws. — Although punitive damages claims were not expressly excepted by G.S. 28A-18-1, the General Assembly had mandated that N.C. Gen. Stat. ch. 1D prevailed over any other law to the contrary with respect to such claims; since G.S. 1D-1 precluded plaintiff from asserting a claim for punitive damages against a decedent's estate on the basis of the decedent's alleged egregiously wrongful acts, plaintiff could not rely upon G.S. 28A-18-1 to procure a different result. Harrell v. Bowen, 362 N.C. 142, 655 S.E.2d 350, 2008 N.C. LEXIS 26 (2008).

Punitive Damages Held Not Available. — Although punitive damages claims were not expressly excepted by G.S. 28A-18-1, the General Assembly had mandated that N.C. Gen. Stat. ch. 1D prevailed over any other law to the contrary with respect to such claims; since G.S. 1D-1 precluded plaintiff from asserting a claim for punitive damages against a decedent's estate on the basis of the decedent's alleged egregiously wrongful acts, plaintiff could not rely upon G.S. 28A-18-1 to procure a different result. Harrell v. Bowen, 362 N.C. 142, 655 S.E.2d 350, 2008 N.C. LEXIS 26 (2008).

Claim for punitive damages cannot be asserted against a decedent's estate on the basis of the decedent's alleged egregiously wrongful acts because a decedent cannot be punished or deterred for whatever egregiously wrongful acts he may have committed before his death. Harrell v. Bowen, 362 N.C. 142, 655 S.E.2d 350, 2008 N.C. LEXIS 26 (2008).

§ 1D-15. Standards for recovery of punitive damages.

CASE NOTES

Applicability of Section. —

There was no basis under North Carolina law to support a finding that punitive damages could not be awarded against a corporation when the current shareholders of that corporation were different from the shareholder in existence at the time of alleged wrongdoing; punitive damages would punish and deter the corporate entity. In re Brokers, Inc., — Bankr. —, 2008 Bankr. LEXIS 744 (Bankr. M.D.N.C. Mar. 4, 2008).

Complaint Adequately Stated Claim for Punitive Damages. — Except for plaintiff borrower's negligent misrepresentation claim, the complaint specifically alleged that defendant attorney engaged in the relevant conduct and that he acted with reckless and wanton disregard for the borrower's rights and interests; thus, the complaint adequately stated a claim for punitive damages against the attorney. Higgins v. Spence & Spence, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 13096 (E.D.N.C. Feb. 21, 2008).

Because the amended complaint adequately stated a claim for punitive damages against defendant attorney as to plaintiff borrower's negligence, breach of fiduciary duty, constructive fraud, and legal malpractice claims, a valid claim for punitive damages against defedant law firm (the attorney was an officer, director, or manager of the law firm at the time of the alleged conduct) was also stated. Higgins v. Spence & Spence, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 13096 (E.D.N.C. Feb. 21, 2008).

Allegations Stating Claim for Punitive Damages Sufficient to Survive Motion to Dismiss. — Claimant sufficiently stated a claim for punitive damages by alleging that a debtor, through its agents, took the claimant's personal property without the claimant's knowledge off of the land leased by the claimant from the debtor, and caused damage to the personal property; the allegations contended that the debtor, with the participation and knowledge of the debtor's officers and directors, acted with willful, wanton, and intentional disregard of the claimant's rights. In re Brokers, Inc., — Bankr. —, 2007 Bankr. LEXIS 4564 (Bankr. M.D.N.C. Dec. 3, 2007).

No Award of Punitive Damages Without Compensatory Damages. — Plaintiff was not entitled to punitive damages as a matter of law under G.S. 1D-15(a) because the trial court at summary judgment properly found against the plaintiff on the plaintiff's claim of tortious interference with contract. Therefore, because the plaintiff was not entitled to compensatory damages, the plaintiff was also not entitled to punitive damages. Sellers v. Morton, — N.C. App. —, 661 S.E.2d 915, 2008 N.C. App. LEXIS 1167 (June 17, 2008).

Evidence Sufficient. —

It was error to grant the employer's motion for judgment notwithstanding the verdict as to punitive damages because there was sufficient evidence of malice, willful and wanton conduct, and manager participation to support the jury's punitive damages award to a terminated part-time department store employee based on, inter alia, the store manager's threat to "mess up" the employee's full-time job at a bank. Scarborough v. Dillard's Inc., — N.C. App. —, 655 S.E.2d 875, 2008 N.C. App. LEXIS 226 (2008).

Because an adjacent property owner tendered evidence of pecuniary loss and personal discomfort related to an apartment owner's erection of a spite fence, the evidence presented was sufficient to meet the elements necessary to require the submission of the punitive damages to the jury pursuant to G.S. 1D-15(b). Austin v. Bald II, L.L.C., — N.C. App. —, 658 S.E.2d 1, 2008 N.C. App. LEXIS 543 (Mar. 18, 2008).

In a mother's wrongful death action, the trial court erred in granting a police department and police officers summary judgment on the mother's punitive damages claim because she alleged evidence sufficient to show that there was a genuine issue of material fact as to whether the conduct of the department and the officers was willful or wanton; the mother outlined incidents or events which tended to establish the conscious and intentional disregard of and indifference to the rights and safety of the mother and her family. Cockerham-Ellerbee v. Town of Jonesville, — N.C. App. —, 660 S.E.2d 178, 2008 N.C. App. LEXIS 853 (2008).

Punitive damages were properly awarded because compensatory damages were shown with reasonable certainty and the evidence was sufficient to establish intent, fraud, malice, and willful and wanton conduct for punitive damages under G.S. 1D-15(a) as the trustee refused to distribute the assets of the trusts, despite the plain language of the trusts requiring distribution upon an individual's death, for reasons unrelated to the trusts and the trustee continued to receive trustee fees during the period in which the trustee served as a trustee and, thus, benefitted from the failure to distribute the trust assets. Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

Cited in Snyder v. Learning Servs. Corp., — N.C. App. —, 653 S.E.2d 548, 2007 N.C. App. LEXIS 2454 (2007).

§ 1D-25. Limitation of amount of recovery.

CASE NOTES

Construction With Other Laws. — G.S. 1D-26 does not infer an obvious intent to have courts read "and" as a disjunctive in G.S. 1D-1, which governs all punitive damages claims; claims for punitive damages cannot be asserted against a decedent's estate on the basis of the decedent's alleged egregiously wrongful acts because a decedent cannot be punished or deterred for whatever egregiously wrongful acts he may have committed before his death. Harrell v. Bowen, 362 N.C. 142, 655 S.E.2d 350, 2008 N.C. LEXIS 26 (2008).

Applied in Greene v. Royster, — N.C. App. —, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007); Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

§ 1D-26. Driving while impaired; exemption from cap.

CASE NOTES

Construction With Other Laws. — G.S. 1D-26 does not infer an obvious intent to have courts read "and" as a disjunctive in G.S. 1D-1, which governs all punitive damages claims; claims for punitive damages cannot be asserted against a decedent's estate on the basis of the decedent's alleged egregiously wrongful acts because a decedent cannot be punished or deterred for whatever egregiously wrongful acts he may have committed before his death. Harrell v. Bowen, 362 N.C. 142, 655 S.E.2d 350, 2008 N.C. LEXIS 26 (2008).

§ 1D-50. Judicial review of award.

CASE NOTES

Motion to Dismiss Appeal. — An employer's motion to dismiss an appeal from the trial court's grant of J.N.O.V. on the issue of punitive damages was denied because the employee correctly appealed from the trial court's order since it contained no reasons as to why the trial court set aside the jury's verdict on the punitive damages claim. Scarborough v. Dillard's Inc., — N.C. App. —, 655 S.E.2d 875, 2008 N.C. App. LEXIS 226 (2008).

Written Opinion Not Required on Award of Punitive Damages. — Trial court was not required to issue a written opinion regarding the award of punitive damages because the trustee did not contend that the amount of punitive damages exceeded the statutory limit and it was clear, based upon appellate review, that the award did not exceed the allowable limit. Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

Chapter 5A.

Contempt.

Article 1.

Criminal Contempt.

§ 5A-13. Direct and indirect criminal contempt; proceedings required.

CASE NOTES

Penalty for Direct and Indirect Contempt the Same; Thus, No Reversible Error. — In a quiet title action wherein the defendants testified in the trial court's presence, which constituted direct criminal contempt, but the trial court mistakenly held them in indirect criminal contempt, such error was not grounds for reversal as the penalty was the same for both direct and indirect criminal contempt. Adams Creek Assocs. v. Davis, — N.C. App. —, 652 S.E.2d 677, 2007 N.C. App. LEXIS 2302 (2007).

Trial court erred when it entered its orders finding defendant in indirect criminal contempt based solely upon acts which occurred after the issuance of the show cause orders. State v. Coleman, — N.C. App. —, 655 S.E.2d 450, 2008 N.C. App. LEXIS 67 (2008).

§ 5A-15. Plenary proceedings for contempt.

CASE NOTES

Trial court erred when it entered its orders finding defendant in indirect criminal contempt based solely upon acts which occurred after the issuance of the show cause orders. State v. Coleman, — N.C. App. —, 655 S.E.2d 450, 2008 N.C. App. LEXIS 67 (2008).

Order Finding Attorney in Criminal Contempt was Erroneous. — Trial court erred in finding the attorney to be in criminal contempt because G.S. 5A-15(a) required the show cause order to be returned before a different judge when the circumstances cited in the statute caused the objectivity of the presiding judge to be reasonably questioned and, in the instant action, there was a reasonable possibility that, had the order been returned before a different judge, a different result would have been reached. In re Marshall, — N.C. App. —, 662 S.E.2d 5, 2008 N.C. App. LEXIS 1131 (June 17, 2008).

Article 2.

Civil Contempt.

§ 5A-21. Civil contempt; imprisonment to compel compliance.

CASE NOTES

I. General Consideration.
II. Orders Enforceable as Civil Contempt.
IV. Practice and Procedure.
V. Appeal and Error.

I. GENERAL CONSIDERATION.

Criminal and Civil Contempt Distinguished. —

In a quiet title action wherein defendants were found in civil contempt for failing to comply with the trial court's 2004 order not to trespass any longer, and were found in criminal contempt for their testimony threatening to disobey future orders of the court, the defendants were found in civil and criminal contempt on the basis of different acts and, therefore, they were found in civil and criminal contempt for the same behavior in violation of G.S. 5A-21 and G.S. 5A-23. Adams Creek Assocs. v. Davis, — N.C. App. —, 652 S.E.2d 677, 2007 N.C. App. LEXIS 2302 (2007).

Findings Inadequate to Support Contempt. —

It was error to hold defendants in a summary ejectment proceeding in civil contempt. The trial court had not made appropriate findings of fact to support the entry of a civil contempt order, as required by G.S. 5A-23(e), and it had not found that defendants had the ability to comply with the order, as required by G.S. 5A-21(2a)-(3); indeed, it had found that defendants were not able to pay the order. Carter v. Hill, 186 N.C. App. 464, 650 S.E.2d 843, 2007 N.C. App. LEXIS 2189 (2007).

No Authority to Award Costs to Private Party in Contempt Proceeding. —

While it was appropriate for a trial court to order the payment of attorneys' fees in a contempt proceeding for failure to comply with an equitable distribution consent order under G.S. 5A-21, the trial court erred in assessing expert witness fees against a former wife when G.S. 5A-21 did not provide for such payment. Watson v. Watson, — N.C. App. —, 652 S.E.2d 310, 2007 N.C. App. LEXIS 2317 (2007).

II. ORDERS ENFORCEABLE AS CIVIL CONTEMPT.

Oral Order Was Not Judgment For Civil Contempt Purposes. — When the trial court orally ordered defendants in a summary ejectment proceeding to pay a certain amount but did not reduce a judgment to writing as required by N.C. R. Civ. P. 58, it was error to hold defendants in civil contempt under G.S. 5A-21, as there was no properly entered judgment of the trial court at the time defendants were found in civil contempt. Carter v. Hill, 186 N.C. App. 464, 650 S.E.2d 843, 2007 N.C. App. LEXIS 2189 (2007).

IV. PRACTICE AND PROCEDURE.

Discretionary Nature of Sanction. — In a workers' compensation case, the North Carolina Industrial Commission did not err by not holding the employer in contempt for its failure to comply with a previous order and by not making specific findings on the issue of civil contempt because civil contempt is a completely discretionary sanction, thus, even if the Commission made explicit findings that all of the conditions outlined in G.S. 5A-21(a) were satisfied, it still would not have been required to sanction the employer. Bolick v. Freight Sys., — N.C. App. —, 654 S.E.2d 793, 2008 N.C. App. LEXIS 81 (2008).

V. APPEAL AND ERROR.

Evidence Sufficient to Support Finding of Contempt. — When parties' consent order provided that a wife was to assume financial responsibility for credit card debt, and the wife had the present means and ability to comply, it was not error for the trial court to hold defendant in contempt of court pursuant to G.S. 5A-23(a)(1) for failing to comply with the consent order as it related to the credit card accounts, and to order the wife to pay off the debt as a condition of purging herself of contempt as required by G.S. 5A-21(a)(2). When the wife refused to execute forms requested by the Internal Revenue Service in order to file amended tax returns, as required under the parties' consent order, it was not error for the court to order defendant to sign these form. Watson v. Watson, — N.C. App. —, 652 S.E.2d 310, 2007 N.C. App. LEXIS 2317 (2007).

Penalty for Direct and Indirect Contempt the Same; Thus, No Reversible Error. — In a quiet title action wherein the defendants testified in the trial court's presence, which constituted direct criminal contempt, but the trial court mistakenly held them in indirect criminal contempt, such error was not grounds for reversal as the penalty was the same for both direct and indirect criminal contempt. Adams Creek Assocs. v. Davis, — N.C. App. —, 652 S.E.2d 677, 2007 N.C. App. LEXIS 2302 (2007).

§ 5A-22. Release when civil contempt no longer continues.

CASE NOTES

Sufficient Notice of Civil Contempt Proceedings. — When a former wife was held in civil contempt of court pursuant to G.S. 5A-23(a)(1) for failing to comply with an equitable distribution consent order, the constitutional notice requirements applicable to criminal contempt proceedings were not implicated, and the wife received adequate notice of the nature of the contempt proceedings when the wife was served with a copy of the motion for an order to show cause, which stated the grounds for the alleged civil contempt as required by G.S. 5A-21(a)(2) and 5A-22, as well as the show cause order referencing the motion. Watson v. Watson, — N.C. App. —, 652 S.E.2d 310, 2007 N.C. App. LEXIS 2317 (2007).

§ 5A-23. Proceedings for civil contempt.

CASE NOTES

Criminal and Civil Contempt Distinguished. — In a quiet title action wherein defendants were found in civil contempt for failing to comply with the trial court's 2004 order not to trespass any longer, and were found in criminal contempt for their testimony threatening to disobey future orders of the court, the defendants were found in civil and criminal contempt on the basis of different acts and, therefore, they were found in civil and criminal contempt for the same behavior in violation of G.S. 5A-21 and G.S. 5A-23. Adams Creek Assocs. v. Davis, — N.C. App. —, 652 S.E.2d 677, 2007 N.C. App. LEXIS 2302 (2007).

Defendant's Rights Under U.S. Const., Amend. V, Not Implicated in Civil Contempt Case. —

When a former wife was held in civil contempt of court pursuant to G.S. 5A-23(a)(1) for failing to comply with an equitable distribution consent order, the constitutional notice requirements applicable to criminal contempt proceedings were not implicated, and the wife received adequate notice of the nature of the contempt proceedings when the wife was served with a copy of the motion for an order to show cause, which stated the grounds for the alleged civil contempt as required by G.S. 5A-21(a)(2) and G.S. 5A-22, as well as the show cause order referencing the motion. Watson v. Watson, — N.C. App. —, 652 S.E.2d 310, 2007 N.C. App. LEXIS 2317 (2007).

Findings were insufficient to support the court's contempt holding, etc.

It was error to hold defendants in a summary ejectment proceeding in civil contempt. The trial court had not made appropriate findings of fact to support the entry of a civil contempt order, as required by G.S. 5A-23(e), and it had not found that defendants had the ability to comply with the order, as required by G.S. 5A-21(2a)-(3); indeed, it had found that defendants were not able to pay the order. Carter v. Hill, 186 N.C. App. 464, 650 S.E.2d 843, 2007 N.C. App. LEXIS 2189 (2007).

Evidence sufficient to support finding of contempt. —

When parties' consent order provided that a wife was to assume financial responsibility for credit card debt, and the wife had the present means and ability to comply, it was not error for the trial court to hold defendant in contempt of court pursuant to G.S. 5A-23(a)(1) for failing to comply with the consent order as it related to the credit card accounts, and to order the wife to pay off the debt as a condition of purging herself of contempt as required by G.S. 5A-21(a)(2). When the wife refused to execute forms requested by the Internal Revenue Service in order to file amended tax returns, as required under the parties' consent order, it was not error for the court to order defendant to sign these form. Watson v. Watson, — N.C. App. —, 652 S.E.2d 310, 2007 N.C. App. LEXIS 2317 (2007).

Notice. —

Defendants in a summary ejectment proceeding were not given proper notice of a civil contempt proceeding as required by G.S. 5A-23(a). They were not told until the end of the summary ejectment trial that they would be held in contempt until the debt was paid; they were taken immediately to jail; and no good cause for the lack of notice had been shown. Carter v. Hill, 186 N.C. App. 464, 650 S.E.2d 843, 2007 N.C. App. LEXIS 2189 (2007).

Cited in State v. Coleman, — N.C. App. —, 655 S.E.2d 450, 2008 N.C. App. LEXIS 67 (2008); In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

Chapter 6.

Liability for Court Costs.

Article 1.

Generally.

§ 6-1. Items allowed as costs.

CASE NOTES

I. General Consideration.
II. Particular Costs.
  C. Other Costs.

I. GENERAL CONSIDERATION.

Failure to Segregate Mandatory From Discretionary Costs. — Trial court's failure to segregate statutorily required costs from discretionary costs is not a failure to exercise the court's discretion. Priest v. Safety-Kleen Sys., — N.C. App. —, 663 S.E.2d 351, 2008 N.C. App. LEXIS 1317 (2008).

II. PARTICULAR COSTS.

C. Other Costs.

Mediation Fees. — As mediation fees were mandatory under former G.S. 7A-305(d)(7), plaintiffs were entitled to those costs as the prevailing parties in a personal injury action, and the trial court abused the court's discretion in not awarding these costs. Priest v. Safety-Kleen Sys., — N.C. App. —, 663 S.E.2d 351, 2008 N.C. App. LEXIS 1317 (2008).

Award of Service Fees Mandatory. — As service fees were mandatory under former G.S. 7A-305(d)(6), plaintiffs were entitled to those costs as the prevailing parties, and the trial court abused the court's discretion in not awarding these costs. Priest v. Safety-Kleen Sys., — N.C. App. —, 663 S.E.2d 351, 2008 N.C. App. LEXIS 1317 (2008).

Article 3.

Civil Actions and Proceedings.

§ 6-19.1. Attorney's fees to parties appealing or defending against agency decision.

CASE NOTES

Findings of Fact Required. —
Trail court erred in awarded North Carolina Department of Environment and Natural Resources (NCDENR) employees partial attorney fees in their appeal of the NCDENR's decision to suspend them from work because the trial court failed to make necessary findings of fact about the reasonableness of the award of attorney fees to enable the court of appeals to determine whether the award was within the trial court's sound discretion or was an abuse thereof. Kelly v. N.C. Dep't of Env't & Natural Res., — N.C. App. —, 664 S.E.2d 625, 2008 N.C. App. LEXIS 1544 (2008).

Substantial Justification. —
Two conservation organizations were entitled to attorney's fees under G.S. 6-19.1 in a judicial review proceeding because a state administrative agency's decision was not substantially justified given the facts known at the time of the decision, and the trial court acted within the court's discretion in finding that no special circumstances existed that made the award unjust. Table Rock Chapter of Trout Unlimited v. Envtl. Mgmt. Comm'n, — N.C. App. —, 663 S.E.2d 333, 2008 N.C. App. LEXIS 1323 (2008).

Cited in Kitchin v. Halifax County, — N.C.

App. —, 665 S.E.2d 760, 2008 N.C. App. LEXIS 1624 (2008).

§ 6-20. Costs allowed or not, in discretion of court.

CASE NOTES

Standard of Review on Appeal. — Appellate court, pursuant to G.S. 6-20, used an abuse of discretion standard to review a trial court's cost assessments under G.S. 7A-305(d). Vaden v. Dombrowski, — N.C. App. —, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007).

Award of Costs for Expert Witnesses. — Even though about $170,000 was requested, a partial award of $1,726.25 for expert witness costs was not an abuse of discretion under G.S. 6-20 as expert witness fees were discretionary, "common law" costs that were not provided for in G.S. 7A-305(d); the trial judge, who presided over 20 days of trial, was in the best position to assess whether the costs were justified under G.S. 1A-1, N.C. R. Civ. P. 41(d). Bennett v. Equity Residential, — N.C. App. —, 665 S.E.2d 514, 2008 N.C. App. LEXIS 1609 (2008).

Applied in Priest v. Safety-Kleen Sys., — N.C. App. —, 663 S.E.2d 351, 2008 N.C. App. LEXIS 1317 (2008).

Cited in Kelly v. N.C. Dep't of Env't & Natural Res., — N.C. App. —, 664 S.E.2d 625, 2008 N.C. App. LEXIS 1544 (2008).

§ 6-21. Costs allowed either party or apportioned in discretion of court.

CASE NOTES

I. General Consideration.
II. Costs In Particular Actions.
  A. Caveats to Wills.
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I. GENERAL CONSIDERATION.

Cited in Bennett v. Equity Residential, — N.C. App. —, 665 S.E.2d 514, 2008 N.C. App. LEXIS 1609 (2008).

II. COSTS IN PARTICULAR ACTIONS.

A. Caveats to Wills.

Award of Fees in Constructive Fraud and Breach of Fiduciary Duty Case. — Award of attorney's fees and trustee commissions upon the removal of a trustee for constructive fraud and breach of fiduciary duty was proper because the award was designed to restore the trust to the same position it would have been in had no breach occurred and the awards fit the nature and gravity of the breach and the consequences to the beneficiaries and the trustee. Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

H. Illegitimate Children.

Attorneys' fees incurred in prosecuting paternity actions, etc.

Trial court abused the court's discretion by ordering a mother to pay a portion of a putative father's attorney's fees, once the putative father was proven not to be the biological father of the mother's child because, while costs, including attorney's fees, were awardable under G.S. 6-21(10), the mother did not file the action to establish paternity and recover child support payments by an administrative agency, was not the real party in interest, and was compelled to participate fully in the agency's action pursuant to G.S. 110-131, including naming the individual the mother believed was the child's biological father. Further, there was no showing that the mother named the putative father as the biological father maliciously, fraudulently, or in bad faith. Guilford County ex rel. Holt v. Puckett, — N.C. App. —, 664 S.E.2d 362, 2008 N.C. App. LEXIS 1471 (2008).

§ 6-21.1. Allowance of counsel fees as part of costs in certain cases.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Award of Attorney's Fees Held Proper. — Judgment awarding attorney fees pursuant to G.S. 6-21.1 following a verdict in a negligence action arising from a motor vehicle accident was affirmed. The trial court's order had specific findings as to the majority of the Washington factors, and the trial court directly observed the attorneys, including their demeanor and characteristics. Wright v. Murray, — N.C. App. —, 651 S.E.2d 913, 2007 N.C. App. LEXIS 2308 (2007).

Cited in Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008).

§ 6-21.2. Attorneys' fees in notes, etc., in addition to interest.

CASE NOTES

Cited in Branch Banking & Trust Co. v. Morrison, — N.C. App. —, 661 S.E.2d 784, 2008 N.C. App. LEXIS 1145 (June 17, 2008).

§ 6-21.5. Attorney's fees in nonjusticiable cases.

CASE NOTES

Justiciable Issue Found. — Homeowners association could not recover attorney's fees under G.S. 6-21.5 as the homeowners raised an appropriate challenge to the validity of a restrictive covenant underlying a special assessment for attorneys fees incurred in a dispute with the homeowners, and a good-faith argument regarding the invalidity of the restrictive covenant. Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008).

Cited in Craven v. Cope, — N.C. App. —, 656 S.E.2d 729, 2008 N.C. App. LEXIS 266 (2008).

Chapter 7A.

Judicial Department.

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7A-474.19. Funds.

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7A-498.6. Director of Indigent Defense Services.
7A-498.8. Appellate Defender.

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7A-796. Local drug treatment court management committee.

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

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§ 7A-27. Appeals of right from the courts of the trial divisions.

CASE NOTES

I. General Consideration.
III. Final Judgments.
IV. Interlocutory Orders.
  B. Particular Orders.

I. GENERAL CONSIDERATION.

Construction with G.S. 150B-51 and G.S. 150B-52. — In an action arising from allegations of age discrimination, while the superior court properly applied both a de novo review and the whole-record test to the respective issues on appeal under G.S. 150B-51(b) when it reviewed the final decision of the State Personnel Commission (SPC), it erred when it improperly substituted its judgment for that of the SPC under the whole-record test. Thus, remand was ordered for the superior court to affirm the SPC's final agency decision. Trotter v. N.C. HHS, — N.C. App. —, 659 S.E.2d 749, 2008 N.C. App. LEXIS 712 (2008).

Applied in State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007); Carl v. State, — N.C. App. —, 665 S.E.2d 787, 2008 N.C. App. LEXIS 1630 (2008); Michael v. Huffman Oil Co., — N.C. App. —, 661 S.E.2d 1, 2008 N.C. App. LEXIS 823 (2008).

Cited in State v. Goss, 361 N.C. 610, 651 S.E.2d 867, 2007 N.C. LEXIS 1106 (2007); State v. Barden, 362 N.C. 277, 658 S.E.2d 654, 2008 N.C. LEXIS 336 (2008).

III. FINAL JUDGMENTS.

Appeal of Contempt Order Was Permissible. — Husband had a right to appeal those aspects of the contempt order that the husband alleged impermissibly modified child custody or exceeded the trial court's authority. Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008).

IV. INTERLOCUTORY ORDERS.

B. Particular Orders.

Order Denying Motion to Set Aside Preliminary Injunction. — The trial court abused its discretion in denying a seller's motion to set the preliminary injunction aside because the seller never received notice of the buyer's intention to seek a preliminary injunction; the lack of notice affected the seller's substantial rights, and the seller's purported attorney of record did not represent the seller in the instant action, thus making service on the attorney insufficient to provide notice to the seller. Perry v. Baxley Dev., Inc., — N.C. App. —, 655 S.E.2d 460, 2008 N.C. App. LEXIS 88 (2008).

Denial of Motion to Dismiss. — Order denying a taxpayer's motion to dismiss an administrative summons requesting documents was appealable because it was an intermediate order that involved the merits and affected the final judgment in that if the motion had been granted, the trial court would not have issued the order to comply with the summons. Even if the appeal was not from a final judgment, the appeal of a discovery order asserting a statutory or a common-law privilege affected a substantial right. In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

Order Granting Summary Judgment. — As the trial court granted summary judgment only to a town, not the other defendants, and did not certify the court's order under N.C. R. Civ. P. 54(b), and plaintiff did not voluntarily dismiss her claims against the other defendants or argue that her appeal affected a substantial right, she was not entitled to appeal the trial court's interlocutory order under G.S. 7A-27(b). Hyatt v. Town of Lake Lure, — N.C. App. —, 663 S.E.2d 320, 2008 N.C. App. LEXIS 1322 (2008).

Order Denying Summary Judgment. — Because there was a question of fact as to whether defendants followed the applicable standard of care, they were not entitled to qualified immunity under G.S. 122C-210.1 on plaintiff's wrongful death claims as a matter of law; accordingly, the denial of their motion for summary judgment did not deprive them of a substantial right, and their appeal was dismissed as interlocutory. Snyder v. Learning Servs. Corp., — N.C. App. —, 653 S.E.2d 548, 2007 N.C. App. LEXIS 2454 (2007).

Order Granting Partial Summary Judgment. —

Trial court's partial summary judgment order that two insurers were obligated to defend an insured in an underlying litigation was immediately appealable under G.S. 1-277 and 7A-27(d) and G.S. 1A-1, N.C. R. Civ. P. 54(b) because the judgment affected a substantial right that might have been lost absent an immediate appeal. Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield L.L.C., — N.C. App. —, 664 S.E.2d 317, 2008 N.C. App. LEXIS 873 (2008).

§ 7A-30. Appeals of right from certain decisions of the Court of Appeals.

CASE NOTES

I. In General.

I. IN GENERAL.

Scope of Review. —

Because the dissent in a decision of a divided panel of the Court of Appeals of North Carolina did not address a particular issue, defendant's arguments on that issue were not properly before the Supreme Court of North Carolina. State v. Barnard, 362 N.C. 244, 658 S.E.2d 643, 2008 N.C. LEXIS 338 (2008).

Applied in State v. Boyce, 361 N.C. 670, 651 S.E.2d 879, 2007 N.C. LEXIS 1104 (2007); State v. Everette, 361 N.C. 646, 652 S.E.2d 241, 2007 N.C. LEXIS 1107 (2007); Tillman v. Commer. Credit Loans, Inc., 362 N.C. 93, 655 S.E.2d 362, 2008 N.C. LEXIS 21 (2008); Davis v. Harrah's Cherokee Casino, 362 N.C. 133, 655 S.E.2d 392, 2008 N.C. LEXIS 30 (2008); State v. Wilson, 362 N.C. 162, 655 S.E.2d 359, 2008 N.C. LEXIS 32 (2008); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 657 S.E.2d 361, 2008 N.C. LEXIS 148 (2008); Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C., 362 N.C. 269, 658 S.E.2d 918, 2008 N.C. LEXIS 337 (2008); State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008); Hassell v. Onslow County Bd. of Educ., 362 N.C. 299, 661 S.E.2d 709, 2008 N.C. LEXIS 498 (2008); Binney v. Banner Therapy Prods., 362 N.C. 310, 661 S.E.2d 717, 2008 N.C. LEXIS 487 (2008); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., — N.C. App. —, 665 S.E.2d 493, 2008 N.C. App. LEXIS 1555 (2008)

Cited in State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007); State v. Stone, 362 N.C. 50, 653 S.E.2d 414, 2007 N.C. LEXIS 1228 (2007); Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007); State v. Coltrane, — N.C. App. —, 656 S.E.2d 322, 2008 N.C. App. LEXIS 194 (2008); State v. Mead, 362 N.C. 218, 657 S.E.2d 367, 2008 N.C. LEXIS 147 (2008); State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008); Shaw v. U.S. Airways, Inc., — N.C. —, 665 S.E.2d 449, 2008 N.C. LEXIS 684 (2008); State v. Styles, — N.C. —, 665 S.E.2d 438, 2008 N.C. LEXIS 685 (2008); In re T.H.T., — N.C. —, 665 S.E.2d 54, 2008 N.C. LEXIS 686 (2008).

§ 7A-31. Discretionary review by the Supreme Court.

CASE NOTES

Applied in State v. Denny, 361 N.C. 662, 652 S.E.2d 212, 2007 N.C. LEXIS 1095 (2007); Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC, 362 N.C. 262, 658 S.E.2d 924, 2008 N.C. LEXIS 335 (2008).

Cited in Gore v. Myrtle/Mueller, 362 N.C. 27, 653 S.E.2d 400, 2007 N.C. LEXIS 1231 (2007); State v. Gillespie, 362 N.C. 150, 655 S.E.2d 355, 2008 N.C. LEXIS 29 (2008); State v. Whaley, 362 N.C. 156, 655 S.E.2d 388, 2008 N.C. LEXIS 31 (2008); Wake Cares, Inc. v. Wake County Bd. of Educ., — N.C. App. —, 660 S.E.2d 217, 2008 N.C. App. LEXIS 872 (2008).

§ 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.

CASE NOTES

The authority of a superior court to grant a writ of certiorari, etc.

Motion to dismiss an interlocutory appeal of the denial of healthcare providers' motion to dismiss an administrator's wrongful death complaint was denied because the healthcare providers' petition for a writ of certiorari was granted. Reid v. Cole, — N.C. App. —, 652 S.E.2d 718, 2007 N.C. App. LEXIS 2355 (2007).

Cited in State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008); In re T.H.T., — N.C. —, 665 S.E.2d 54, 2008 N.C. LEXIS 686 (2008).

§ 7A-34. Rules of practice and procedure in trial courts.

CASE NOTES

Applied in State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

Cited in In re T.M., — N.C. App. —, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

§ 7A-38.1. Mediated settlement conferences in superior court civil actions.

(a) Purpose. — The General Assembly finds that a system of court-ordered mediated settlement conferences should be established to facilitate the settlement of superior court civil actions and to make civil litigation more economical, efficient, and satisfactory to litigants and the State. Therefore, this section is enacted to require parties to superior court civil actions and their representatives to attend a pretrial, mediated settlement conference conducted pursuant to this section and pursuant to rules of the Supreme Court adopted to implement this section.

(b) Definitions. — As used in this section:

(1) "Mediated settlement conference" means a pretrial, court-ordered conference of the parties to a civil action and their representatives conducted by a mediator.

(2) "Mediation" means an informal process conducted by a mediator with the objective of helping parties voluntarily settle their dispute.

(3) "Mediator" means a neutral person who acts to encourage and facilitate a resolution of a pending civil action. A mediator does not make an award or render a judgment as to the merits of the action.

(c) Rules of procedure. — The Supreme Court may adopt rules to implement this section.

(d) Statewide implementation. — Mediated settlement conferences authorized by this section shall be implemented in all judicial districts as soon as practicable, as determined by the Director of the Administrative Office of the Courts.

(e) Cases selected for mediated settlement conferences. — The senior resident superior court judge of any participating district may order a mediated settlement conference for any superior court civil action pending in the district. The senior resident superior court judge may by local rule order all cases, not otherwise exempted by the Supreme Court rule, to mediated settlement conference.

(f) Attendance of parties. — The parties to a superior court civil action in which a mediated settlement conference is ordered, their attorneys and other persons or entities with authority, by law or by contract, to settle the parties' claims shall attend the mediated settlement conference unless excused by rules of the Supreme Court or by order of the senior resident superior court judge. Nothing in this section shall require any party or other participant in the conference to make a settlement offer or demand which it deems is contrary to its best interests.

(g) **(Effective until January 1, 2009)** Sanctions. — Any person required to attend a mediated settlement conference who, without good cause, fails to attend in compliance with this section and the rules adopted under this section, shall be subject to any appropriate monetary sanction imposed by a resident or presiding superior court judge, including the payment of attorneys' fees, mediator fees, and expenses incurred in attending the conference. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence.

(g) **(Effective January 1, 2009)** Sanctions. — Any person required to attend a mediated settlement conference or other settlement procedure under this section who, without good cause, fails to attend or fails to pay any or all of the mediator's or other neutral's fee in compliance with this section and the rules promulgated by the Supreme Court to implement this section is subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. The monetary sanctions may include the payment of fines, attorneys' fees, mediator and neutral fees, and the expenses and loss of earnings incurred by persons attending the procedure. A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all parties and upon any person against whom the sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence.

(h) Selection of mediator. — The parties to a superior court civil action in which a mediated settlement conference is to be held pursuant to this section shall have the right to designate a mediator. Upon failure of the parties to designate a mediator within the time established by the rules of the Supreme Court, a mediator shall be appointed by the senior resident superior court judge.

(i) Promotion of other settlement procedures. — Nothing in this section is intended to preclude the use of other dispute resolution methods within the superior court. Parties to a superior court civil action are encouraged to select other available dispute resolution methods. The senior resident superior court judge, at the request of and with the consent of the parties, may order the parties to attend and participate in any other settlement procedure authorized by rules of the Supreme Court or by the local superior court rules, in lieu of attending a mediated settlement conference. Neutral third parties acting pursuant to this section shall be selected and compensated in accordance with such rules or pursuant to agreement of the parties. Nothing in this section shall prohibit the parties from participating in, or the court from ordering, other dispute resolution procedures, including arbitration to the extent authorized under State or federal law.

(j) Immunity. — Mediator and other neutrals acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators and other neutrals may be disciplined in accordance with enforcement procedures adopted by the Supreme Court pursuant to G.S. 7A-38.2.

(k) Costs of mediated settlement conference. — Costs of mediated settlement conferences shall be borne by the parties. Unless otherwise ordered by the court or agreed to by the parties, the mediator's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The rules adopted by the Supreme Court implementing this section shall set out a method whereby parties found by the court to be unable to pay the costs of the mediated settlement conference are afforded an opportunity to participate without cost. The rules adopted by the Supreme Court shall set the fees to be paid a mediator appointed by a judge upon the failure of the parties to designate a mediator.

(*l*) Inadmissibility of negotiations. — Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(1) In proceedings for sanctions under this section;
(2) In proceedings to enforce or rescind a settlement of the action;
(3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
(4) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(m) Right to jury trial. — Nothing in this section or the rules adopted by the Supreme Court implementing this section shall restrict the right to jury trial. (1995, c. 500, s. 1; 1999-354, s. 5; 2005-167, s. 1; 2008-194, s. 8(a).)

Subsection (g) Set Out Twice. — The first version of subsection (g) set out above is effective until January 1, 2009. The second version of subsection (g) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-194, s. 8(a), effective January 1, 2009, rewrote subsection (g).

§ 7A-38.3B. Mediation in matters within the jurisdiction of the clerk of superior court.

(a) Purpose. — The General Assembly finds that the clerk of superior court in the General Court of Justice should have the discretion and authority to order that mediation be conducted in matters within the clerk's jurisdiction in order to facilitate a more economical, efficient, and satisfactory resolution of those matters.

(b) Enabling Authority. — The clerk of superior court may order that mediation be conducted in any matter in which the clerk has exclusive or original jurisdiction, except for matters under Chapters 45 and 48 of the General Statutes and except in matters in which the jurisdiction of the clerk is ancillary. The Supreme Court may adopt rules to implement this section. Such mediations shall be conducted pursuant to this section and the Supreme Court rules as adopted.

(c) Attendance. — In those matters ordered to mediation pursuant to this section, the following persons or entities, along with their attorneys, may be ordered by the clerk to attend the mediation:

(1) Named parties.

(2) Interested persons, meaning persons or entities who have a right, interest, or claim in the matter; heirs or devisees in matters under Chapter 28A of the General Statutes, next of kin under Chapter 35A of the General Statutes, and other persons or entities as the clerk deems necessary for the adjudication of the matter. The meaning of "interested person" may vary according to the issues involved in the matter.

(3) Nonparty participants, meaning any other person or entity identified by the clerk as possessing useful information about the matter and whose attendance would be beneficial to the mediation.

(4) Fiduciaries, meaning persons or entities who serve as fiduciaries, as that term is defined by G.S. 36A-22.1, of named parties, interested persons, or nonparty participants.

Any person or entity ordered to attend a mediation shall be notified of its date, time, and location and shall attend unless excused by rules of the Supreme Court or by order of the clerk. No one attending the mediation shall be required to make a settlement offer or demand that it deems contrary to its best interests.

(d) Selection of Mediator. — Persons ordered to mediation pursuant to this section have the right to designate a mediator in accordance with rules promulgated by the Supreme Court implementing this section. Upon failure of those persons to agree upon a designation within the time established by rules of the Supreme Court, a mediator certified by the Dispute Resolution Commission pursuant to those rules shall be appointed by the clerk.

(e) Immunity. — Mediators acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators may be disciplined in accordance with procedures adopted by the Supreme Court pursuant to G.S. 7A-38.2.

(f) Costs of Mediation. — Costs of mediation under this section shall be borne by the named parties, interested persons, and fiduciaries ordered to attend the mediation. The rules adopted by the Supreme Court implementing this section shall set out the manner in which costs shall be paid and a method by which an opportunity to participate without cost shall be afforded to persons found by the clerk to be unable to pay their share of the costs of mediation. Costs may only be assessed against the estate of a decedent, the estate of an adjudicated or alleged incompetent, a trust corpus, or against a fiduciary upon

G.S. 7A-38.3B(j) is set out twice. See note.

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the entry of a written order making specific findings of fact justifying the taxing of costs.

(g) Inadmissibility of Negotiations. — Evidence of statements made or conduct occurring during a mediation conducted pursuant to this section, whether attributable to any participant, mediator, expert, or neutral observer, shall not be subject to discovery and shall be inadmissible in any proceeding in the matter or other civil actions on the same claim, except in:

(1) Proceedings for sanctions pursuant to this section;
(2) Proceedings to enforce or rescind a written and signed settlement agreement;
(3) Incompetency, guardianship, or estate proceedings in which a mediated agreement is presented to the clerk;
(4) Disciplinary proceedings before the North Carolina State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
(5) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse, neglect, or exploitation of an adult, for which there is a duty to report under G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes, respectively.

No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in mediation.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

(h) Testimony. — No mediator or neutral observer shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to the mediation in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the matter except to attest to the signing of any agreements reached in mediation, and except in:

(1) Proceedings for sanctions pursuant to this section;
(2) Disciplinary proceedings before the North Carolina State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
(3) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse, neglect, or exploitation of an adult, for which there is a duty to report under G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes, respectively.

(i) Agreements. — In matters before the clerk in which agreements are reached in a mediation conducted pursuant to this section, or during one of its recesses, those agreements shall be treated as follows:

(1) Where as a matter of law, a matter may be resolved by agreement of the parties, a settlement is enforceable only if it has been reduced to writing and signed by the parties.
(2) In all other matters before the clerk, including guardianship and estate matters, all agreements shall be delivered to the clerk for consideration in deciding the matter.

(j) **(Effective until January 1, 2009)** Sanctions. — The clerk may sanction any person ordered to attend a mediation conducted pursuant to this section and rules of the Supreme Court who, without good cause, fails to attend the mediation, by imposing an appropriate monetary sanction, including the payment of attorneys' fees, mediator fees, and expenses incurred in attending the conference. If the clerk imposes sanctions, the clerk shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of

G.S. 7A-38.3B(j) is set out twice. See note.

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law. An order imposing sanctions is reviewable by the superior court in accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate courts in accordance with G.S. 7A-38.1(g).

(j) **(Effective January 1, 2009)** Sanctions. — Any person ordered to attend a mediation conducted pursuant to this section and rules of the Supreme Court who, without good cause, fails to attend the mediation or fails to pay any or all of the mediator's fee in compliance with this section and the rules promulgated by the Supreme Court to implement this section, is subject to the contempt powers of the clerk and monetary sanctions. The monetary sanctions may include the payment of fines, attorneys' fees, mediator fees, and the expenses and loss of earnings incurred by persons attending the mediation. If the clerk imposes sanctions, the clerk shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate courts in accordance with G.S. 7A-38.1(g).

(k) Authority to Supplement Procedural Details. — The clerk of superior court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with rules adopted by the Supreme Court implementing this section. (2005-67, s. 1; 2008-194, s. 8(b).)

Subsection (j) Set Out Twice. — The first version of subsection (j) set out above is effective until January 1, 2009. The second version of subsection (j) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-194, s. 8(b), effective January 1, 2009, rewrote subsection (j).

§ 7A-38.4A. Settlement procedures in district court actions.

(a) The General Assembly finds that a system of settlement events should be established to facilitate the settlement of district court actions involving equitable distribution, alimony, or support and to make that litigation more economical, efficient, and satisfactory to the parties, their representatives, and the State. District courts should be able to require parties to those actions and their representatives to attend a pretrial mediated settlement conference or other settlement procedure conducted under this section and rules adopted by the Supreme Court to implement this section.

(b) The definitions in G.S. 7A-38.1(b)(2) and (b)(3) apply in this section.

(c) Any chief district court judge in a judicial district may order a mediated settlement conference or another settlement procedure, as provided under subsection (g) of this section, for any action pending in that district involving issues of equitable distribution, alimony, child or post separation support, or claims arising out of contracts between the parties under G.S. 52-10, G.S. 52-10.1, or Chapter 52B of the General Statutes. The chief district court judge may adopt local rules that order settlement procedures in all of the foregoing actions and designate other district court judges or administrative personnel to issue orders implementing those settlement procedures. However, local rules adopted by a chief district court judge shall not be inconsistent with any rules adopted by the Supreme Court.

(d) The parties to a district court action where a mediated settlement conference or other settlement procedure is ordered, their attorneys, and other persons or entities with authority, by law or contract, to settle a party's claim, shall attend the mediated settlement conference or other settlement procedure, unless the rules ordering the settlement procedure provide otherwise. No party or other participant in a mediated settlement conference or other settlement procedure is required to make a settlement offer or demand that the party or participant deems contrary to that party's or participant's best interests. Parties who have been victims of domestic violence may be excused from physically attending or participating in a mediated settlement conference or other settlement procedure.

(e) **(Effective until January 1, 2009)** Any person required to attend a mediated settlement conference or other settlement procedure under this section who, without good cause fails to attend, is subject to any appropriate monetary sanction imposed by a district court judge, including the payment of attorneys' fees, mediator fees, and expenses incurred in attending the settlement procedure. If the court imposes sanctions, it shall do so, after notice and hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal, and the entire record shall be reviewed to determine whether the order is supported by substantial evidence.

(e) **(Effective January 1, 2009)** Any person required to attend a mediated settlement conference or other settlement procedure under this section who, without good cause fails to attend or fails to pay any or all of the mediator or other neutral's fee in compliance with this section is subject to the contempt powers of the court and monetary sanctions imposed by a district court judge. A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all parties and upon any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the court imposes sanctions, it shall do so, after notice and hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable upon appeal, and the entire record shall be reviewed to determine whether the order is supported by substantial evidence.

(f) The parties to a district court action in which a mediated settlement conference is to be held under this section shall have the right to designate a mediator. Upon failure of the parties to designate within the time established by the rules adopted by the Supreme Court, a mediator shall be appointed by a district court judge.

(g) A chief district court judge or that judge's designee, at the request of a party and with the consent of all parties, may order the parties to attend and participate in any other settlement procedure authorized by rules adopted by the Supreme Court or adopted by local district court rules, in lieu of attending a mediated settlement conference. Neutrals acting under this section shall be selected and compensated in accordance with rules adopted by the Supreme Court. Nothing herein shall prohibit the parties from participating in other dispute resolution procedures, including arbitration, to the extent authorized under State or federal law. Nothing herein shall prohibit the parties from participating in mediation at a community mediation center operating under G.S. 7A-38.5.

(h) Mediators and other neutrals acting under this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators and other neutrals may be disciplined in accordance with enforcement procedures adopted by the Supreme Court under G.S. 7A-38.2.

(i) Costs of mediated settlement conferences and other settlement procedures shall be borne by the parties. Unless otherwise ordered by the court or agreed to by the parties, the mediator's fees shall be paid in equal shares by the parties. The rules adopted by the Supreme Court shall set out a method whereby a party found by the court to be unable to pay the costs of settlement procedures is afforded an opportunity to participate without cost to that party and without expenditure of State funds.

(j) Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(1) In proceedings for sanctions under this section;
(2) In proceedings to enforce or rescind a settlement of the action;
(3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
(4) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(k) The Supreme Court may adopt standards for the certification and conduct of mediators and other neutrals who participate in settlement procedures conducted under this section. The standards may also regulate mediator training programs. The Supreme Court may adopt procedures for the enforcement of those standards. The administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission.

(*l*) An administrative fee not to exceed two hundred dollars ($200.00) may be charged by the Administrative Office of the Courts to applicants for certification and annual renewal of certification for mediators and mediator training programs operating under this section. The fees collected may be used by the Director of the Administrative Office of the Courts to establish and maintain the operations of the Commission and its staff. The administrative fee shall be set by the Director of the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

(m) The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the chief district court judge of any district to report statistical data about settlement procedures conducted under this section for administrative purposes.

(n) Nothing in this section or in rules adopted by the Supreme Court implementing this section shall restrict a party's right to a trial by jury.

(o) The Supreme Court may adopt rules to implement this section. (1997-229, s. 1; 1998-212, s. 16.19(a); 1999-354, s. 6; 2000-140, s. 1; 2001-320, s. 2; 2001-487, s. 39; 2005-167, s. 3; 2008-194, s. 8(c).)

Subsection (e) Set Out Twice. — The first version of subsection (e) set out above is effective until January 1, 2009. The second version of subsection (e) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-194, s. 8(c), effective January 1, 2009, rewrote subsection (e).

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 7.

Organization.

§ 7A-41.1. District and set of districts defined; senior resident superior court judges and their authority.

Pilot Program for Alternative Scheduling. — Session Laws 2008-107, s. 14.1, provides: "Of the funds appropriated to the Office of Indigent Defense Services in this act, the Office of Indigent Defense Services may spend up to the sum of twenty-five thousand dollars ($25,000) to support one or more pilot programs of alternative scheduling in district or superior court that would reduce defense attorney wait time and State expense. The establishment of any pilot program under this section would require the prior agreement of the district attorney, chief district court judge, and senior resident superior court judge for the district."

Editor's Note. — Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

§ 7A-49.4. Superior court criminal case docketing.

Pilot Program for Alternative Scheduling. — Session Laws 2008-107, s. 14.1, provides: "Of the funds appropriated to the Office of Indigent Defense Services in this act, the Office of Indigent Defense Services may spend up to the sum of twenty-five thousand dollars ($25,000) to support one or more pilot programs of alternative scheduling in district or superior court that would reduce defense attorney wait time and State expense. The establishment of any pilot program under this section would require the prior agreement of the district attorney, chief district court judge, and senior resident superior court judge for the district."

Editor's Note. — Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

ARTICLE 9.

District Attorneys and Judicial Districts.

§ 7A-60. District attorneys and prosecutorial districts.

(a) The State shall be divided into prosecutorial districts, as shown in subsection (a1) of this section. There shall be a district attorney for each prosecutorial district, as provided in subsections (b) and (c) of this section who shall be a resident of the prosecutorial district for which elected. A vacancy in the office of district attorney shall be filled as provided in Article IV, Sec. 19 of the Constitution.

(a1) **(Effective until January 1, 2009)** The counties of the State are organized into prosecutorial districts, and each district has the counties and the number of full-time assistant district attorneys set forth in the following table:

Prosecutorial District	*Counties*	*No. of Full-Time Asst. District Attorneys*
1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	11
2	Beaufort, Hyde, Martin, Tyrrell, Washington	8
3A	Pitt	11
3B	Carteret, Craven, Pamlico	12
4	Duplin, Jones, Onslow, Sampson	18
5	New Hanover, Pender	18
6A	Halifax	5
6B	Bertie, Hertford, Northampton	6
7	Edgecombe, Nash, Wilson	19
8	Greene, Lenoir, Wayne	14
9	Franklin, Granville, Vance, Warren	12
9A	Person, Caswell	6
10	Wake	42
11	Harnett, Johnston, Lee	19
12	Cumberland	23
13	Bladen, Brunswick, Columbus	13
14	Durham	18
15A	Alamance	11
15B	Orange, Chatham	10
16A	Scotland, Hoke	7
16B	Robeson	13
17A	Rockingham	7
17B	Stokes, Surry	8
18	Guilford	32
19A	Cabarrus	9
19B	Montgomery, Randolph	10

G.S. 7A-60(a1) is set out twice. See note.

Prosecutorial District	*Counties*	*No. of Full-Time Asst. District Attorneys*
19C	Rowan	8
19D	Moore	5
20A	Anson, Richmond, Stanly	12
20B	Union	10
21	Forsyth	25
22	Alexander, Davidson, Davie, Iredell	20
23	Alleghany, Ashe, Wilkes, Yadkin	8
24	Avery, Madison, Mitchell, Watauga, Yancey	7
25	Burke, Caldwell, Catawba	19
26	Mecklenburg	58
27A	Gaston	15
27B	Cleveland, Lincoln	11
28	Buncombe	14
29A	McDowell, Rutherford	7
29B	Henderson, Polk, Transylvania	8
30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain.	11

(a1) **(Effective January 1, 2009)** The counties of the State are organized into prosecutorial districts, and each district has the counties and the number of full-time assistant district attorneys set forth in the following table:

Prosecutorial District	*Counties*	*No. of Full-Time Asst. District Attorneys*
1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	11
2	Beaufort, Hyde, Martin, Tyrrell, Washington	8
3A	Pitt	11
3B	Carteret, Craven, Pamlico	12
4	Duplin, Jones, Onslow, Sampson	18
5	New Hanover, Pender	18
6A	Halifax	5
6B	Bertie, Hertford, Northampton	6
7	Edgecombe, Nash, Wilson	19
8	Greene, Lenoir, Wayne	14
9	Franklin, Granville,	12

G.S. 7A-60(a1) is set out twice. See note.

Prosecutorial District	*Counties*	*No. of Full-Time Asst. District Attorneys*
	Vance, Warren	
9A	Person, Caswell	6
10	Wake	42
11	Harnett, Johnston, Lee	19
12	Cumberland	23
13	Bladen, Brunswick, Columbus	13
14	Durham	18
15A	Alamance	11
15B	Orange, Chatham	10
16A	Scotland, Hoke	7
16B	Robeson	13
17A	Rockingham	7
17B	Stokes, Surry	8
18	Guilford	32
19A	Cabarrus	9
19B	Montgomery, Randolph	10
19C	Rowan	8
19D	Moore	5
20A	Anson, Richmond, Stanly	12
20B	Union	10
21	Forsyth	25
22A	Alexander, Iredell	11
22B	Davidson, Davie	11
23	Alleghany, Ashe, Wilkes, Yadkin	8
24	Avery, Madison, Mitchell, Watauga, Yancey	7
25	Burke, Caldwell, Catawba	19
26	Mecklenburg	58
27A	Gaston	15
27B	Cleveland, Lincoln	11
28	Buncombe	14
29A	McDowell, Rutherford	7
29B	Henderson, Polk, Transylvania	8
30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain.	11

(a2) Upon the convening of each regular session of the General Assembly and its reconvening in the even-numbered year, the Administrative Office of the Courts shall report its recommendations regarding the allocation of assistant district attorneys for the upcoming fiscal biennium and fiscal year to the General Assembly, including any request for additional assistant district attorneys. The report shall include the number of assistant district attorneys that the Administrative Office of the Courts recommends to be allocated to each prosecutorial district and the caseload and criteria on which each recommended allocation is based. Any reports required under this subsection shall be made to the Joint Legislative Commission of Governmental Operations, the House of Representatives and Senate Appropriations Subcommittees on Justice and Public, and the Fiscal Research Division.

(b) Except as provided in subsection (c) of this section, each district attorney for a prosecutorial district as defined in subsection (a1) of this section, other than District 19B, who is in office on December 31, 1988, shall continue in office for that prosecutorial district, for a term expiring December 31, 1990. In the general election of 1990, and every four years thereafter, a district attorney shall be elected for a four-year term for each prosecutorial district other than Districts 16A and 19B, and shall take office on the January 1 following such election. The district attorney for Prosecutorial District 19B, who is elected in the general election of 1988 for a four-year term beginning January 1, 1989, shall serve that term for Prosecutorial District 19B. In the general election of 1992, and every four years thereafter, a district attorney shall be elected for a four-year term for Prosecutorial Districts 16A and 19B and shall take office on the January 1 following such election.

(c) The office and term of the district attorney for Prosecutorial District 12 formerly consisting of Cumberland and Hoke Counties are allocated to Prosecutorial District 12 as defined by subsection (a1) of this section. The office and the term of the district attorney for former Prosecutorial District 16 consisting of Robeson and Scotland Counties are allocated to Prosecutorial District 16B as defined by subsection (a1) of this section. The initial district attorney for Prosecutorial District 16A as defined in subsection (a1) of this section shall be elected in the general election of November 1988, from nominations made in accordance with G.S. 163-114 as if a vacancy had occurred in nomination, and shall serve an initial term expiring December 31, 1992. In all other respects, subsection (b) of this section shall apply to the district attorneys for Prosecutorial Districts 12, 16A, and 16B to the same extent as all other district attorneys. (1967, c. 1049, s. 1; 1975, c. 956, s. 4; 1977, c. 1130, s. 3; 1977, 2nd Sess., c. 1238, s. 2; 1981, c. 964, ss. 2, 3; 1987, c. 509, ss. 4, 5; c. 738, s. 127(a); 1987 (Reg. Sess., 1988), c. 1056, s. 1; c. 1086, s. 111; 1989, c. 770, ss. 1, 56; c. 795, s. 24(a), (e); 1991, c. 742, s. 13; 1991 (Reg. Sess., 1992), c. 900, s. 120(a), (b); 1993, c. 321, ss. 200.4(*l*), 200.7(a), (b); 1995, c. 507, s. 21.7; 1995 (Reg. Sess., 1996), c. 589, s. 3(a); 1996, 2nd Ex. Sess., c. 18, s. 22(a); 1997-443, s. 18.11(a); 1998-212, s. 16.20(a); 1999-237, s. 17.8(a); 2004-124, s. 14.6(h); 2005-276, s. 14.2(*l*); 2006-66, ss. 14.3(a), 14.19(a); 2007-323, ss. 14.14(a), (b), 14.25(j); 2008-107, s. 14.6.)

Subsection (a1) Set Out Twice. — The first version of subsection (a1) set out above is effective until January 1, 2009. The second version of subsection (a1) set out above is effective January 1, 2009.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 14.6, effective July 1, 2008, rewrote the second version of subsection (a1), which is effective January 1, 2009.

ARTICLE 12.

Clerk of Superior Court.

§ 7A-101. Compensation.

(a) The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county as determined in subsection (a1) of this section, according to the following schedule:

Population	*Annual Salary*
Less than 100,000	$ 82,401
100,000 to 149,999	92,468
150,000 to 249,999	102,536
250,000 and above	112,607.

When a county changes from one population group to another, the salary of the clerk shall be changed, on July 1 of the fiscal year for which the change is reported, to the salary appropriate for the new population group, except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

(a1) For purposes of subsection (a) of this section, the population of a county for any fiscal year shall be the population for the beginning of that fiscal year as reported by the Office of State Budget and Management to the Administrative Office of the Courts prior to the beginning of that fiscal year.

(b) The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office.

(c) In lieu of merit and other increment raises paid to regular State employees, a clerk of superior court shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the clerk's annual salary payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, nineteen and two-tenths percent (19.2%) after 20 years of service, and twenty-four percent (24%) after 25 years of service. Service shall mean service in the elective position of clerk of superior court, as an assistant clerk of court and as a supervisor of clerks of superior court with the Administrative Office of the Courts and shall not include service as a deputy or acting clerk. Service shall also mean service as a justice, judge, or magistrate of the General Court of Justice or as a district attorney. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13; 1979, c. 838, s. 85; 1979, 2nd Sess., c. 1137, s. 12; 1981, c. 964, s. 14; c. 1127, s. 12; 1983, c. 761, ss. 200, 247, 249; 1983 (Reg. Sess., 1984), c. 1034, ss. 86, 87; c. 1109, s. 13.1; 1985, c. 479, s. 211; c. 689, s. 3; c. 698, s. 10(c); 1985 (Reg. Sess., 1986), c. 1014, s. 34; 1987, c. 738, s. 20; 1987 (Reg. Sess., 1988), c. 1086, s. 14; c. 1100, ss. 16(a), 17; 1989, c. 752, s. 31; c. 799, s. 27(a); 1991 (Reg. Sess., 1992), c. 900, s. 40; c. 1039, s. 21; 1993, c. 321, s. 57(a); 1993 (Reg. Sess., 1994), c. 769, s. 7.10(a); 1996, 2nd Ex. Sess., c. 18, s. 28.4; 1997-443, s. 33.9; 1998-153, s. 7; 1999-237, s. 28.4; 2000-67, s. 26.4; 2000-140, s. 93.1(b); 2001-424, ss. 12.2(b), 32.5; 2004-124, s. 31.5(b); 2005-276, ss. 29.5, 29.23B; 2006-66, s. 22.5; 2007-323, ss. 28.5, 28.18A(e); 2008-107, s. 26.5.)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 26.5, effective July 1, 2008, updated the Annual Salary column in the first paragraph of subsection (a).

§ 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

(a) The numbers and salaries of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court shall be determined by the Administrative Officer of the Courts after consultation with the clerk concerned. All personnel in the clerk's office are employees of the State. The clerk appoints the assistants, deputies, and other employees in the clerk's office to serve at his or her pleasure. Assistant and deputy clerks shall take the oath of office prescribed for clerks of superior court, conformed to the office of assistant or deputy clerk, as the case may be. Except as provided by subsection (c2) of this section, the job classifications and related salaries of each employee within the office of each superior court clerk shall be subject to the approval of the Administrative Officer of the Courts after consultation with each clerk concerned and shall be subject to the availability of funds appropriated for that purpose by the General Assembly.

(b) An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk. A deputy clerk is authorized to certify the existence and correctness of any record in the clerk's office, to take the proofs and examinations of the witnesses touching the execution of a will as required by G.S. 31-17, and to perform any other ministerial act which the clerk may be authorized and empowered to do, in his own name and without reciting the name of his principal. The clerk is responsible for the acts of his assistants and deputies. With the consent of the clerk of superior court of each county and the consent of the presiding judge in any proceeding, an assistant or deputy clerk is authorized to perform all the duties and functions of the office of the clerk of superior court in another county in any proceeding in the district or superior court that has been transferred to that county from the county in which the assistant or deputy clerk is employed.

(c) Notwithstanding the provisions of subsection (a), the Administrative Officer of the Courts shall establish an incremental salary plan for assistant clerks and for deputy clerks based on a series of salary steps corresponding to the steps contained in the Salary Plan for State Employees adopted by the Office of State Personnel, subject to a minimum and a maximum annual salary as set forth below. On and after July 1, 1985, each assistant clerk and each deputy clerk shall be eligible for an annual step increase in his salary plan based on satisfactory job performance as determined by each clerk. Notwithstanding the foregoing, if an assistant or deputy clerk's years of service in the office of superior court clerk would warrant an annual salary greater than the salary first established under this section, that assistant or deputy clerk shall be eligible on and after July 1, 1984, for an annual step increase in his salary plan. Furthermore, on and after July 1, 1985, that assistant or deputy clerk shall be eligible for an increase of two steps in his salary plan, and shall remain eligible for a two-step increase each year as recommended by each clerk until that assistant or deputy clerk's annual salary corresponds to his number of years of service. Any person covered by this subsection who would not receive a step increase in fiscal year 1995-96 because that person is at the top of the salary range as it existed for fiscal year 1994-95 shall receive a salary increase to the maximum annual salary provided by subsection (c1) of this section.

(c1) A full-time assistant clerk or a full-time deputy clerk, and up to one full-time deputy clerk serving as head bookkeeper per county, shall be paid an annual salary subject to the following minimum and maximum rates:

Assistant Clerks and Head Bookkeeper	*Annual Salary*
Minimum	$32,222
Maximum	54,767

Deputy Clerks	*Annual Salary*
Minimum	$27,888
Maximum	42,596.

(c2) The clerk of superior court may appoint assistant clerks, deputy clerks, and a head bookkeeper and set their salaries above the minimum rate established for the positions by subsection (c1) of this section if, in the clerk's discretion, (i) the needs of the clerk's office would be best served by an appointment above the minimum rate, (ii) the appointee's skills and experience support the higher rate, and (iii) the Administrative Office of the Courts certifies that there are sufficient funds available.

(d) Full-time assistant clerks, licensed to practice law in North Carolina, who are employed in the office of superior court clerk on and after July 1, 1984, and full-time assistant clerks possessing a masters degree in business administration, public administration, accounting, or other similar discipline from an accredited college or university who are employed in the office of superior court clerk on and after July 1, 1997, are authorized an annual salary of not less than three-fourths of the maximum annual salary established for assistant clerks; the clerk of superior court, with the approval of the Administrative Office of the Courts, may establish a higher annual salary but that salary shall not be higher than the maximum annual salary established for assistant clerks. Full-time assistant clerks, holding a law degree from an accredited law school, who are employed in the office of superior court clerk on and after July 1, 1984, are authorized an annual salary of not less than two-thirds of the maximum annual salary established for assistant clerks; the clerk of superior court, with the approval of the Administrative Office of the Courts, may establish a higher annual salary, but the entry-level salary may not be more than three-fourths of the maximum annual salary established for assistant clerks, and in no event may be higher than the maximum annual salary established for assistant clerks. Except as provided by subsection (c2) of this section, the entry-level annual salary for all other assistant and deputy clerks employed on and after July 1, 1984, shall be at the minimum rates as herein established.

(e) A clerk of superior court may apply to the Director of the Administrative Office of the Courts to enter into contracts with local governments for the provision by the State of services of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court pursuant to G.S. 153A-212.1 or G.S. 160A-289.1.

(f) The Director of the Administrative Office of the Courts may provide assistance requested pursuant to subsection (e) of this section only upon a showing by the senior resident superior court judge, supported by facts, that the overwhelming public interest warrants the use of additional resources for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving a threat to public safety.

(g) The terms of any contract entered into with local governments pursuant to subsection (e) of this section shall be fixed by the Director of the Administrative Office of the Courts in each case. Nothing in this section shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this section or to obligate the Administrative Office of the Courts to provide the administrative costs of establishing or maintaining the positions or services provided for under this section. Further, nothing in this section shall be construed to obligate the Administrative Office of the Courts to maintain positions or services initially provided for under this section. (1777, c. 115, s. 86; P.R.; R.C., c. 19, s. 15; Code, s. 75; 1899, c. 235, ss.

2, 3; Rev., ss. 898-900; 1921, c. 32, ss. 1-3; C.S., ss. 934(a)-934(c), 935-937; 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1963, c. 1187; 1965, c. 264; c. 310, s. 1; 1971, c. 363, s. 2; 1973, c. 678; 1983 (Reg. Sess., 1984), c. 1034, ss. 88, 89; 1985, c. 479, s. 212; c. 757, s. 190; 1985 (Reg. Sess., 1986), c. 1014, s. 35; 1987, c. 738, s. 21(a); 1987 (Reg. Sess., 1988), c. 1086, s. 15; 1989, c. 445; c. 752, s. 32; 1991 (Reg. Sess., 1992), c. 900, ss. 42, 119; 1993, c. 321, ss. 58, 59; 1993 (Reg. Sess., 1994), c. 769, ss. 7.11, 7.12; 1995, c. 507, s. 7.6(a), (b); 1996, 2nd Ex. Sess., c. 18, s. 28.5; 1997-443, ss. 33.12, 33.10(b); 1998-153, s. 8(b); 1999-237, s. 28.5; 2000-67, ss. 15.4(b), 26.5; 2001-424, s. 32.6; 2003-284, s. 30.14B; 2004-124, s. 31.6(b); 2005-276, s. 29.6; 2006-66, s. 22.6; 2007-323, s. 28.6; 2008-107, s. 26.6.)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 26.6, effective July 1, 2008, increased the amounts in the Annual Salary columns in subsection (c1).

§ 7A-109. Record-keeping procedures.

Editor's Note. —

Session Laws 2008-107, s. 6.15, provides: "(a) The General Assembly finds that the State's Uniform Crime Reporting technology is based on procedures developed in the 1930s and a design plan developed in the late 1980s. Based on recent unfortunate events, it is abundantly clear that the State must establish a framework for sharing critical information, and the framework must be implemented as soon as possible. With improved access to timely, complete, and accurate information, the members of the General Assembly, leadership in State and local law enforcement agencies, law enforcement officers, and everyone working in the criminal justice system can enhance their ability to make decisions on behalf of the people of the State, with fewer decisions based on instinct or guesswork.

"The General Assembly further finds that the April 2008 Beacon Report on a Strategic Plan for Data Integration recommends the development and implementation of a Crime Reporting Re-Design Project, a statewide crime analysis system designed to save time, save money, and save lives.

"(b) The Office of the State Controller, in cooperation with the State Chief Information Officer, and under the governance of the BEACON Project Steering Committee, shall by May 1, 2009, develop and implement a Criminal Justice Data Integration Pilot Program in Wake County in cooperation and communication with the advisory committee established pursuant to subsection (c) of this section and the leadership of State and local agencies. This pilot program shall integrate and provide up-to-date criminal information in a centralized location via a secure connection for use by State and local government. The pilot program vendor shall be selected by October 1, 2008.

"While it is the intent that this initiative provide a broad new access to information across State government, the plan shall comply with all necessary security measures and restrictions to ensure that access to any specific information held confidential under federal and State law shall be limited to authorized persons.

"(c) The Advisory Committee to the Criminal Justice Data Integration Pilot program is hereby established. The Advisory Committee shall consist of the following members:

"(1) The District Attorney for Prosecutorial District 10, who shall serve as chair.

"(2) The senior resident superior court judge for Superior Court Districts 10A through 10D.

"(3) A Wake County magistrate designated by the senior resident superior court judge.

"(4) The Clerk of Superior Court of Wake County.

"(5) The sheriff of Wake County.

"(6) The judicial district manager for District 10 of the Division of Community Corrections.

"(7) The chief court counselor for District Court District 10.

"(8) The president of Duke University and the chancellor of The University of North Carolina, or their designees.

"(d) The Advisory Committee, the Department of Justice, the Administrative Office of the Courts, the Department of Juvenile Justice and Delinquency Prevention, the Department of Correction, the Department of Crime Control and Public Safety, the Department of Transportation, and local law enforcement agencies shall fully cooperate with the Office of the State Controller and the State Chief Information

Officer, under the guidance of the BEACON Steering Committee, to identify the informational needs, develop a plan of action, provide access to data, and implement secure integrated applications for information sharing of criminal justice and corrections data.

"(e) Of the funds appropriated in this act, the sum of five million dollars ($5,000,000) may be used to support the Criminal Justice Data Integration Pilot Program. Other funds available to BEACON may also be used for this purpose.

"The Office of the State Controller, with the support of the Office of State Budget and Management, shall identify and make all efforts to secure any matching funds or other resources to assist in funding this initiative.

"(f) The Office of the State Controller, with the support of the Advisory Committee and the State Chief Information Officer, shall provide a written report of the plan's implementation progress to the House of Representatives and Senate Appropriations Committees, to the Joint Legislative Oversight Committee on Information Technology, and to the Fiscal Research Division on a quarterly basis beginning October 1, 2008."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

CASE NOTES

Cited in State v. Mead, 362 N.C. 218, 657 S.E.2d 367, 2008 N.C. LEXIS 147 (2008).

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 13.

Creation and Organization of the District Court Division.

§ 7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

(a) (**Effective until January 1, 2009**) Each district court district shall have the numbers of judges as set forth in the following table:

District	Judges	County
1	5	Camden
		Chowan
		Currituck
		Dare
		Gates
		Pasquotank
		Perquimans
2	4	Martin
		Beaufort
		Tyrrell
		Hyde
		Washington

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
3A	5	Pitt
3B	6	Craven Pamlico Carteret
4	8	Sampson Duplin Jones Onslow
5	8	New Hanover Pender
6A	3	Halifax
6B	3	Northampton Bertie Hertford
7	7	Nash Edgecombe Wilson
8	6	Wayne Greene Lenoir
9	4	Granville (part of Vance see subsection (b)) Franklin
9A	2	Person Caswell
9B	2	Warren (part of Vance see subsection (b))
10	17	Wake
11	10	Harnett Johnston Lee
12	10	Cumberland
13	6	Bladen Brunswick Columbus
14	7	Durham
15A	4	Alamance
15B	5	Orange Chatham
16A	3	Scotland Hoke
16B	5	Robeson
17A	3	Rockingham
17B	4	Stokes Surry

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
18	14	Guilford
19A	4	Cabarrus
19B	7	Montgomery Moore Randolph
19C	5	Rowan
20A	4	Stanly Anson Richmond
20B	1	(part of Union see subsection (b))
20C	2	(part of Union see subsection (b))
20D	1	Union
21	10	Forsyth
22	9	Alexander Davidson Davie Iredell
23	4	Alleghany Ashe Wilkes Yadkin
24	4	Avery Madison Mitchell Watauga Yancey
25	9	Burke Caldwell Catawba
26	19	Mecklenburg
27A	7	Gaston
27B	5	Cleveland Lincoln
28	7	Buncombe
29A	3	McDowell Rutherford
29B	4	Henderson Polk Transylvania
30	6	Cherokee Clay Graham Haywood Jackson

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
		Macon
		Swain.

(a) **(Effective January 1, 2009, until January 15, 2009)** Each district court district shall have the numbers of judges as set forth in the following table:

District	Judges	County
1	5	Camden
		Chowan
		Currituck
		Dare
		Gates
		Pasquotank
		Perquimans
2	4	Martin
		Beaufort
		Tyrrell
		Hyde
		Washington
3A	5	Pitt
3B	6	Craven
		Pamlico
		Carteret
4	8	Sampson
		Duplin
		Jones
		Onslow
5	8	New Hanover
		Pender
6A	3	Halifax
6B	3	Northampton
		Bertie
		Hertford
7	7	Nash
		Edgecombe
		Wilson
8	6	Wayne
		Greene
		Lenoir
9	4	Granville
		(part of Vance see subsection (b))
		Franklin
9A	2	Person

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
		Caswell
9B	2	Warren
		(part of Vance see subsection (b))
10	17	Wake
11	10	Harnett
		Johnston
		Lee
12	10	Cumberland
13	6	Bladen
		Brunswick
		Columbus
14	7	Durham
15A	4	Alamance
15B	5	Orange
		Chatham
16A	3	Scotland
		Hoke
16B	5	Robeson
17A	3	Rockingham
17B	4	Stokes
		Surry
18	14	Guilford
19A	4	Cabarrus
19B	7	Montgomery
		Moore
		Randolph
19C	5	Rowan
20A	4	Stanly
		Anson
		Richmond
20B	1	(part of Union see subsection (b))
20C	2	(part of Union see subsection (b))
20D	1	Union
21	10	Forsyth
22A	5	Alexander
		Iredell
22B	6	Davidson
		Davie
23	4	Alleghany
		Ashe
		Wilkes
		Yadkin
24	4	Avery
		Madison

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
		Mitchell
		Watauga
		Yancey
25	9	Burke
		Caldwell
		Catawba
26	19	Mecklenburg
27A	7	Gaston
27B	5	Cleveland
		Lincoln
28	7	Buncombe
29A	3	McDowell
		Rutherford
29B	4	Henderson
		Polk
		Transylvania
30	6	Cherokee
		Clay
		Graham
		Haywood
		Jackson
		Macon
		Swain.

(a) (**Contingently effective January 15, 2009; see note for contingency regarding District 11**) Each district court district shall have the numbers of judges as set forth in the following table:

District	Judges	County
1	5	Camden
		Chowan
		Currituck
		Dare
		Gates
		Pasquotank
		Perquimans
2	4	Martin
		Beaufort
		Tyrrell
		Hyde
		Washington
3A	5	Pitt
3B	6	Craven
		Pamlico
		Carteret

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
4	8	Sampson Duplin Jones Onslow
5	9	New Hanover Pender
6A	3	Halifax
6B	3	Northampton Bertie Hertford
7	7	Nash Edgecombe Wilson
8	6	Wayne Greene Lenoir
9	4	Granville (part of Vance see subsection (b)) Franklin
9A	2	Person Caswell
9B	2	Warren (part of Vance see subsection (b))
10	19	Wake
11	11	Harnett Johnston Lee
12	10	Cumberland
13	6	Bladen Brunswick Columbus
14	7	Durham
15A	4	Alamance
15B	5	Orange Chatham
16A	3	Scotland Hoke
16B	5	Robeson
17A	3	Rockingham
17B	4	Stokes Surry
18	14	Guilford
19A	4	Cabarrus
19B	7	Montgomery Moore

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
		Randolph
19C	5	Rowan
20A	4	Stanly
		Anson
		Richmond
20B	1	(part of Union see subsection (b))
20C	2	(part of Union see subsection (b))
20D	1	Union
21	10	Forsyth
22A	5	Alexander
		Iredell
22B	6	Davidson
		Davie
23	4	Alleghany
		Ashe
		Wilkes
		Yadkin
24	4	Avery
		Madison
		Mitchell
		Watauga
		Yancey
25	9	Burke
		Caldwell
		Catawba
26	21	Mecklenburg
27A	7	Gaston
27B	5	Cleveland
		Lincoln
28	7	Buncombe
29A	3	McDowell
		Rutherford
29B	4	Henderson
		Polk
		Transylvania
30	6	Cherokee
		Clay
		Graham
		Haywood
		Jackson
		Macon
		Swain.

(b) For district court districts of less than a whole county, or with part or all of one county with part of another, the composition of the district is as follows:

(1) District Court District 9 consists of Franklin and Granville Counties and the remainder of Vance County not in District Court District 9B.

(2) District Court District 9B consists of Warren County and East Henderson I, North Henderson I, North Henderson II, Middleburg, Townsville, and Williamsboro Precincts of Vance County.

(3) District Court District 20C consists of the remainder of Union County not in District Court District 20B.

(4) District Court District 20B consists of Precinct 01: Tract 204.01: Block Group 2: Block 2040, Block 2057, Block 2058, Block 2060, Block 2061, Block 2062, Block 2064, Block 2065; Tract 204.02: Block Group 2: Block 2001, Block 2002, Block 2003, Block 2004, Block 2005, Block 2006, Block 2007, Block 2008, Block 2009, Block 2010, Block 2011, Block 2012, Block 2013, Block 2014, Block 2015, Block 2016, Block 2017, Block 2018, Block 2023, Block 2024, Block 2025, Block 2026, Block 2027, Block 2028, Block 2029, Block 2030, Block 2031, Block 2032, Block 2033, Block 2034; Block Group 3: Block 3000, Block 3003, Block 3004, Block 3005, Block 3006, Block 3007, Block 3008, Block 3009, Block 3010, Block 3011, Block 3012, Block 3013, Block 3014, Block 3015, Block 3016, Block 3017, Block 3018, Block 3019, Block 3020, Block 3021, Block 3022, Block 3023, Block 3024, Block 3025, Block 3026, Block 3027, Block 3028, Block 3029, Block 3030, Block 3031, Block 3032, Block 3033, Block 3034, Block 3035, Block 3036, Block 3037, Block 3038, Block 3039, Block 3040, Block 3041, Block 3042, Block 3043, Block 3044, Block 3045, Block 3046, Block 3047; Block Group 4: Block 4035, Block 4054, Block 4055; Precinct 02: Tract 205: Block Group 1: Block 1000, Block 1001, Block 1002, Block 1003, Block 1004, Block 1005, Block 1006, Block 1007, Block 1009, Block 1010, Block 1011, Block 1012, Block 1013, Block 1014, Block 1015, Block 1016, Block 1017, Block 1018, Block 1019, Block 1020, Block 1021, Block 1022, Block 1023, Block 1037, Block 1038; Block Group 2: Block 2081, Block 2082, Block 2092, Block 2099, Block 2100, Block 2101, Block 2102; Tract 206: Block Group 3: Block 3036, Block 3038, Block 3039, Block 3040, Block 3048; Block Group 4: Block 4053; Precinct 03, Precinct 04, Precinct 06: Tract 202.02: Block Group 1: Block 1012, Block 1013, Block 1014, Block 1015, Block 1017, Block 1018, Block 1021, Block 1022, Block 1023; Tract 204.01: Block Group 2: Block 2000, Block 2001, Block 2002, Block 2003, Block 2004, Block 2005, Block 2033, Block 2034, Block 2035, Block 2036, Block 2041, Block 2042, Block 2043, Block 2044, Block 2045, Block 2056, Block 2063, Block 2999; Precinct 08, Precinct 09, Precinct 10, Precinct 13, Precinct 23: Tract 206: Block Group 4: Block 4051; Precinct 25: Tract 206: Block Group 4: Block 4036; Precinct 34, Precinct 36, Precinct 43 of Union County.

Precinct boundaries as used in this section for Vance County are those shown on maps on file with the Legislative Services Office on May 1, 1991, for Union County, are those shown on the Legislative Services Office's redistricting computer database on January 1, 2005; and for other counties are those reported by the United States Bureau of the Census under Public Law 94-171 for the 1990 Census in the IVTD Version of the TIGER files.

(b1) The qualified voters of District Court District 11 shall elect all eight judges established for the District in subsection (a) of this section, but only persons who reside in Johnston County may be candidates for five of the judgeships, only persons who reside in Harnett County may be candidates for two of the judgeships, and only persons who reside in Lee County may be candidates for the remaining judgeship.

(b2) The qualified voters of District Court District 13 shall elect all six judges established for the District in subsection (a) of this section, but only persons who reside in Bladen County may be candidates for one of those judgeships, only persons who reside in Columbus County may be candidates for one of those judgeships, and only persons who reside in Brunswick County may be candidates for two of those judgeships. The district court judgeship established for residents of Bladen County by this subsection shall be the judgeship currently held by Judge Phillips, who resides in Bladen County. The district court judgeship established for residents of Columbus County by this subsection shall be the judgeship currently held by Judge Jolly, who resides in Columbus County. The district court judgeships established for residents of Brunswick County by this subsection shall be the judgeships currently held by Judge Barefoot and Judge Warren, who reside in Brunswick County. Those judges' successors shall be elected for four-year terms in the 2008 general election. Candidates for the remaining judgeships in District 13 may be residents of any county within the district.

(b3) (**Effective January 1, 2009**) The qualified voters of District Court District 22A shall elect all five judges established for the District in subsection (a) of this section, but only persons who reside in Alexander County may be candidates for two of the judgeships, and only persons who reside in Iredell County may be candidates for three of the judgeships.

(b4) (**Effective January 1, 2009**) The qualified voters of District Court District 22B shall elect all six judges established for the District in subsection (a) of this section, but only persons who reside in Davie County may be candidates for two of the judgeships, and only persons who reside in Davidson County may be candidates for four of the judgeships.

(c) Each county shall have the numbers of magistrates and additional seats of district court, as set forth in the following table:

County	Magistrates Min.	Additional Seats of Court
Camden	3	
Chowan	3	
Currituck	4	
Dare	6	
Gates	2	
Pasquotank	5	
Perquimans	3	
Martin	4	
Beaufort	5.05	
Tyrrell	3	
Hyde	3.5	
Washington	4	
Pitt	10.5	Farmville Ayden
Craven	10	Havelock
Pamlico	3	
Carteret	9	
Sampson	7	
Duplin	8	
Jones	2	
Onslow	11	
New Hanover	11	
Pender	4.8	
Halifax	12	Roanoke

County	Magistrates Min.	Additional Seats of Court
		Rapids, Scotland Neck
Northampton	5.25	
Bertie	5	
Hertford	6	
Nash	9	Rocky Mount
Edgecombe	7	Rocky Mount
Wilson	7	
Wayne	9	Mount Olive
Greene	4	
Lenoir	7	La Grange
Granville	7	
Vance	6	
Warren	3.5	
Franklin	7	
Person	4	
Caswell	4	
Wake	18.5	Apex, Wendell, Fuquay-Varina, Wake Forest
Harnett	10	Dunn
Johnston	11	Benson, Clayton, Selma
Lee	5.5	
Cumberland	19	
Bladen	5	
Brunswick	9	
Columbus	9.5	Tabor City
Durham	13	
Alamance	12	Burlington
Orange	9	Chapel Hill
Chatham	6	Siler City
Scotland	5	
Hoke	5	
Robeson	15	Fairmont, Maxton, Pembroke, Red Springs, Rowland, St. Pauls
Rockingham	9	Reidsville, Eden, Madison
Stokes	5	

County	Magistrates Min.	Additional Seats of Court
Surry	9	Mt. Airy
Guilford	24.4	High Point
Cabarrus	9	Kannapolis
Montgomery	5	
Randolph	10	Liberty
Rowan	9	
Stanly	6	
Union	7	
Anson	5	
Richmond	6	Hamlet
Moore	6.5	Southern Pines
Forsyth	15	Kernersville
Alexander	4	
Davidson	10	Thomasville
Davie	4	
Iredell	9	Mooresville
Alleghany	2	
Ashe	4	
Wilkes	6	
Yadkin	4	
Avery	4	
Madison	4	
Mitchell	4	
Watauga	5	
Yancey	3	
Burke	6.75	
Caldwell	7	
Catawba	10	Hickory
Mecklenburg	26.50	
Gaston	17	
Cleveland	8	
Lincoln	6	
Buncombe	15	
Henderson	6.5	
McDowell	4.5	
Polk	4	
Rutherford	7	
Transylvania	4	
Cherokee	4	
Clay	2	
Graham	2	
Haywood	6.75	Canton
Jackson	5	
Macon	3.5	
Swain	3.75	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6; 1979, c. 465; c. 838, ss. 117, 118; c. 1072, ss. 2, 3; 1979, 2nd Sess., c. 1221, s. 2; 1981, c. 964, s. 4; 1983, c. 881, s. 5; 1983 (Reg. Sess., 1984), c. 1109, s. 5; 1985, c. 698, ss. 7(a), 12; 1985 (Reg. Sess., 1986), c. 1014, s. 222; 1987, c. 738, ss. 126(a), 130(a); 1987 (Reg. Sess., 1988), c. 1056, s. 4; c. 1075; c. 1100, s. 17.2(a); 1989, c. 795, s. 23(a), (d), (h); 1991, c. 742, ss. 11, 12(a); 1993, c. 321, ss. 200.4(e), 200.6(a), (d); 1993 (Reg. Sess., 1994), c. 769, s. 24.9; 1995, c. 507, s. 21.1(c); 1995 (Reg. Sess., 1996), c. 589, s. 2(a); 1996, 2nd Ex. Sess., c. 18, ss. 22.4, 22.7(a); 1997-443, ss. 18.12(a), 18.13; 1998-212, ss. 16.11, 16.16(a); 1998-217, s. 67.3(a); 1999-237, ss. 17.4, 17.6(a); 2000-67, ss. 15.2, 15.3(a); 2001-400, s. 1; 2001-424, ss. 22.16, 22.17(a); 2003-284, s. 13.8; 2004-124, ss. 14.1(a), 14.6(e); 2005-276, s. 14.2(f), (f1); 2005-345, s. 27(a), (b); 2006-66, ss. 14.4(a), 14.5; 2006-96, s. 1; 2006-187, s. 7(a); 2006-221, s. 14(a); 2006-264, s. 93(a); 2007-323, ss. 14.13(a), (d), 14.25(e), (f); 2007-484, s. 25(a), 36; 2008-107, s. 14.13(a).)

Subsection (a) Set Out Three Times. — The first version of subsection (a) set out above is effective until January 1, 2009. The second version of subsection (a) set out above is effective from January 1, 2009, until January 15, 2009. The third version of subsection (a) set out above is effective January 15, 2009, but see note regarding contingency for District 11.

Preclearance Under § 5 of the Voting Rights Act.

Session Laws 2008-107, s. 14.13(c), provides: "As to District 11, subsection (a) of this section becomes effective January 15, 2009, or 15 days after preclearance under section 5 of the Voting Rights Act of 1965, whichever is later. The remainder of this section becomes effective January 15, 2009."

Editor's Note.

Session Laws 2008-107, s. 14.13(b), provides: "The Governor shall appoint the additional district court judges for Districts 10, 11, and 26 authorized by subsection (a) of this section, and those judges' successors shall be elected in the 2010 election for four-year terms commencing January 1, 2011."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 14.13(a), effective January 15, 2009, in subsection (a), substituted "19" for "18" in District 10, substituted "11" for "10" in District 11, and substituted "21" for "20" in District 26. See note under "Preclearance Under § 5 of the Voting Rights Act" for contingency regarding the amendment to District 11.

ARTICLE 14.

District Judges.

§ 7A-146. Administrative authority and duties of chief district judge.

Editor's Note. — Session Laws 2008-107, s. 14.1, provides: "Of the funds appropriated to the Office of Indigent Defense Services in this act, the Office of Indigent Defense Services may spend up to the sum of twenty-five thousand dollars ($25,000) to support one or more pilot programs of alternative scheduling in district or superior court that would reduce defense attorney wait time and State expense. The establishment of any pilot program under this section would require the prior agreement of the district attorney, chief district court judge, and senior resident superior court judge for the district."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

ARTICLE 16.

Magistrates.

§ 7A-171.1. Duty hours, salary, and travel expenses within county.

(a) The Administrative Officer of the Courts, after consultation with the chief district judge and pursuant to the following provisions, shall set an annual salary for each magistrate.

(1) A full-time magistrate shall be paid the annual salary indicated in the table set out in this subdivision. A full-time magistrate is a magistrate who is assigned to work an average of not less than 40 hours a week during the term of office. The Administrative Officer of the Courts shall designate whether a magistrate is full-time. Initial appointment shall be at the entry rate. A magistrate's salary shall increase to the next step every two years on the anniversary of the date the magistrate was originally appointed for increases to Steps 1 through 3, and every four years on the anniversary of the date the magistrate was originally appointed for increases to Steps 4 through 6.

Table of Salaries of Full-Time Magistrates

Step Level	*Annual Salary*
Entry Rate	$32,633
Step 1	35,525
Step 2	38,671
Step 3	42,134
Step 4	45,999
Step 5	50,335
Step 6	55,238.

(2) A part-time magistrate is a magistrate who is assigned to work an average of less than 40 hours of work a week during the term, except that no magistrate shall be assigned an average of less than 10 hours of work a week during the term. A part-time magistrate is included, in accordance with G.S. 7A-170, under the provisions of G.S. 135-1(10) and G.S. 135-40.2(a). The Administrative Officer of the Courts designates whether a magistrate is a part-time magistrate. A part-time magistrate shall receive an annual salary based on the following formula: The average number of hours a week that a part-time magistrate is assigned work during the term shall be multiplied by the annual salary payable to a full-time magistrate who has the same number of years of service prior to the beginning of that term as does the part-time magistrate and the product of that multiplication shall be divided by the number 40. The quotient shall be the annual salary payable to that part-time magistrate.

(3) Notwithstanding any other provision of this subsection, a magistrate who is licensed to practice law in North Carolina or any other state shall receive the annual salary provided in the Table in subdivision (1) of this subsection for Step 4.

(a1) Notwithstanding subsection (a) of this section, the following salary provisions apply to individuals who were serving as magistrates on June 30, 1994:

(1) The salaries of magistrates who on June 30, 1994, were paid at a salary level of less than five years of service under the table in effect that date shall be as follows:

Less than 1 year of service	$26,528
1 or more but less than 3 years of service	27,695
3 or more but less than 5 years of service	30,044.

Upon completion of five years of service, those magistrates shall receive the salary set as the Entry Rate in the table in subsection (a).

(2) The salaries of magistrates who on June 30, 1994, were paid at a salary level of five or more years of service shall be based on the rates set out in subsection (a) as follows:

Salary Level on June 30, 1994	*Salary Level on July 1, 1994*
5 or more but less than 7 years of service	Entry Rate
7 or more but less than 9 years of service	Step 1
9 or more but less than 11 years of service	Step 2
11 or more years of service	Step 3

Thereafter, their salaries shall be set in accordance with the provisions in subsection (a).

(3) The salaries of magistrates who are licensed to practice law in North Carolina shall be adjusted to the annual salary provided in the table in subsection (a) as Step 4, and, thereafter, their salaries shall be set in accordance with the provisions in subsection (a).

(4) The salaries of "part-time magistrates" shall be set under the formula set out in subdivision (2) of subsection (a) but according to the rates set out in this subsection.

(a2) The Administrative Officer of the Courts shall provide magistrates with longevity pay at the same rates as are provided by the State to its employees subject to the State Personnel Act.

(b) Notwithstanding G.S. 138-6, a magistrate may not be reimbursed by the State for travel expenses incurred on official business within the county in which the magistrate resides. (1977, c. 945, s. 5; 1979, c. 838, s. 84; c. 991; 1979, 2nd Sess., c. 1137, s. 11; 1981, c. 914, s. 1; c. 1127, s. 11; 1983, c. 761, s. 199; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, ss. 84, 211; 1985, c. 479, s. 210; c. 698, ss. 13(a), (b) (14); 791, s. 39.1; 1985 (Reg. Sess., 1986), c. 1014, ss. 36, 223(a); 1987, c. 564, s. 12; c. 738, ss. 22, 34; 1987 (Reg. Sess., 1988), c. 1086, s. 16; 1989, c. 752, s. 33; 1991, c. 742, s. 14(a); 1991 (Reg. Sess., 1992), c. 900, ss. 41, 43; c. 1044, s. 9.1; 1993, c. 321, s. 60; 1993 (Reg. Sess., 1994), c. 769, s. 7.13(b), (c); 1995, c. 507, s. 7.7(a), (b); 1996, 2nd Ex. Sess., c. 18, s. 28.6(a), (b); 1999-237, s. 28.6(a), (b); 2000-67, s. 26.6; 2001-424, s. 32.7; 2004-124, s. 31.7(b); 2005-276, s. 29.7(a), (b); 2006-66, s. 22.7(a), (b); 2007-323, ss. 28.7(a), (b); 2008-107, ss. 26.7(a), (b).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 26.7 (a) and (b), effective July 1, 2008, increased the amounts listed in the Annual Salary column under "Table of Salaries of Full Time Magistrates" in subdivision (a)(1); and in subdivision (a1)(1), in the table of magistrate salaries, substituted "26,528 " for "25,428," "27,695" for "26,595," and "30,044" for "28,944."

§ 7A-177. Training course in duties of magistrate.

(a) Within six months of taking the oath of office as a magistrate for the first time, a magistrate is required to attend and satisfactorily complete a course of basic training of at least 40 hours in the civil and criminal duties of a magistrate. The Administrative Office of the Courts is authorized to contract with the School of Government at the University of North Carolina at Chapel Hill or with any other qualified educational organization to conduct this training, and to reimburse magistrates for travel and subsistence expenses incurred in taking such training.

(b) In addition to the basic training course required under subsection (a) of this section, continuing education courses shall be provided at such times and locations as necessary to assure that they are conveniently available to all magistrates without extensive travel to other parts of the State. (1975, c. 956, s. 11; 1983 (Reg. Sess., 1984), c. 1116, s. 87; 2006-264, s. 29(a); 2007-393, s. 15; 2007-484, s. 25.5; 2008-187, s. 2.)

Editor's Note. — Session Laws 2007-484, s. 25.5, amended this section in the coded bill drafting format prescribed by G.S. 120-20.1. However, the act failed to account for the amendments by Session Laws 2007-393, s. 15, and the result was that subsection (b) read in part: "required in under subsection (a) of this section." The section, as set out above, reflects the amendment to subsection (b) by Session Laws 2008-187, s. 2, which corrected the problem.

Effect of Amendments. —

Session Laws 2008-187, s. 2, effective August 7, 2008, deleted "in" preceding "under subsection (a)" in subsection (b).

Article 19.

Small Claim Actions in District Court.

§ 7A-228. New trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice; dismissal.

CASE NOTES

Cited in In re Advance Am., Cash Advance Ctrs. of N.C. Inc., — N.C. App. —, 657 S.E.2d 405, 2008 N.C. App. LEXIS 426 (2008).

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

Article 20.

Original Civil Jurisdiction of the Trial Divisions.

§ 7A-243. Proper division for trial of civil actions generally determined by amount in controversy.

CASE NOTES

Superior Court Had Jurisdiction. — Proper division for the trial of the plaintiffs' claims was in the superior court because the plaintiffs' requested to recover from defendants an amount in excess of $10,000.00 for each alleged claim. Kitchin v. Halifax County, —

N.C. App. —, 665 S.E.2d 760, 2008 N.C. App. LEXIS 1624 (2008).

§ 7A-244. Domestic relations.

CASE NOTES

Jurisdiction of District Court. — District court properly exercised jurisdiction over the subject matter of the parties' divorce action as in the State of North Carolina, subject matter jurisdiction for divorce involves not only bringing the matter in the correct court, but also the court's finding residence by one of the parties for the requisite length of time and verification of the pleadings. In the case at issue, the plaintiff husband sufficiently alleged that he was a citizen and resident of North Carolina for more than six months next preceding the institution of the action and had lived separate and apart from the wife for more than one year next preceding the institution of the action without resuming the marital relationship, with those district court findings being supported by the husband's verified complaint, which was treated as an affidavit. Wilson v. Wilson, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1479 (Aug. 5, 2008).

ARTICLE 21.

Institution, Docketing, and Transferring Civil Causes in the Trial Divisions.

§ 7A-258. Motion to transfer.

CASE NOTES

Applied in Kitchin v. Halifax County, — N.C. App. —, 665 S.E.2d 760, 2008 N.C. App. LEXIS 1624 (2008).

§ 7A-260. Review of transfer matters.

CASE NOTES

Plaintiffs Did Not Suffer Prejudice by Transfer. — Assuming that defendants waived any objection to the case pending in district court as plaintiffs contended, the plaintiffs did not and could not demonstrate that the plaintiffs suffered prejudice, as required by G.S. 7A-260, for the transfer of the plaintiffs' case from the district court to the superior court because the proper division for the trial of the plaintiffs' claims was the superior court. Kitchin v. Halifax County, — N.C. App. —, 665 S.E.2d 760, 2008 N.C. App. LEXIS 1624 (2008).

ARTICLE 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-271. Jurisdiction of superior court.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in State v. Haislip, 186 N.C. App. 275, 651 S.E.2d 243, 2007 N.C. App. LEXIS 2108 (2007).

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 27.

Expenses of the Judicial Department.

§ 7A-302. Counties and municipalities responsible for physical facilities.

In each county in which a district court has been established, courtrooms, office space for juvenile court counselors and support staff as assigned by the Department of Juvenile Justice and Delinquency Prevention, and related judicial facilities (including furniture), as defined in this Subchapter, shall be provided by the county, except that courtrooms and related judicial facilities may, with the approval of the administrative Officer of the Courts, after consultation with county and municipal authorities, be provided by a municipality in the county. To assist a county or municipality in meeting the expense of providing courtrooms and related judicial facilities, a part of the costs of court, known as the "facilities fee," collected for the State by the clerk of superior court, shall be remitted to the county or municipality providing the facilities. (1965, c. 310, s. 1; 1998-202, s. 15; 2000-137, s. 4(a); 2007-323, s. 14.16; 2008-107, s. 29.8(f).)

Editor's Note. — Session Laws 2007-323, s. 14.16(a), effective July 1, 2008, added "properly functioning telephones that meet the specifications for Administrative Office of the Court telephones, and the equipment and infrastructure necessary to support those telephones" in the middle of the first sentence. Session Laws 2008-107, s. 29.8(f), effective July 1, 2008, repealed Session Laws 2007-323, s. 14.16(a). The section appears as it did prior to the amendment by Session Laws 2007-323, s. 14.16(a).

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

ARTICLE 28.

Uniform Costs and Fees in the Trial Divisions.

§ 7A-304. Costs in criminal actions.

(a) In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides, and that no costs may be assessed when a case is dismissed.

(1) For each arrest or personal service of criminal process, including citations and subpoenas, the sum of five dollars ($5.00), to be remitted to the county wherein the arrest was made or process was served, except that in those cases in which the arrest was made or process

served by a law-enforcement officer employed by a municipality, the fee shall be paid to the municipality employing the officer.

(2) For the use of the courtroom and related judicial facilities, the sum of twelve dollars ($12.00) in the district court, including cases before a magistrate, and the sum of thirty dollars ($30.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: adequate space and furniture for judges, district attorneys, public defenders and other personnel of the Office of Indigent Defense Services, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; free parking for jurors; and a law library (including books) if one has heretofore been established or if the governing body hereafter decides to establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

(2a) For the upgrade, maintenance, and operation of the judicial and county courthouse phone systems, the sum of one dollar ($1.00), to be credited to the Court Information Technology Fund.

(3) For the retirement and insurance benefits of both State and local government law-enforcement officers, the sum of six dollars and twenty-five cents ($6.25), to be remitted to the State Treasurer. Fifty cents (50¢) of this sum shall be administered as is provided in Article 12C of Chapter 143 of the General Statutes. Five dollars and seventy-five cents ($5.75) of this sum shall be administered as is provided in Article 12E of Chapter 143 of the General Statutes, with one dollar and twenty-five cents ($1.25) being administered in accordance with the provisions of G.S. 143-166.50(e).

(3a) For the supplemental pension benefits of sheriffs, the sum of one dollar twenty-five cents ($1.25) to be remitted to the Department of Justice and administered under the provisions of Article 12G of Chapter 143 of the General Statutes.

(4) For support of the General Court of Justice, the sum of ninety-five dollars and fifty cents ($95.50) in the district court, including cases before a magistrate, and the sum of one hundred two dollars and fifty cents ($102.50) in the superior court, to be remitted to the State Treasurer. For a person convicted of a felony in superior court who has made a first appearance in district court, both the district court and superior court fees shall be assessed. The State Treasurer shall remit the sum of two dollars and five cents ($2.05) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4, and ninety-five cents ($.95) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.19.

(5) For using pretrial release services, the district or superior court judge shall, upon conviction, impose a fee of fifteen dollars ($15.00) to be

remitted to the county providing the pretrial release services. This cost shall be assessed and collected only if the defendant had been accepted and released to the supervision of the agency providing the pretrial release services.

(6) For support of the General Court of Justice, the sum of one hundred dollars ($100.00) is payable by a defendant who fails to appear to answer the charge as scheduled, unless within 20 days after the scheduled appearance, the person either appears in court to answer the charge or disposes of the charge pursuant to G.S. 7A-146. Upon a showing to the court that the defendant failed to appear because of an error or omission of a judicial official, a prosecutor, or a law-enforcement officer, the court shall waive this fee. This fee shall be remitted to the State Treasurer.

(7) For the services of the State Bureau of Investigation laboratory facilities, the district or superior court judge shall, upon conviction, order payment of the sum of three hundred dollars ($300.00) to be remitted to the Department of Justice for support of the State Bureau of Investigation. This cost shall be assessed only in cases in which, as part of the investigation leading to the defendant's conviction, the laboratories have performed DNA analysis of the crime, tests of bodily fluids of the defendant for the presence of alcohol or controlled substances, or analysis of any controlled substance possessed by the defendant or the defendant's agent. The court may waive or reduce the amount of the payment required by this subdivision upon a finding of just cause to grant such a waiver or reduction.

(8) For the services of any crime laboratory facility operated by a local government or group of local governments, the district or superior court judge shall, upon conviction, order payment of the sum of three hundred dollars ($300.00) to be remitted to the general fund of the local governmental unit that operates the laboratory to be used for law enforcement purposes. The cost shall be assessed only in cases in which, as part of the investigation leading to the defendant's conviction, the laboratory has performed DNA analysis of the crime, test of bodily fluids of the defendant for the presence of alcohol or controlled substances, or analysis of any controlled substance possessed by the defendant or the defendant's agent. The costs shall be assessed only if the court finds that the work performed at the local government's laboratory is the equivalent of the same kind of work performed by the State Bureau of Investigation under subdivision (7) of this subsection. The court may waive or reduce the amount of the payment required by this subdivision upon a finding of just cause to grant such a waiver or reduction.

(a1) Repealed by Session Laws 1997-475, s. 4.1.

(b) On appeal, costs are cumulative, and costs assessed before a magistrate shall be added to costs assessed in the district court, and costs assessed in the district court shall be added to costs assessed in the superior court, except that the fee for the Law-Enforcement Officers' Benefit and Retirement Fund and the Sheriffs' Supplemental Pension Fund and the fee for pretrial release services shall be assessed only once in each case. No superior court costs shall be assessed against a defendant who gives notice of appeal from the district court but withdraws it prior to the expiration of the 10-day period for entering notice of appeal. When a case is reversed on appeal, the defendant shall not be liable for costs, and the State shall be liable for the cost of printing records and briefs in the Appellate Division.

(c) Witness fees, expenses for blood tests and comparisons incurred by G.S. 8-50.1(a), jail fees and cost of necessary trial transcripts shall be assessed as provided by law in addition to other costs set out in this section. Nothing in this section shall limit the power or discretion of the judge in imposing fines or forfeitures or ordering restitution.

(d)(1) In any criminal case in which the liability for costs, fines, restitution, attorneys' fees, or any other lawful charge has been finally determined, the clerk of superior court shall, unless otherwise ordered by the presiding judge, disburse such funds when paid in accordance with the following priorities:
  a. Sums in restitution to the victim entitled thereto;
  b. Costs due the county;
  c. Costs due the city;
  d. Fines to the county school fund;
  e. Sums in restitution prorated among the persons other than the victim entitled thereto;
  f. Costs due the State;
  g. Attorney's fees, including appointment fees assessed pursuant to G.S. 7A-455.1.

(2) Sums in restitution received by the clerk of superior court shall be disbursed when:
  a. Complete restitution has been received; or
  b. When, in the opinion of the clerk, additional payments in restriction will not be collected; or
  c. Upon the request of the person or persons entitled thereto; and
  d. In any event, at least once each calendar year.

(e) Unless otherwise provided by law, the costs assessed pursuant to this section for criminal actions disposed of in the district court are also applicable to infractions disposed of in the district court. The costs assessed in superior court for criminal actions appealed from district court to superior court are also applicable to infractions appealed to superior court. If an infraction is disposed of in the superior court pursuant to G.S. 7A-271(d), costs applicable to the original charge are applicable to the infraction. (1965, c. 310, s. 1; 1967, c. 601, s. 2; c. 691, ss. 27-29; c. 1049, s. 5; 1969, c. 1013, s. 3; c. 1190, ss. 28, 29; 1971, c. 377, ss. 19-21; c. 1129; 1973, c. 47, s. 2; 1975, c. 558, ss. 1, 2; 1975, 2nd Sess., c. 980, s. 1; 1979, c. 576, s. 3; 1981, c. 369; c. 691, s. 1; c. 896, s. 2; c. 959, s. 1; 1983, c. 713, ss. 2, 3; 1983 (Reg. Sess., 1984), c. 1034, s. 249; 1985, c. 479, s. 196(a); c. 729, ss. 2-4; c. 764, s. 17; 1986, Ex. Sess., c. 5; 1985 (Reg. Sess., 1986), c. 852, s. 17; c. 1015, s. 1; 1989, c. 664, ss. 1, 2; c. 786, s. 1; 1989 (Reg. Sess., 1990), c. 1044, s. 1; 1991, c. 742, s. 15(a); 1991 (Reg. Sess., 1992), c. 811, s. 1; 1993, c. 313, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 22.13(a); 1997-475, s. 4.1; 1998-212, ss. 19.4(k), 29A.12(a); 2000-109, s. 4(a); 2000-144, s. 2; 2001-424, s. 22.14(a); 2002-126, ss. 29A.4(a), 29A.8(a), 29A.9(b); 2003-284, s. 30.19B(a); 2004-186, s. 4.4; 2005-250, s. 1; 2005-276, ss. 43.1(a), 29.30(b); 2005-363, s. 1; 2007-323, s. 30.8(a); 2008-107, s. 29.8(a); 2008-118, s. 2.9(a).)

Editor's Note. —

Session Laws 2008-107, s. 29.8(g), as amended by Session Laws 2008-118, s. 2.9(a), provides, in part, that Session Laws 2008-107, s. 29.8(a) applies to all costs assessed and collected on or after July 20, 2008, "except that in misdemeanor or infraction cases disposed of on or after that date by written appearance, waiver of trial or hearing, and plea of guilt or admission of responsibility pursuant to G.S. 7A-180(4) or G.S. 7A-273(2), in which the citation or other criminal process was issued before that date, the cost shall be the lesser of those specified in G.S. 7A-304(a), as amended by subsection (a) of this section, or those specified in the notice portion of the defendant's or respondent's copy of the citation or other criminal process, if any costs are specified in that notice."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 29.8(a), as amended by Session Laws 2008-118, s. 2.9(a), effective July 20, 2008, added subdivision (a)(2a). See Editor's note for applicability.

§ 7A-305. Costs in civil actions.

(a) In every civil action in the superior or district court, except for actions brought under Chapter 50B of the General Statutes, shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of twelve dollars ($12.00) in cases heard before a magistrate, and the sum of sixteen dollars ($16.00) in district and superior court, to be remitted to the county in which the judgment is rendered, except that in all cases in which the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(1a) For the upgrade, maintenance, and operation of the judicial and county courthouse phone systems, the sum of one dollar ($1.00), to be credited to the Court Information Technology Fund.

(2) For support of the General Court of Justice, the sum of ninety-three dollars ($93.00) in the superior court, except that if a case is assigned to a special superior court judge as a complex business case under G.S. 7A-45.3, an additional two hundred dollars ($200.00) shall be paid upon its assignment, and the sum of seventy-three dollars ($73.00) in the district court except that if the case is assigned to a magistrate the sum shall be sixty-three dollars ($63.00). Sums collected under this subdivision shall be remitted to the State Treasurer. The State Treasurer shall remit the sum of two dollars and five cents ($2.05) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4, and ninety-five cents ($.95) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.19.

(a1) Costs apply to any and all additional and subsequent actions filed by amendment to the original action brought under Chapter 50B of the General Statutes, unless such additional and subsequent amendment to the action is also brought under Chapter 50B of the General Statutes.

(a2) In every action for absolute divorce filed in the district court, a cost of seventy-five dollars ($75.00) shall be assessed against the person filing the divorce action. Costs collected by the clerk pursuant to this subsection shall be remitted to the State Treasurer, who shall deposit fifty-five dollars ($55.00) to the North Carolina Fund for Displaced Homemakers established under G.S. 143B-394.10 and twenty dollars ($20.00) to the Domestic Violence Center Fund established under G.S. 50B-9. Costs assessed under this subsection shall be in addition to any other costs assessed under this section.

(a3), (a4) Repealed by Session Laws 2008-118, s. 2.9(c), effective July 1, 2008.

(b) On appeal, costs are cumulative, and when cases heard before a magistrate are appealed to the district court, the General Court of Justice fee and the facilities fee applicable in the district court shall be added to the fees assessed before the magistrate. When an order of the clerk of the superior court is appealed to either the district court or the superior court, no additional General Court of Justice fee or facilities fee shall be assessed.

(b1) When a defendant files an answer in an action filed as a small claim which requires the entire case to be withdrawn from a magistrate and transferred to the district court, the difference between the General Court of Justice fee and facilities fee applicable to the district court and the General Court of Justice fee and facilities fee applicable to cases heard by a magistrate shall be assessed. The defendant is responsible for paying the fee.

(c) The clerk of superior court, at the time of the filing of the papers initiating the action or the appeal, shall collect as advance court costs, the facilities fee, General Court of Justice fee, and the divorce fee imposed under subsection (a2) of this section, except in suits by an indigent. The clerk shall also collect the fee for discovery procedures under Rule 27(a) and (b) at the time of the filing of the verified petition.

(d) The following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20:

(1) Witness fees, as provided by law.
(2) Jail fees, as provided by law.
(3) Counsel fees, as provided by law.
(4) Expense of service of process by certified mail and by publication.
(5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
(6) Fees for personal service and civil process and other sheriff's fees, as provided by law. Fees for personal service by a private process server may be recoverable in an amount equal to the actual cost of such service or fifty dollars ($50.00), whichever is less, unless the court finds that due to difficulty of service a greater amount is appropriate.
(7) Fees of mediators appointed by the court, mediators agreed upon by the parties, guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.
(8) Fees of interpreters, when authorized and approved by the court.
(9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.
(10) Reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts.
(11) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.

Nothing in this subsection or in G.S. 6-20 shall be construed to limit the trial court's authority to award fees and expenses in connection with pretrial discovery matters as provided in Rule 26(b) or Rule 37 of the Rules of Civil Procedure, and no award of costs made pursuant to this section or pursuant to G.S. 6-20 shall reverse or modify any such orders entered in connection with pretrial discovery.

(e) Nothing in this section shall affect the liability of the respective parties for costs as provided by law. (1965, c. 310, s. 1; 1967, c. 108, s. 10; c. 691, s. 30; 1971, c. 377, ss. 23, 24; c. 1181, s. 1; 1973, c. 503, ss. 12-14; c. 1267, s. 3; 1975, c. 558, s. 3; 1975, 2nd Sess., c. 980, ss. 2, 3; 1979, 2nd Sess., c. 1234, s. 1; 1981, c. 555, s. 6; c. 691, s. 2; 1983, c. 713, ss. 4-6; 1989, c. 786, s. 2; 1991, c. 742, s. 15(b); 1991 (Reg. Sess., 1992), c. 811, s. 2; 1993, c. 435, s. 6; 1995, c. 275, s. 2; 1998-212, s. 29A.12(b); 1998-219, ss. 2, 3; 2000-109, s. 4(b); 2001-424, s. 22.14(b); 2002-126, ss. 29A.4(b), 29A.6(e); 2004-186, s. 4.3; 2005-276, s. 43.1(b);

2005-405, s. 5; 2005-425, s. 1.2; 2007-212, s. 3; 2007-293, s. 2; 2007-323, ss. 30.8(b), 30.10(a), 30.11(a), (c); 2007-345, ss. 9.1(a), (c); 2008-107, ss. 29.1(a), 29.8(b); 2008-118, s. 2.9(c); 2008-193, s. 2.)

Editor's Note. —

Session Laws 2007-323, s. 30.10(h), which provided that the amendment to this section by Session Laws 2007-323, s. 30.10(a), was effective August 1, 2007, and applicable to all costs assessed and collected on or after that date, was amended by Session Laws 2008-193, s. 2, by substituting the words "this section" for "this act."

Session Laws 2008-107, s. 29.8(g), as amended by Session Laws 2008-118, s. 2.9(a), provides, in part, that Session Laws 2008-107, s. 29.8(b) is applicable to all costs assessed and collected on or after July 20, 2008.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, ss. 29.1(a) and 29.8(b), effective July 20, 2008, added subdivision (a)(1a); and rewrote subsection (a2). For applicability, see Editor's note.

Session Laws 2008-118, s. 2.9(c), effective July 1, 2008, deleted subsections (a3) and (a4) regarding court filing fees for divorce action and for limited driving privilege.

CASE NOTES

Expenses Not Enumerated or Otherwise Provided by Law. —

Even though about $170,000 was requested, a partial award of $1,726.25 for expert witness costs was not an abuse of discretion under G.S. 6-20 as expert witness fees were discretionary, "common law" costs that were not provided for in G.S. 7A-305(d); the trial judge, who presided over 20 days of trial, was in the best position to assess whether the costs were justified under G.S. 1A-1, N.C. R. Civ. P. 41(d). Bennett v. Equity Residential, — N.C. App. —, 665 S.E.2d 514, 2008 N.C. App. LEXIS 1609 (2008).

Costs in Personal Injury Action. —

Trial court's decision to award deposition-related expenses was supported by the common law, attorney's affidavit, and numerous invoices and receipts, and the trial court did not abuse its discretion under G.S. 7A-305(d) by taxing the accident victim for an expert's deposition fee when the expert was under a subpoena; however, the trial court abused its discretion in awarding costs for traveling to a mediation. Vaden v. Dombrowski, — N.C. App. —, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007).

As mediation fees were mandatory under former G.S. 7A-305(d)(7), plaintiffs were entitled to those costs as the prevailing parties in a personal injury action, and the trial court abused the court's discretion in not awarding these costs. Priest v. Safety-Kleen Sys., — N.C. App. —, 663 S.E.2d 351, 2008 N.C. App. LEXIS 1317 (2008).

Court's Failure to Segregate Mandatory From Discretionary Costs. — Trial court's failure to segregate statutorily required costs from discretionary costs was not a failure to exercise the court's discretion. Priest v. Safety-Kleen Sys., — N.C. App. —, 663 S.E.2d 351, 2008 N.C. App. LEXIS 1317 (2008).

Cited in Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

§ 7A-306. Costs in special proceedings.

(a) In every special proceeding in the superior court, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of ten dollars ($10.00) to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(1a) For the upgrade, maintenance, and operation of the judicial and county courthouse phone systems, the sum of one dollar ($1.00), to be credited to the Court Information Technology Fund.

(2) For support of the General Court of Justice the sum of forty dollars ($40.00). In addition, in proceedings involving land, except boundary disputes, if the fair market value of the land involved is over one hundred dollars ($100.00), there shall be an additional sum of thirty cents (30¢) per one hundred dollars ($100.00) of value, or major fraction thereof, not to exceed a maximum additional sum of two hundred dollars ($200.00). Fair market value is determined by the sale price if there is a sale, the appraiser's valuation if there is no sale, or the appraised value from the property tax records if there is neither a sale nor an appraiser's valuation. Sums collected under this subdivision shall be remitted to the State Treasurer. The State Treasurer shall remit the sum of two dollars and five cents ($2.05) of each forty-dollar ($40.00) General Court of Justice fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4.

(b) The facilities fee and thirty dollars ($30.00) of the General Court of Justice fee are payable at the time the proceeding is initiated.

(c) The following additional expenses, when incurred, are assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.
(2) Counsel fees, as provided by law.
(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.
(4) Fees for personal service of civil process, and other sheriff's fees, and for service by publication, as provided by law.
(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fees of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law.

(f) This section does not apply to a foreclosure under power of sale in a deed of trust or mortgage. (1965, c. 310, s. 1; 1967, c. 24, s. 2; 1971, c. 377, s. 25; c. 1181, s. 1; 1973, c. 503, s. 15; 1981, c. 691, s. 3; 1983, c. 713, ss. 7-9; c. 881, s. 4; 1985, c. 511, s. 1; 1989, c. 646, s. 1; 1991 (Reg. Sess., 1992), c. 811, s. 3; 1998-212, s. 29A.12(c); 2000-109, s. 4(c); 2001-424, s. 22.14(c); 2002-135, s. 1; 2005-276, s. 43.1(c); 2007-323, s. 30.8(c); 2008-107, s. 29.8(c).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 29.8(c), effective July 20, 2008, and applicable to all costs assessed and collected on or after that date, added subdivision (a)(1a).

§ 7A-307. Costs in administration of estates.

(a) In the administration of the estates of decedents, minors, incompetents, of missing persons, and of trusts under wills and under powers of attorney, in trust proceedings under G.S. 36A-23.1, and in collections of personal property by affidavit, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of ten dollars ($10.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same

purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(1a) For the upgrade, maintenance, and operation of the judicial and county courthouse phone systems, the sum of one dollar ($1.00), to be credited to the Court Information Technology Fund.

(2) For support of the General Court of Justice, the sum of fifty dollars ($50.00), plus an additional forty cents (40¢) per one hundred dollars ($100.00), or major fraction thereof, of the gross estate, not to exceed six thousand dollars ($6,000). Gross estate shall include the fair market value of all personalty when received, and all proceeds from the sale of realty coming into the hands of the fiduciary, but shall not include the value of realty. In collections of personal property by affidavit, the fee based on the gross estate shall be computed from the information in the final affidavit of collection made pursuant to G.S. 28A-25-3 and shall be paid when that affidavit is filed. In all other cases, this fee shall be computed from the information reported in the inventory and shall be paid when the inventory is filed with the clerk. If additional gross estate, including income, comes into the hands of the fiduciary after the filing of the inventory, the fee for such additional value shall be assessed and paid upon the filing of any account or report disclosing such additional value. For each filing the minimum fee shall be fifteen dollars ($15.00). Sums collected under this subdivision shall be remitted to the State Treasurer. The State Treasurer shall remit the sum of two dollars and five cents ($2.05) of each fifty-dollar ($50.00) General Court of Justice fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4.

(2a) Notwithstanding subdivision (2) of this subsection, the fee of forty cents (40¢) per one hundred dollars ($100.00), or major fraction, of the gross estate, not to exceed six thousand dollars ($6,000), shall not be assessed on personalty received by a trust under a will when the estate of the decedent was administered under Chapters 28 or 28A of the General Statutes. Instead, a fee of twenty dollars ($20.00) shall be assessed on the filing of each annual and final account. However, the fee shall be assessed only on newly contributed or acquired assets, all interest or other income that accrues or is earned on or with respect to any existing or newly contributed or acquired assets, and realized gains on the sale of any and all trust assets. Newly contributed or acquired assets do not include assets acquired by the sale, transfer, exchange, or otherwise of the amount of trust property on which fees were previously assessed.

(2b) Notwithstanding subdivisions (1) and (2) of this subsection, no costs shall be assessed when the estate is administered or settled pursuant to G.S. 28A-25-6.

(2c) Notwithstanding subdivision (2) of this subsection, the fee of forty cents (40¢) per one hundred dollars ($100.00), or major fraction, of the gross estate shall not be assessed on the gross estate of a trust that is the subject of a proceeding under G.S. 36A-23.1 if there is no requirement in the trust that accountings be filed with the clerk.

(3) For probate of a will without qualification of a personal representative, the clerk shall assess a facilities fee as provided in subdivision (1) of this subsection and shall assess for support of the General Court of Justice, the sum of twenty dollars ($20.00).

(b) In collections of personal property by affidavit, the facilities fee and thirty dollars ($30.00) of the General Court of Justice fee shall be paid at the time of filing the qualifying affidavit pursuant to G.S. 28A-25-1. In all other cases, these fees shall be paid at the time of filing of the first inventory. If the sole asset of the estate is a cause of action, these fees shall be paid at the time of the qualification of the fiduciary.

(b1) The clerk shall assess the following miscellaneous fees:

(1) Filing and indexing a will with no probate	
— first page	$ 1.00
— each additional page or fraction thereof	.25
(2) Issuing letters to fiduciaries, per letter over five letters issued	1.00
(3) Inventory of safe deposits of a decedent, per box, per day	15.00
(4) Taking a deposition	10.00
(5) Docketing and indexing a will probated in another county in the State	
— first page	6.00
— each additional page or fraction thereof	.25
(6) Hearing petition for year's allowance to surviving spouse or child, in cases not assigned to a magistrate, and allotting the same	8.00

(c) The following additional expenses, when incurred, are also assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.
(2) Counsel fees, as provided by law.
(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.
(4) Fees for personal service of civil process, and other sheriff's fees, as provided by law.
(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law. (1965, c. 310, s. 1; 1967, c. 691, s. 31; 1969, c. 1190, s. 30; 1971, c. 1181, s. 1; 1973, c. 1335, s. 1; 1981, c. 691, s. 4; 1983, c. 713, ss. 10-17; 1985, c. 481, ss. 1-5; 1985 (Reg. Sess., 1986), c. 855; 1987, c. 837; 1989, c. 719; 1991 (Reg. Sess., 1992), c. 811, ss. 4, 5; 1997-310, s. 4; 1998-212, s. 29A.12(d); 2000-109, s. 4(d); 2001-413, s. 1.2; 2001-424, s. 22.14(d); 2002-135, ss. 2, 3; 2005-276, s. 43.1(d); 2007-323, ss. 30.8(d), 30.10(b); 2008-107, s. 29.8(d); 2008-193, s. 2.)

Editor's Note. —

Session Laws 2007-323, s. 30.10(h), which provided that the amendment to this section by Session Laws 2007-323, s. 30.10(b), was effective August 1, 2007, and applicable to all costs assessed and collected on or after that date, was amended by Session Laws 2008-193, s. 2, by substituting the words "this section" for "this act."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 29.8(d), effective July 20, 2008, and applicable to all costs assessed and collected on or after that date, added subdivision (a)(1a).

§ 7A-308. Miscellaneous fees and commissions.

Editor's Note. —

Session Laws 2007-323, s. 30.10(h), which provided that the amendment to this section by Session Laws 2007-323, s. 30.10(c), was effective August 1, 2007, and applicable to all costs assessed and collected on or after that date, was amended by Session Laws 2008-193, s. 2, by substituting the words "this section" for "this act."

§ 7A-314. Uniform fees for witnesses; experts; limit on number.

CASE NOTES

Denial of Witness Fees Was Proper. — As plaintiffs, the prevailing parties did not ask for the mandatory witness fees outlined in G.S. 7A-314(a) and (b), and apparently did not certify the uniform witness fees to the court clerk as required by G.S. 7A-314(a), the trial court did not abuse the court's discretion by not awarding the plaintiffs uniform witness fees and travel expenses under G.S. 7A-314(a) and (b). Priest v. Safety-Kleen Sys., — N.C. App. —, 663 S.E.2d 351, 2008 N.C. App. LEXIS 1317 (2008).

Failure to Segregate Mandatory From Discretionary Costs. — Trial court's failure to segregate statutorily required costs from discretionary costs was not a failure to exercise the court's discretion. Priest v. Safety-Kleen Sys., — N.C. App. —, 663 S.E.2d 351, 2008 N.C. App. LEXIS 1317 (2008).

Cited in Vaden v. Dombrowski, — N.C. App. —, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007); Babb v. Graham, — N.C. App. —, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008); Bennett v. Equity Residential, — N.C. App. —, 665 S.E.2d 514, 2008 N.C. App. LEXIS 1609 (2008).

§ 7A-317. Counties and municipalities not required to advance certain fees.

Counties and municipalities are required to advance costs except for the following:

(1) The facilities fee.
(2) The General Court of Justice fee.
(3) The miscellaneous fees enumerated in G.S. 7A-308 in child support actions, child abuse actions, and other actions filed by the department of social services.
(4) The civil process fees enumerated in G.S. 7A-311. (1967, c. 691, s. 35; 2007-323, s. 30.10(d); 2008-193, ss. 1-3.)

Editor's Note. —

Session Laws 2008-193, s. 1, repealed Session Laws 2007-323, s. 30.10(d), effective June 30, 2008. Therefore Session Laws 2007-323, s. 30.10(d), which would have deleted "costs for the facilities fee, the General Court of Justice fee, the miscellaneous fees enumerated in G.S. 7A-308, or" following "to advance" never became effective.

Session Laws 2008-193, s. 2, amended Session Laws 2007-323, s. 30.10.(h), to remove that portion providing that the amendment to this section by Session Laws 2007-323, s. 30.10(d), was effective July 1, 2008.

Effect of Amendments. — Session Laws 2008-193, s. 3, effective July 1, 2008, rewrote the section.

§ 7A-320. Costs are exclusive.

CASE NOTES

Cited in Vaden v. Dombrowski, — N.C. App. —, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007).

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

Article 29.

Administrative Office of the Courts.

§ 7A-343.2. Court Information Technology Fund.

(a) Fund. — The Court Information Technology Fund is established within the Judicial Department as a special revenue fund. Interest and other investment income earned by the Fund accrues to it. The fund consists of the following revenues:

(1) All moneys collected by the Director pursuant to G.S. 7A-109(d) and G.S. 7A-49.5.

(2) State judicial facilities fees credited to the Fund under G.S. 7A-304 through G.S. 7A-307.

(b) Use. — Money in the fund derived from State judicial facilities fees must be used to upgrade, maintain, and operate the judicial and county courthouse phone systems. All other monies in the fund must be used to supplement funds otherwise available to the Judicial Department for court information technology and office automation needs.

(c) Report. — The Director must report by August 1 and February 1 of each year to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House Appropriations Committees, and the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety. The report must include the following:

(1) Amounts credited in the preceding six months to the Fund.

(2) Amounts expended in the preceding six months from the Fund and the purposes of the expenditures.

(3) Proposed expenditures of the funds funds. (1999-237, s. 17.15(b); 2000-67, s. 15.1; 2006-187, s. 2(d); 2008-107, s. 29.8(e).)

Editor's Note. —

This section was amended by Session Laws 2008-107, s. 29.8(e), in the coded bill drafting format provided by G.S. 120-20.1. In subdivision (c)(3), the word "funds" preceding "funds" was not struck through. Subdivision (c)(3) has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2008-107, s. 14.15, provides: "The Administrative Office of the Courts shall use up to the sum of one hundred thousand dollars ($100,000) from the Court Information Technology Fund established in G.S. 7A-343.2 to develop an interface between the case management functions of the Offender Population Unified System (OPUS) of the Department of Correction and the Automated Court Information System, in order to provide probation parole officers with access to the most recent information on arrests and pending charges against probationers."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 29.8(e), effective July 20, 2008, and applicable to all costs assessed and collected on or after that date, rewrote the section.

ARTICLE 30.

Judicial Standards Commission.

§ 7A-374.1. Purpose.

CASE NOTES

Whether or not a judge's comments at a hearing on motions violated N.C. Code Jud. Conduct 3(A)(3) was the province of the North Carolina Judicial Standards Commission under G.S. 7A-374.1 Carpenter v. Carpenter, — N.C. App. —, 659 S.E.2d 762, 2008 N.C. App. LEXIS 692 (2008).

§ 7A-376. Grounds for discipline by Commission; censure, suspension, or removal by the Supreme Court.

CASE NOTES

I. General Consideration.
III. Conduct Prejudicial to Administration of Justice.
IV. Illustrative Cases.

I. GENERAL CONSIDERATION.

Powers of Supreme Court. — Because the Supreme Court of North Carolina's adjudication in a proceeding against a judge was unfettered by the North Carolina Judicial Standards Commission's recommendations, the court could remove the judge even if the Commission had suggested a lesser sanction, such as censure. In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008).

III. CONDUCT PREJUDICIAL TO ADMINISTRATION OF JUSTICE.

Interference with Former Client's Judicial Proceedings. — Because a judge stipulated that his conduct, which included encouraging another judge to go easy on a former client, violated N.C. Jud. Conduct 1, 2A, 2B, 3A(4), 3C(1)(a), and 3D and constituted conduct prejudicial to the administration of justice that brought the judicial office into disrepute, the court censured him pursuant to G.S. 7A-376 and G.S. 7A-377. In re Inquiry Concerning a Judge (Allen), 362 N.C. 73, 653 S.E.2d 423, 2007 N.C. LEXIS 1227 (2007).

IV. ILLUSTRATIVE CASES.

Censure and Suspension of Judge. — Judge was censured and suspended because: the judge (1) had an undisclosed business relationship with an attorney and did not disqualify himself in cases involving the attorney, thereby calling into question his impartiality; (2) attempted to coerce a district attorney into signing a remittal of disqualification; (3) engaged in retaliatory conduct against the district attorney's office after the district attorney refused to sign the remittal; (4) coerced or attempted to coerce a guilty plea from criminal defendants; and (5) was habitually rude and condescending to those who appeared before him and demonstrated an arrogant and contemptuous demeanor while presiding over court. In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008).

§ 7A-377. Procedures.

CASE NOTES

Powers of Supreme Court. — Because the Supreme Court of North Carolina's adjudication in a proceeding against a judge was unfettered by the North Carolina Judicial Standards Commission's recommendations, the court could remove the judge even if the Commission had suggested a lesser sanction, such as censure. In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008).

Judge was censured for conduct prejudicial to the administration of justice, etc.

Because a judge stipulated that his conduct violated N.C. Jud. Conduct 1, 2A, 2B, 3A(4), 3C(1)(a), and 3D and constituted conduct prejudicial to the administration of justice that brought the judicial office into disrepute, the court censured him pursuant to G.S. 7A-376 and G.S. 7A-377. In re Inquiry Concerning a Judge (Allen), 362 N.C. 73, 653 S.E.2d 423, 2007 N.C. LEXIS 1227 (2007).

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

Article 36.

Entitlement of Indigent Persons Generally.

§ 7A-451. Scope of entitlement.

CASE NOTES

II. Right to Counsel in Particular Actions.

II. RIGHT TO COUNSEL IN PARTICULAR ACTIONS.

Fine of More Than $500. — Because a trial court failed to comply with G.S. 15A-1242 as it failed to properly inform defendant regarding the range of permissible punishments that he faced, and its conclusion that he was not entitled to appointed counsel was also erroneous as defendant faced a fine of greater than $500, his speeding convictions had to be reversed and the matter had to be remanded for a new trial. State v. Taylor, — N.C. App. —, 652 S.E.2d 741, 2007 N.C. App. LEXIS 2358 (2007).

§ 7A-452. Source of counsel; fees; appellate records.

CASE NOTES

New Trial Due to Inability to Provide Verbatim Transcript to Defendant. — Defendant was entitled to a new trial because a verbatim transcript of the evidentiary phase of defendant's trial was unavailable to defendant in preparing for defendant's appeal, as was required by G.S.7A-452(e), and defendant demonstrated the absence of available alternatives to the missing transcripts under N.C. R. App. P. 9(c)(1). State v. Hobbs, — N.C. App. —, 660 S.E.2d 168, 2008 N.C. App. LEXIS 893 (2008).

§ 7A-456. False statements; penalty.

CASE NOTES

Insufficient Evidence. —

Reversal of a false statement conviction under G.S. 7A-456 was proper as the record revealed no evidence that defendant was notified by a judicial officer of the provisions of G.S. 7A-456(a), as required by G.S. 7A-456(b). State v. Denny, 361 N.C. 662, 652 S.E.2d 212, 2007 N.C. LEXIS 1095 (2007).

Article 37A.

Access to Civil Justice Act.

§ 7A-474.2. Definitions.

The following definitions shall apply throughout this Article, unless the context otherwise requires:

(1) "Eligible client" means a resident of North Carolina financially eligible for representation under the Legal Services Corporation Act, regulations, and interpretations adopted thereunder (45 C.F.R. § 1611, and subsequent revisions), or a person entitled to State benefits or services pursuant to G.S. 14-43.11(d).

(1a) "Established legal services programs" means the following not-for-profit corporations using State funds to serve the counties listed: Legal Services of the Southern Piedmont, serving Cabarrus, Gaston, Mecklenburg, Stanly, and Union Counties; Pisgah Legal Services, serving Buncombe, Henderson, Madison, Polk, Rutherford, and Transylvania Counties; and Legal Aid of North Carolina, a statewide program; or any successor entity or entities of the named organizations, or, should any of the named organizations dissolve, the entity or entities providing substantially the same services in substantially the same service area.

(2) "Legal assistance" means the provision of any legal services, as defined by Chapter 84 of the General Statutes, consistent with this Article. Provided, that all legal services provided hereunder shall be performed consistently with the Rules of Professional Conduct promul-

gated by the North Carolina State Bar. Provided, further, that no funds appropriated under this Article shall be used for lobbying to influence the passage or defeat of any legislation before any municipal, county, state, or national legislative body.

(3) Repealed by Session Laws 2001-424, s. 22.14(f), effective January 1, 2002.

(4) Recodified as subdivision (1a). (1989, c. 795, s. 25; 2001-424, s. 22.14(f); 2007-323, s. 30.8(h); 2007-547, s. 9; 2008-194, s. 3(a).)

Effect of Amendments. —
Session Laws 2008-194, s. 3(a), effective August 8, 2008, deleted "Legal Aid Society of Northwest North Carolina, serving Davie, Forsyth, Iredell, Stokes, Surry, and Yadkin Counties" following "Union Counties" in subdivision (1a).

§ 7A-474.3. Eligible activities and limitations.

(a) Eligible Activities. Funds appropriated under this Article shall be used only for the following purposes:

(1) To provide legal assistance to eligible clients;

(2) To provide education to eligible clients regarding their rights and duties under the law;

(3) To involve the private bar in the representation of eligible clients pursuant to this Article.

(b) Eligible Cases. Legal assistance shall be provided to eligible clients under this Article only in the following types of cases:

(1) Family violence or spouse abuse;

(2) Assistance for the disabled in obtaining federal Social Security benefits;

(2a) Assistance for eligible clients in obtaining benefits or assistance under any federal law or program providing benefits or assistance for human trafficking victims.

(3) Representation of eligible farmers faced with the potential of farm foreclosure;

(4) Representation of eligible clients over the age of 60 regarding the following matters:
  a. Wills and estates;
  b. Safe and sanitary housing;
  c. Pensions and retirement rights;
  d. Social Security and Medicare rights;
  e. Access to health care;
  f. Food and nutrition; and
  g. Transportation.

(5) Representation of eligible clients designed to enable them to obtain the necessary skills and means to obtain meaningful employment at a decent wage and reduce the public welfare rolls; and

(6) Representation of eligible clients under the age of 21 or eligible families with legal problems affecting persons under the age of 21 regarding the following matters:
  a. Financial support and custody of children;
  b. Child care;
  c. Child abuse or neglect;
  d. Safe and sanitary housing;
  e. Food and nutrition; and
  f. Access to health care.

(7) Legal assistance to consumers in cases involving predatory mortgage lending, mortgage broker and loan services abuses, foreclosure de-

fense, and other legal issues that relate to helping consumers avoid foreclosure and home loss.

(c) Limitations. No funds appropriated under this Article shall be used for any of the following purposes:

(1) To provide legal assistance with respect to any proceeding or litigation which seeks to procure a nontherapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion;

(2) To provide legal assistance with respect to any criminal proceeding;

(3) To provide legal assistance to any agricultural employee or migrant farmworker employed in North Carolina with regard to the terms of the worker's employment, including conditions relating to housing;

(4) To provide legal assistance to any prisoner within the North Carolina Department of Correction with regard to the terms of that person's incarceration; or

(5) To provide legal assistance to persons with mental handicaps residing in State institutions with regard to the terms and conditions of the treatment or services provided to them by the State. (1989, c. 795, s. 25; 1997-506, s. 29; 2007-547, s. 10; 2008-107, s. 14.9.)

Editor's Note. — Session Laws 2008-107, s. 6.9A, as amended by Session Laws 2008-226, s. 4, and as amended by Session Laws 2008-187, s. 49.7, provides: "The General Assembly finds that homeownership is the primary means by which families and individuals of low and moderate incomes build wealth. The General Assembly further finds that homeownership and a healthy housing market are essential to the health and economic vitality of North Carolina. To help stabilize the housing market, the General Assembly provides in excess of fourteen million dollars ($14,000,000) in funding for and support of the following initiatives:

"(1) $600,000 in nonrecurring funds from the State Banking Commission for counseling services to assist homeowners at risk of foreclosure and $400,000 in nonrecurring funds from the State Banking Commission to implement the Emergency Home Foreclosure Reduction Program as provided in House Bill 2623, 2007 Regular Session.

"(2) $2,000,000 in recurring funds for the Housing Trust Fund, located in the Housing Finance Agency, to provide affordable housing to low-income citizens.

"(3) $7,000,000 in nonrecurring funds for the Housing Trust Fund, located in the Housing Finance Agency, to provide additional independent- and supportive-living apartments for persons with disabilities.

"(4) $1,000,000 in recurring funds to the Department of Health and Human Services for operating cost subsidies for independent- and supportive-living apartments for individuals with disabilities.

"(5) $3,000,000 in recurring funds for the Home Protection Program, located in the Housing Finance Agency, to provide counseling services and mortgage assistance to citizens who are at risk of foreclosure due to job loss.

"(6) $200,000 in recurring funds to the North Carolina State Bar to provide legal assistance to low-income consumers in cases involving predatory mortgage lending, mortgage broker and loan services abuses, foreclosure defense, and other legal issues that relate to helping low-income consumers avoid foreclosure and home loss. Of these funds, $100,000 recurring is provided to the Land Loss Prevention Project and $100,000 recurring is provided to the Financial Protection Law Center.

"(7) Amends G.S. 7A-474.3(b) to allow the use of a portion of the estimated $1,700,000 in increased revenue generated by Section 30.8 (a)(4) of S.L. 2007-323, to provide access to legal assistance to homeowners in cases involving predatory mortgage lending, mortgage broker and loan services abuses, foreclosure defense, and other legal issues that relate to helping consumers avoid foreclosure and home loss."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 14.9, effective July 1, 2008, added subdivision (b)(7).

§ 7A-474.4. Funds.

Funds to provide representation pursuant to this Article shall be provided to the North Carolina State Bar for provision of direct services by and support of the established legal services programs. The North Carolina State Bar shall allocate these funds directly to each of the established legal services programs based upon the eligible client population in each area, with Pisgah Legal Services receiving the allocation for Buncombe, Henderson, Madison, Polk, Rutherford, and Transylvania Counties; and Legal Services of Southern Piedmont receiving half of the allocation for Cabarrus, Gaston, Mecklenburg, Stanly, and Union Counties. The North Carolina State Bar shall not use any of these funds for its administrative costs. (1989, c. 795, s. 25; 2001-424, s. 22.14(g); 2007-323, s. 30.8(i); 2008-194, s. 3(b).)

Effect of Amendments. — Session Laws 2008-194, s. 3(b), effective August 8, 2008, deleted "Legal Aid Society of Northwest North Carolina, serving Davie, Forsyth, Iredell, Stokes, Surry, and Yadkin Counties" following "Transylvania Counties."

ARTICLE 37B.

Domestic Violence Victim Assistance Act.

§ 7A-474.17. Definitions.

The following definitions shall apply throughout this Article, unless the context otherwise requires:

(1) "Domestic violence victim" means a resident of North Carolina that has been subjected to acts of domestic violence as defined in G.S. 50B-1. A resident is not required to seek a protective order under Chapter 50B of the General Statutes to qualify as a domestic violence victim under this Article.

(2) "Legal assistance" means the provision of any legal services, as defined by Chapter 84 of the General Statutes, consistent with this Article. Provided, that all legal services provided hereunder shall be performed consistently with the Rules of Professional Conduct promulgated by the North Carolina State Bar. Provided, further, that no funds appropriated under this Article shall be used for lobbying to influence the passage or defeat of any legislation before any municipal, county, state, or national legislative body.

(3) "Established legal services program" means the following not-for-profit corporations using State funds to serve the counties listed: Pisgah Legal Services, serving Buncombe, Henderson, Madison, Polk, Rutherford, and Transylvania Counties; and Legal Aid of North Carolina; or any successor entity or entities of the named organizations, or, should any of the named organizations dissolve, the entity or entities providing substantially the same services in substantially the same service area. (2004-186, s. 4.1; 2008-194, s. 3(c).)

Effect of Amendments. — Session Laws 2008-194, s. 3(c), effective August 8, 2008, deleted "Legal Aid Society of Northwest North Carolina, serving Davie, Forsyth, Iredell, Stokes, Surry, and Yadkin Counties" preceding "Pisgah Legal Services" in subdivision (3).

§ 7A-474.19. Funds.

Funds to provide representation pursuant to this Article shall be provided to the North Carolina State Bar for provision of direct services by and support of the established legal services programs. The North Carolina State Bar shall allocate these funds directly to each of the established legal services programs with Pisgah Legal Services receiving the allocation for Buncombe, Henderson, Madison, Polk, Rutherford, and Transylvania Counties. Funds shall be allocated to each program based on the counties served by that program using the following formula:

(1) Twenty percent (20%) based on a fixed equal dollar amount for each county.

(2) Eighty percent (80%) based on the rate of civil actions filed pursuant to Chapter 50B of the General Statutes in that county.

The North Carolina State Bar shall not use any of these funds for its administrative costs. (2004-186, s. 4.1; 2008-194, s. 3(d).)

Effect of Amendments. — Session Laws 2008-194, s. 3(d), effective August 8, 2008, in the first paragraph, deleted "and Legal Aid Society of Northwest North Carolina, serving Davie, Forsyth, Iredell, Stokes, Surry, and Yadkin Counties" following "Transylvania Counties"; and made related changes.

ARTICLE 39B.

Indigent Defense Services Act.

§ 7A-498.1. Purpose.

CASE NOTES

Cited in State v. Murrell, — N.C. —, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008).

§ 7A-498.3. Responsibilities of Office of Indigent Defense Services.

Pilot Program for Alternative Scheduling. — Session Laws 2008-107, s. 14.1, provides: "Of the funds appropriated to the Office of Indigent Defense Services in this act, the Office of Indigent Defense Services may spend up to the sum of twenty-five thousand dollars ($25,000) to support one or more pilot programs of alternative scheduling in district or superior court that would reduce defense attorney wait time and State expense. The establishment of any pilot program under this section would require the prior agreement of the district attorney, chief district court judge, and senior resident superior court judge for the district."

Editor's Note. — Session Laws 2008-107, s. 14.7, provides: "The Office of Indigent Defense Services and the Administrative Office of the Courts shall consult on developing a statewide system to enable the Office of Indigent Defense Services to obtain information about indigent cases when counsel is first appointed and shall develop a proposal for statewide implementation of such a system. A report on this proposal shall be included in the Office of Indigent Defense Services' annual report due March 1, 2009."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

§ 7A-498.6. Director of Indigent Defense Services.

(a) The Director of Indigent Defense Services shall be appointed by the

Commission for a term of four years. The salary of the Director shall be set by the General Assembly in the Current Operations Appropriations Act, after consultation with the Commission. The Director may be removed during this term in the discretion of the Commission by a vote of two-thirds of all of the Commission members. The Director shall be an attorney licensed and eligible to practice in the courts of this State at the time of appointment and at all times during service as the Director.

(b) The Director shall:

(1) Prepare and submit to the Commission a proposed budget for the Office of Indigent Defense Services, an annual report containing pertinent data on the operations, costs, and needs of the Office, and such other information as the Commission may require;

(2) Assist the Commission in developing rules and standards for the delivery of services under this Article;

(3) Administer and coordinate the operations of the Office and supervise compliance with standards adopted by the Commission;

(4) Subject to policies and procedures established by the Commission, hire such professional, technical, and support personnel as deemed reasonably necessary for the efficient operation of the Office of Indigent Defense Services;

(5) Keep and maintain proper financial records for use in calculating the costs of the operations of the Office of Indigent Defense Services;

(6) Apply for and accept on behalf of the Office of Indigent Defense Services any funds that may become available from government grants, private gifts, donations, or bequests from any source;

(7) Coordinate the services of the Office of Indigent Defense Services with any federal, county, or private programs established to provide assistance to indigent persons in cases subject to this Article and consult with professional bodies concerning improving the administration of indigent services;

(8) Conduct training programs for attorneys and others involved in the legal representation of persons subject to this Article;

(8a) Administer the Sentencing Services Program established in Article 61 of this Chapter; and

(9) Perform other duties as the Commission may assign.

(c) In lieu of merit and other increment raises paid to regular State employees, the Director of Indigent Defense Services shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, nineteen and two-tenths percent (19.2%) after 20 years of service, and twenty-four percent (24%) after 25 years of service. "Service" means service as Director of Indigent Defense Services, a public defender, appellate defender, assistant public or appellate defender, district attorney, assistant district attorney, justice or judge of the General Court of Justice, or clerk of superior court. (2000-144, s. 1; 2002-126, s. 14.7(c); 2008-107, ss. 26.4(b), (c).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, ss. 26.4(b) and (c), effective July 1, 2008, inserted the second sentence in subsection (a); and added subsection (c).

§ 7A-498.7. Public Defender Offices.

Editor's Note. —

Session Laws 2008-107, s. 14.4, provided for the repeal of Session Laws 2007-323, s. 14.4(b), which had authorized the Indigent Defense Services Commission to establish additional district public defender offices.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

§ 7A-498.8. Appellate Defender.

(a) The appellate defender shall be appointed by the Commission on Indigent Defense Services for a term of four years. A vacancy in the office of appellate defender shall be filled by appointment of the Commission on Indigent Defense Services for the unexpired term. The appellate defender may be suspended or removed from office for cause by two-thirds vote of all the members of the Commission on Indigent Defense Services. The Commission shall provide the appellate defender with timely written notice of the alleged causes and an opportunity for hearing before the Commission prior to taking any final action to remove or suspend the appellate defender, and the appellate defender shall be given written notice of the Commission's decision. The appellate defender may obtain judicial review of suspension or removal by the Commission by filing a petition within 30 days of receiving notice of the decision with the Superior Court of Wake County. Review of the Commission's decision shall be heard on the record and not as a de novo review or trial de novo. The Commission shall adopt rules implementing this section.

(b) The appellate defender shall perform such duties as may be directed by the Office of Indigent Defense Services, including:

(1) Representing indigent persons subsequent to conviction in trial courts. The Office of Indigent Defense Services may, following consultation with the appellate defender and consistent with the resources available to the appellate defender to ensure quality criminal defense services by the appellate defender's office, assign appeals, or authorize the appellate defender to assign appeals, to a local public defender's office or to private assigned counsel.

(2) Maintaining a clearinghouse of materials and a repository of briefs prepared by the appellate defender to be made available to private counsel representing indigents in criminal cases.

(3) Providing continuing legal education training to assistant appellate defenders and to private counsel representing indigents in criminal cases, including capital cases, as resources are available.

(4) Providing consulting services to attorneys representing defendants in capital cases.

(5) Recruiting qualified members of the private bar who are willing to provide representation in State and federal death penalty postconviction proceedings.

(6) In the appellate defender's discretion, serving as counsel of record for indigent defendants in capital cases in State court.

(6a) In the appellate defender's discretion, serving as counsel of record for indigent defendants in the United States Supreme Court pursuant to a petition for writ of certiorari of the decision on direct appeal by a court of the North Carolina Appellate Division.

(7) Undertaking other direct representation and consultation in capital cases pending in federal court only to the extent that such work is fully federally funded.

(c) The appellate defender shall appoint assistants and staff, not to exceed the number authorized by the Office of Indigent Defense Services. The assistants and staff shall serve at the pleasure of the appellate defender.

(d) Funds to operate the office of appellate defender, including office space, office equipment, supplies, postage, telephone, library, staff salaries, training, and travel, shall be provided by the Office of Indigent Defense Services from funds authorized by law. Salaries shall be set by the Office of Indigent Defense Services. (2000-144, s. 1; 2007-323, s. 14.19(b); 2008-187, s. 3.)

Editor's Note. —

This section was amended by Session Laws 2007-323, s. 14.19(b), in the coded bill drafting format provided by G.S. 120-20.1. The act failed to use underscoring to indicate the insertion of the word "other," and subdivision (b)(7) was set out with the word "other" in brackets at the direction of the Revisor of Statutes. Session Laws 2008-187, s. 3, corrected the omission by inserting the word "other."

Effect of Amendments. —

Session Laws 2008-187, s. 3, effective August 7, 2008, inserted "other" preceding "direct representation" near the beginning of subdivision (b)(7).

SUBCHAPTER XIV. DRUG TREATMENT COURTS.

Article 62.

North Carolina Drug Treatment Court Act.

§ 7A-796. Local drug treatment court management committee.

Each judicial district choosing to establish a drug treatment court shall form a local drug treatment court management committee, which shall be comprised to assure representation appropriate to the type or types of drug treatment court operations to be conducted in the district and shall consist of persons appointed by the senior resident superior court judge with the concurrence of the chief district court judge and the district attorney for that district, chosen from the following list:

(1) A judge of the superior court;
(2) A judge of the district court;
(3) A district attorney or assistant district attorney;
(4) A public defender or assistant public defender in judicial districts served by a public defender;
(5) An attorney representing a county department of social services within the district;
(6) A representative of the guardian ad litem;
(7) A member of the private criminal defense bar;
(8) A member of the private bar who represents respondents in department of social services juvenile matters;
(9) A clerk of superior court;
(10) The trial court administrator in judicial districts served by a trial court administrator;
(11) The director or member of the child welfare services division of a county department of social services within the district;
(12) The chief juvenile court counselor for the district;
(13) A probation officer;

(14) A local law enforcement officer;
(15) A representative of the local school administrative unit;
(16) A representative of the local community college;
(17) A representative of the treatment providers;
(18) A representative of the area mental health program;
(19) Any local drug treatment coordinator; and
(20) Any other persons selected by the local management committee.

The local drug treatment court management committee shall develop local guidelines and procedures, not inconsistent with the State guidelines, that are necessary for the operation and evaluation of the local drug treatment court. (1995, c. 507, s. 21.6(a); 1998-23, s. 9; 1998-212, s. 16.15(a), (f); 2001-424, s. 22.8(e); 2008-187, s. 4.)

Effect of Amendments. — Session Laws 2008-187, s. 4, effective August 7, 2008, rewrote subsection (19), which formerly read: "The local program director provided for in G.S. 7A-798; and."

Chapter 7B.

Juvenile Code.

SUBCHAPTER III. JUVENILE RECORDS.

Article 31.

Disclosure of Juvenile Information.

Sec.
7B-3102. Disclosure of information about juveniles who escape.

SUBCHAPTER I. ABUSE, NEGLECT, DEPENDENCY.

ARTICLE 1.

Purposes; Definitions.

§ 7B-100. Purpose.

CASE NOTES

Applied in In re A.M., — N.C. App. —, 665 S.E.2d 534, 2008 N.C. App. LEXIS 1632 (2008).

Cited in In re R.L., — N.C. App. —, 652 S.E.2d 327, 2007 N.C. App. LEXIS 2314 (2007); In re T.H.T., — N.C. —, 665 S.E.2d 54, 2008 N.C. LEXIS 686 (2008).

§ 7B-101. Definitions.

CASE NOTES

Jurisdiction. —

Trial court had subject matter jurisdiction over the juvenile petition filed by the caseworker even though the caseworker did not sign it and, thus, the trial court could enter its termination of parental rights order regarding the father; while the caseworker did not specifically state in the petition that the caseworker was an authorized representative of the director of the Department of Social Services, the caseworker's verification of the petition was sufficient for the trial court to exercise jurisdiction over the case. In re D.D.F., — N.C. App. —, 654 S.E.2d 1, 2007 N.C. App. LEXIS 2447 (2007).

Failure to Provide Medical Care or Remedial Care Constitutes Neglect. —

Even accepting the parents' argument that they did not inflict a child's broken ribs, because they either failed to notice their baby's extensive injuries and pain, or noticed but ignored them, their failure to obtain medical attention constituted neglect per G.S. 7B-101(15). In re S.W., — N.C. App. —, 653 S.E.2d 425, 2007 N.C. App. LEXIS 2438 (2007).

Evidence of abuse of another child in the home, etc.

Trial court properly adjudicated a mother's son a neglected child because the trial court was permitted, although not required, to conclude that the son was neglected based on evidence that the mother had abused her daughter by intentionally burning her six mothers earlier; the mother was arrested and charged with felony child abuse days before the son's birth and less than three months before the adjudication order. In re A.S., — N.C. App. —, 661 S.E.2d 313, 2008 N.C. App. LEXIS 1099 (2008).

Evidence Held Sufficient to Show Neglect. —

Termination of a mother's parental rights to her two minor children was upheld on appeal where the unchallenged findings of fact made by the trial court established by clear, cogent, and convincing evidence in the record that the mother had willfully left her children in foster care without making reasonable progress to correct the conditions that led to their placement. The findings supporting that conclusion included: the children were in foster care for over 12 months; the mother missed seven out of eleven appointments and failed to complete a substance abuse treatment program; missed five out of ten parenting classes; tested positive for drugs several times; failed to establish a permanent residence and had been moving around from family and friends for a total of eight separate residences; failed to obtain employment; and failed to stay in contact with the Department of Social Services. In re A.R.H.B., 186 N.C. App. 211, 651 S.E.2d 247, 2007 N.C. App. LEXIS 2086 (2007).

Termination of a father's parental rights was upheld on appeal since the father failed to challenge any of the findings of fact made by the trial court, namely that prior to the date the motion to terminate his parental rights was filed, he never established paternity over the minor child at issue, never legitimated the child by statute or marriage, nor had he provided any financial support. In re A.R.H.B., 186 N.C. App. 211, 651 S.E.2d 247, 2007 N.C. App. LEXIS 2086 (2007).

Where the children were taken into custody based on a referral from a hospital after the parents engaged in a physical fight where not only were the children present, but the mother was holding her youngest child in arms, and the mother failed to complete a required parenting program, failed to attend individual counseling, and failed to address her substance abuse issues, the evidence supported the conclusion that the children were neglected under G.S. 7B-101. In re D.B., — N.C. App. —, 652 S.E.2d 56, 2007 N.C. App. LEXIS 2257 (2007).

Father's encouragement of smoking, drinking, and marijuana use by his biological children supported a determination that they were neglected children, but did not constitute abuse. In re M.G., — N.C. App. —, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007).

Termination order was supported by clear, cogent, and convincing evidence based on the mother's unfitness to have custody, and the overwhelming evidence of neglect, including improper supervision of her children, inappropriate discipline, and the severely unsanitary condition of the family's home due to the many different farm animals living therein, as well as a roach infestation. Further, given evidence of the significant positive progress that the children made since they were taken from the mother's custody, termination was in the children's best interests. In re of J.A.P., — N.C. App. —, 659 S.E.2d 14, 2008 N.C. App. LEXIS 716 (2008).

Unchallenged findings showing that, inter alia, the mother's home had no heat, the mother had not seen the child for a significant period of time, and the mother had begun allowing a sex offender to live with the mother, supported a finding of neglect. In re S.D.J., — N.C. App. —, 665 S.E.2d 818, 2008 N.C. App. LEXIS 1617 (2008).

Evidence Held Sufficient to Show Abuse. —

Evidence that the mother (1) knew of the father's violent and abuse nature and alcohol abuse, (2) failed to take the steps necessary to protect the minor children, (3) witnessed many of the incidents where the father would consume alcohol to excess and act out upon the children, and (4) allowed the father to drive the children after the father had consumed a large quantity of alcohol sufficiently supported a determination that the mother allowed to be created a substantial risk of serious physical injury to the children other than by accidental means, and thus, supported a finding of abuse as to the mother. In re M.G., — N.C. App. —, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007).

In terminating parental rights, the trial court only needed to find one basis for termination pursuant to G.S. 7B-1111, and the trial court based its termination on detailed findings and conclusions as to ongoing, severe and repeated abuse of the child, who suffered injuries that were not accidental (including fractures), who had failed to thrive, and who was an abused juvenile as defined by G.S. 7B-101(a); thus, respondent mother's argument that the termination was based solely on felonious child abuse charges lacked merit. In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

Cited in In re A.M., — N.C. App. —, 665 S.E.2d 534, 2008 N.C. App. LEXIS 1632 (2008).

ARTICLE 2.

Jurisdiction.

§ 7B-200. Jurisdiction.

CASE NOTES

Jurisdiction to Issue Nonsecure Custody Order. — County department of social services (DSS) had no right to appeal the trial court's denial of the court's motion to review the foster care board rate provisions of a nonsecure custody order under G.S. 7B-1001(a)(1), which permitted appeal from any order finding absence of jurisdiction, as the trial court never ruled that the court lacked jurisdiction to decide DSS's motion. Under G.S. 7B-506(d), 7B-200(a), the trial court clearly had jurisdiction to enter a nonsecure custody order; and, assuming arguendo that the court erred in the scope of the court's order for board payments to foster parents, this did not necessarily deprive the court of jurisdiction. In re A.T., — N.C. App. —, 662 S.E.2d 917, 2008 N.C. App. LEXIS 1316 (July 15, 2008).

Article 3.

Screening of Abuse and Neglect Complaints.

§ 7B-302. Assessment by director; access to confidential information; notification of person making the report.

CASE NOTES

Public Duty Doctrine Not Extended to Department of Social Services. — Court of appeals declined to extend the public duty doctrine to cover a county, the county department of social services (DSS), DSS supervisory employees, and social workers because the home assessment DSS was required to perform under G.S. 7B-302 was different from the mandatory statutory requirements of state agencies to protect the public in general and law enforcement departments who exercised a general duty to protect the public at large. Christmas v. Cabarrus County, — N.C. App. —, 664 S.E.2d 649, 2008 N.C. App. LEXIS 1532 (2008).

Article 4.

Venue; Petitions.

§ 7B-403. Receipt of reports; filing of petition.

CASE NOTES

Verification of Petition. —

Trial court had subject matter jurisdiction over the juvenile petition filed by the caseworker even though the caseworker did not sign it and, thus, the trial court could enter its termination of parental rights order regarding the father; while the caseworker did not specifically state in the petition that the caseworker was an authorized representative of the director of the Department of Social Services, the caseworker's verification of the petition was sufficient for the trial court to exercise jurisdiction over the case. In re D.D.F., — N.C. App. —, 654 S.E.2d 1, 2007 N.C. App. LEXIS 2447 (2007).

§ 7B-404. Immediate need for petition when clerk's office is closed.

CASE NOTES

Cited in In re A.S., — N.C. App. —, 661 S.E.2d 313, 2008 N.C. App. LEXIS 1099 (2008).

§ 7B-405. Commencement of action.

CASE NOTES

Verification of petition. — Trial court had subject matter jurisdiction over a petition filed by the Department of Social Services, alleging that a mother's son was neglected because the petition was filed with the clerk's office, and the summons issued the same day to the mother was signed by a deputy clerk, stating that a petition had been filed and a nonsecure custody order had been entered; the lack of an official "filed" stamp on the petition did not require a conclusion, contrary to the other material in the record, that the petition was not filed with the clerk's office. In re A.S., — N.C. App. —, 661 S.E.2d 313, 2008 N.C. App. LEXIS 1099 (2008).

Trial court had subject matter jurisdiction over a petition filed by DSS, alleging that a mother's son was neglected because the petition was filed with the clerk's office, and the summons issued the same day to the mother was signed by a deputy clerk, stating that a petition had been filed and a nonsecure custody order had been entered; even if the petition was filed after the issuance of the nonsecure custody order, that fact would not deprive the district court of jurisdiction. In re A.S., — N.C. App. —, 661 S.E.2d 313, 2008 N.C. App. LEXIS 1099 (2008).

§ 7B-406. Issuance of summons.

CASE NOTES

Jurisdiction. — Failure to serve the children with a petition alleging abuse and neglect could not be basis for lack of subject matter jurisdiction because only a parent, guardian, or caretaker was required to be served. In re M.G., — N.C. App. —, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007).

Because summonses were not signed or dated by the clerk of court, pursuant to G.S. 1A-1, N.C. R. Civ. P. 4(a), and did not contain an official stamp indicating that they had been filed, the trial court lacked jurisdiction over the juvenile file and the parent in a G.S. 7B-406(a) termination of parental rights action. In re K.J.L., — N.C. App. —, 665 S.E.2d 504, 2008 N.C. App. LEXIS 1514 (2008).

ARTICLE 5.

Temporary Custody; Nonsecure Custody; Custody Hearings.

§ 7B-502. Authority to issue custody orders; delegation.

CASE NOTES

Jurisdiction. — Proper order of custody existed prior to a trial court's entering its adjudication and dispositional order that a mother's son was neglected because the trial court entered an order stating that pending further hearings, the son would remain or be placed in the non-secure custody of the county Department of Social Services (DSS); assuming, without deciding, that a magistrate lacked authority to enter a nonsecure custody order, the mother cited no authority suggesting that such a lack of authority stripped the trial court of subject matter jurisdiction over the petition filed by DSS, alleging that her son was neglected. In re A.S., — N.C. App. —, 661 S.E.2d 313, 2008 N.C. App. LEXIS 1099 (2008).

§ 7B-506. Hearing to determine need for continued nonsecure custody.

CASE NOTES

Court's Jurisdiction. — County department of social services (DSS) had no right to appeal the trial court's denial of the court's motion to review the foster care board rate provisions of a nonsecure custody order under G.S. 7B-1001(a)(1), which permitted appeal from any order finding absence of jurisdiction, as the trial court never ruled that the court lacked jurisdiction to decide DSS's motion. Under G.S. 7B-506(d), 7B-200(a), the trial court clearly had jurisdiction to enter a nonsecure custody order; and, assuming arguendo that the court erred in the scope of the court's order for board payments to foster parents, this did not necessarily deprive the court of jurisdiction. In re A.T., — N.C. App. —, 662 S.E.2d 917, 2008 N.C. App. LEXIS 1316 (July 15, 2008).

No Prejudice from Delay of Hearing for Continued Nonsecure Custody. — Mother's claim that a trial court violated G.S. 7B-506(a) by failing to hold a hearing for continued nonsecure custody within seven calendar days after entry of a nonsecure custody order was overruled because although the initial nonsecure custody order was entered on 18 June 2007 and was set to expire on 25 June 2007, and the trial court did not conduct a hearing on the need for continued nonsecure custody until 27 June 2007, the mother did not make any argument as to how she was prejudiced by the two-day delay. In re A.S., — N.C. App. —, 661 S.E.2d 313, 2008 N.C. App. LEXIS 1099 (2008).

Cited in In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

§ 7B-507. Reasonable efforts.

CASE NOTES

Reunification Efforts Not Warranted Due to Threat of Harm to Child. — Trial court repeatedly found that the immediate threat of harm to a child outweighed the reasonable efforts to reunify him with respondent mother. Due to the severe abuse by the mother and the mother's reaction to the boyfriend's abuse, the trial court determined it was not in the best interests of the child to order reasonable efforts to reunify the child with respondent, as it was too dangerous to do so, and the trial court properly complied with G.S. 7B-507. In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

Article 6.

Basic Rights.

§ 7B-600. Appointment of guardian.

CASE NOTES

Cited in In re T.R.M., — N.C. App. —, 656 S.E.2d 626, 2008 N.C. App. LEXIS 275 (2008).

§ 7B-601. Appointment and duties of guardian ad litem.

CASE NOTES

Trial court did not err in failing to appoint a guardian ad litem for a mother's son because the guardian ad litem prepared a report, which reflected an investigation that complied with her duties as set forth in G.S. 7B-601(a); the report was submitted to the trial court in connection with the initial adjudication hearing, the trial court's adjudication and disposition order asserted that the guardian ad litem appeared at the hearing on the son's behalf, and that she submitted a report to the trial court relating to the son. In re A.S., — N.C. App. —, 661 S.E.2d 313, 2008 N.C. App. LEXIS 1099 (2008).

Guardian's Acceptance of Petition to Terminate Parental Rights Sufficient for Jurisdiction. — Because the captions of the summonses naming the parents as respondents stated the name of the juvenile, and the guardians ad litem for the juvenile certified that they accepted service of the petition on the juvenile's behalf, the trial court had subject matter jurisdiction to hear the petition for termination of parental rights. In re S.D.J., — N.C. App. —, 665 S.E.2d 818, 2008 N.C. App. LEXIS 1617 (2008).

§ 7B-602. Parent's right to counsel; guardian ad litem.

CASE NOTES

Failure to Hold Hearing on Parent's Competency. — Trial court considering the custody and visitation of an abused and neglected child abused the court's discretion after the court failed to exercise the court's discretion to hold a hearing on the competency of a respondent parent under G.S. 7B-602(c), and where it improperly ceded complete discretion to determine visitation with the child. In re M.H.B., — N.C. App. —, 664 S.E.2d 583, 2008 N.C. App. LEXIS 1534 (2008).

ARTICLE 8.

Hearing Procedures.

§ 7B-800. Amendment of petition.

CASE NOTES

Improper Petition Amendment. —

Trial court's decision to allow the Department of Social Services to amend its petition to add sexual abuse allegations against a second child was erroneous because it changed the nature of the conditions relied upon in the original petition. In re M.G., — N.C. App. —, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007).

Because the trial court erred in allowing the county department of social services to amend the petitions to terminate a mother's parental rights to conform to the evidence, the original petitions failed to put the mother on notice that G.S. 7B-1111(a)(2) would be a possible ground to support termination, and G.S. 1A-1, N.C. R. Civ. P. 15(b) did not apply, the termination order was reversed. In re B.L.H., — N.C. App. —, 660 S.E.2d 255, 2008 N.C. App. LEXIS 831 (2008).

Petition Could Be Amended. — Trial court did not lack subject matter jurisdiction over the juvenile petition that the caseworker filed in the termination of parental rights case regarding the father even though the caseworker did not sign the juvenile petition; the caseworker verified the petition, which was sufficient to confer jurisdiction, and in any event, would have been allowed to amend the petition by signing it if not signing it was a problem. In re D.D.F., — N.C. App. —, 654 S.E.2d 1, 2007 N.C. App. LEXIS 2447 (2007).

§ 7B-801. Hearing.

CASE NOTES

Failure to Show Delay was Prejudicial. —

As for delays in a child neglect case based on various continuances, most of the delay was attributed to respondent-parents' search for an expert witness, and their request for a special trial setting, and not as they argued, due to the trial court; any assignment of error based on G.S. 7B-801(c) and G.S. 7B-803 was overruled. In re T.M., — N.C. App. —, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

Delay Not Justified by Continuances. — Trial court, which continued a neglect and dependency case seven times due to a crowded docket, three times due to the absence of parties, and four times due to the absence of attorneys, did not abuse its discretion when it continued the case due to an attorney's medical needs and again due to a death in the mother's family, as these situations might have been considered extraordinary circumstances justifying a continuance. However, a new trial was required because the court abused its discretion by continuing the case the other times in a manner inconsistent with G.S. 7B-803; therefore, the court's violations of the time limits set out in G.S. 7B-801(c) and G.S. 7B-906(a) were not justified, and the mother and the fathers of her two children were prejudiced by the delays. In re R.L., — N.C. App. —, 652 S.E.2d 327, 2007 N.C. App. LEXIS 2314 (2007).

§ 7B-802. Conduct of hearing.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

§ 7B-803. Continuances.

CASE NOTES

Delay Not Justified by Continuances. — Trial court, which continued a neglect and dependency case seven times due to a crowded docket, three times due to the absence of parties, and four times due to the absence of attorneys, did not abuse its discretion when it continued the case due to an attorney's medical needs and again due to a death in the mother's family, as these situations might have been considered extraordinary circumstances justifying a continuance. However, a new trial was required because the court abused its discretion by continuing the case the other times in a manner inconsistent with G.S. 7B-803; therefore, the court's violations of the time limits set out in G.S. 7B-801(c) and G.S. 7B-906(a) were not justified, and the mother and the fathers of her two children were prejudiced by the delays. In re R.L., — N.C. App. —, 652 S.E.2d 327, 2007 N.C. App. LEXIS 2314 (2007).

Prejudice Not Shown After Continuance. —

As for delays in a child neglect case based on various continuances, most of the delay was attributed to respondent-parents' search for an expert witness, and their request for a special trial setting, and not as they argued, due to the trial court; any assignment of error based on G.S. 7B-801(c) and G.S. 7B-803 was overruled. In re T.M., — N.C. App. —, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

§ 7B-804. Rules of evidence.

CASE NOTES

Medical Records. — Although medical records were admitted (in reliance on Rule 10.3, Twelfth Judicial District Juvenile Case Management Plan) into evidence without proper foundation, as required by G.S. 8C-1, N.C. R. Evid. 703, 803(6), in order to fit within the exceptions to the hearsay rule, G.S. 8C-1, N.C. R. Evid. 801(c), 802, because — pursuant to G.S. 7B-804 — the rules of evidence in civil cases were to apply to child neglect cases, respondents, parents of the children, who were found neglected, had the burden of showing prejudice at the admission of the records; but they could not, given the other extensive direct testimony from medical experts upon which it was presumed the trial court had relied. In re T.M., — N.C. App. —, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

§ 7B-805. Quantum of proof in adjudicatory hearing.

CASE NOTES

Applied in In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

§ 7B-807. Adjudication.

CASE NOTES

Adjudication Supported by Evidence. — Termination of a mother's parental rights to her two minor children was upheld on appeal where the unchallenged findings of fact made by the trial court established by clear, cogent, and convincing evidence in the record that the mother had willfully left her children in foster care without making reasonable progress to correct the conditions that led to their placement. The findings supporting that conclusion included: the children were in foster care for over 12 months; the mother missed seven out of eleven appointments and failed to complete a substance abuse treatment program; missed five out of ten parenting classes; tested positive for drugs several times; failed to establish a permanent residence and had been moving around from family and friends for a total of eight separate residences; failed to obtain employment; and failed to stay in contact with the Department of Social Services. In re A.R.H.B., 186 N.C. App. 211, 651 S.E.2d 247, 2007 N.C. App. LEXIS 2086 (2007).

Trial court met the requirements of this section by stating the standard used at the adjudication stage, etc.

Trial court properly adjudicated a mother's son as a neglected child because the trial court's order stated that it made its conclusion through clear, cogent, and convincing evidence, which was sufficient to meet the requirement of G.S. 7B-807. In re A.S., — N.C. App. —, 661 S.E.2d 313, 2008 N.C. App. LEXIS 1099 (2008).

Violation of Time Limit. — New trial was required where the trial court violated the statutory time limit set out in G.S. 7B-807(b) for the writing, signing, and entering of an adjudicatory order because the fathers of the two subject children were prejudiced by the delay. In re R.L., — N.C. App. —, 652 S.E.2d 327, 2007 N.C. App. LEXIS 2314 (2007).

Mandamus Proper Remedy for Violation of Time Limit. — In appeals from adjudicatory and dispositional orders in which the alleged error is the trial court's failure to adhere to statutory deadlines set forth in G.S. 7B-807(b) and 7B-905(a), such error arises subsequent to the hearing and therefore does not affect the integrity of the hearing itself; thus, a new hearing serves no legitimate purpose, does not remedy the error, and only exacerbates the error and causes further delay. Instead, a party seeking recourse for such error should petition for writ of mandamus pursuant to N.C. R. App. P. 22(a). In re T.H.T., — N.C. —, 665 S.E.2d 54, 2008 N.C. LEXIS 686 (2008).

Trial court committed no prejudicial error where the court's failure to comply with G.S. §§ 7B-807(b) and 7B-905(a) occurred after a dispositional and adjudicative hearing, and the three-month delay in entry of the order of adjudication and disposition could not have been remedied by a new hearing. The proper remedy would have been to seek a writ of mandamus pursuant to N.C. R. App. P. 22(a) to compel the trial court to enter the order. In re T.H.T., — N.C. —, 665 S.E.2d 54, 2008 N.C. LEXIS 686 (2008).

Applied in In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

Article 9.

Dispositions.

§ 7B-901. Dispositional hearing.

CASE NOTES

Cited in In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

§ 7B-903. Dispositional alternatives for abused, neglected, or dependent juvenile.

CASE NOTES

Cited in In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

§ 7B-904. Authority over parents of juvenile adjudicated as abused, neglected, or dependent.

CASE NOTES

Applied in In re R.L., — N.C. App. —, 652 S.E.2d 327, 2007 N.C. App. LEXIS 2314 (2007).

§ 7B-905. Dispositional order.

CASE NOTES

Time Limit Affects Child's Welfare. — Regularly allowing bureaucratic failure to be the sole cause of delay in the entry of orders (pursuant to G.S. §§ 7B-807(b) and 7B-905(a)) affecting a child's welfare is anathema to the principles underlying the Juvenile Code. In re T.H.T., — N.C. —, 665 S.E.2d 54, 2008 N.C. LEXIS 686 (2008).

Mandamus Proper Remedy for Violation of Time Limit. — Trial court committed no prejudicial error where the court's failure to comply with G.S. 7B-807(b) and 7B-905(a) occurred after a dispositional and adjudicative hearing, and the three-month delay in entry of the order of adjudication and disposition could not have been remedied by a new hearing. The proper remedy would have been to seek a writ of mandamus pursuant to N.C. R. App. P. 22(a) to compel the trial court to enter the order. In re T.H.T., — N.C. —, 665 S.E.2d 54, 2008 N.C. LEXIS 686 (2008).

Cited in In re A.R.H.B., 186 N.C. App. 211, 651 S.E.2d 247, 2007 N.C. App. LEXIS 2086 (2007); In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

§ 7B-906. Review of custody order.

CASE NOTES

Lack of Timeliness. —

Trial court, which continued a neglect and dependency case seven times due to a crowded docket, three times due to the absence of parties, and four times due to the absence of attorneys, did not abuse its discretion when it continued the case due to an attorney's medical needs and again due to a death in the mother's family, as these situations might have been considered extraordinary circumstances justifying a continuance. However, a new trial was required because the court abused its discretion by continuing the case the other times in a manner inconsistent with G.S. 7B-803; therefore, the court's violations of the time limits set out in G.S. 7B-801(c) and G.S. 7B-906(a) were not justified, and the mother and the fathers of her two children were prejudiced by the delays. In re R.L., — N.C. App. —, 652 S.E.2d 327, 2007 N.C. App. LEXIS 2314 (2007).

Sufficient Evidence Supported Guardianship Order. — Granting of guardianship to the child's maternal grandparents was supported by evidence that the mother was not employed, did not have stable housing, and refused to participate in individual counseling. In re T.R.M., — N.C. App. —, 656 S.E.2d 626, 2008 N.C. App. LEXIS 275 (2008).

Cited in In re A.R.H.B., 186 N.C. App. 211, 651 S.E.2d 247, 2007 N.C. App. LEXIS 2086 (2007).

§ 7B-907. Permanency planning hearing.

CASE NOTES

Findings of Fact. — Granting of guardianship to the child's maternal grandparents was supported by the trial court's findings that the mother was not employed, did not have stable housing, and refused to participate in individual counseling. In re T.R.M., — N.C. App. —, 656 S.E.2d 626, 2008 N.C. App. LEXIS 275 (2008).

Although it would be better practice to use the words of the statute, the trial court's use of the word "improbable" when concluding that the child's return to the mother was not "possible" did not require remand. In re T.R.M., — N.C. App. —, 656 S.E.2d 626, 2008 N.C. App. LEXIS 275 (2008).

Applied in In re R.L., — N.C. App. —, 652 S.E.2d 327, 2007 N.C. App. LEXIS 2314 (2007).

Cited in In re A.R.H.B., 186 N.C. App. 211, 651 S.E.2d 247, 2007 N.C. App. LEXIS 2086 (2007); In re T.H.T., — N.C. —, 665 S.E.2d 54, 2008 N.C. LEXIS 686 (2008); In re T.H.T., — N.C. —, 665 S.E.2d 54, 2008 N.C. LEXIS 686 (2008).

ARTICLE 10.

Modification and Enforcement of Dispositional Orders; Appeals.

§ 7B-1001. Right to appeal.

CASE NOTES

Guardian Ad Litem Not "Proper Party." — Guardian ad litem for parents in a termination of parental rights action was not designated as a "proper party" who could give notice of appeal pursuant to G.S. 7B-1001. In re L.B., — N.C. App. —, 653 S.E.2d 240, 2007 N.C. App. LEXIS 2456 (2007).

Appeal of Nonsecure Custody Order. — As the trial court's denial of the motion of the county department of social services (DSS) for review of the foster care board rate provisions of a nonsecure custody order was not a "final order" as defined in G.S. 7B-1001, and as nonsecure custody orders were excluded from the list of appealable juvenile orders set out in G.S. 7B-1001, DSS had no right of appeal from the trial court's ruling. In re A.T., — N.C. App. —, 662 S.E.2d 917, 2008 N.C. App. LEXIS 1316 (July 15, 2008).

County department of social services (DSS) had no right to appeal the trial court's denial of the court's motion to review the foster care board rate provisions of a nonsecure custody order under G.S. 7B-1001(a)(1), which permitted appeal from any order finding absence of jurisdiction, as the trial court never ruled that the court lacked jurisdiction to decide DSS's motion. Under G.S. 7B-506(d), 7B-200(a), the trial court clearly had jurisdiction to enter a nonsecure custody order; and, assuming arguendo that the court erred in the scope of the court's order for board payments to foster parents, this did not necessarily deprive the court of jurisdiction. In re A.T., — N.C. App. —, 662 S.E.2d 917, 2008 N.C. App. LEXIS 1316 (July 15, 2008).

§ 7B-1002. Proper parties for appeal.

CASE NOTES

Guardian Ad Litem Not "Proper Party." — Guardian ad litem for parents in a termination of parental rights action was not designated as a "proper party" who could give notice of appeal pursuant to G.S. 7B-1001. In re L.B., — N.C. App. —, 653 S.E.2d 240, 2007 N.C. App. LEXIS 2456 (2007).

Article 11.

Termination of Parental Rights.

§ 7B-1100. Legislative intent; construction of Article.

CASE NOTES

Rules of Civil Procedure Not Superimposed on Hearings under Article. —
Because the trial court erred in allowing the county department of social services to amend the petitions to terminate a mother's parental rights to conform to the evidence, the original petitions failed to put the mother on notice that G.S. 7B-1111(a)(2) would be a possible ground to support termination, and G.S. 1A-1, N.C. R. Civ. P. 15(b) did not apply, the termination order was reversed. In re B.L.H., — N.C. App. —, 660 S.E.2d 255, 2008 N.C. App. LEXIS 831 (2008).

Counterclaim for Termination of Parental Rights. — Given both the statement of legislative intent in G.S. 7B-1100(1) and the specificity of the procedures in G.S. 7B-100 et seq., Article 11 of Chapter 7B provides the exclusive procedures to be used in a termination of parental rights proceeding; a defendant therefore cannot rely on G.S. 1A-1, N.C. R. Civ. P. 13 as the basis for a counterclaim for termination of parental rights. In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

G.S. 7B-1100 et seq. does not provide a procedure through which a party may counterclaim for termination of parental rights in response to a complaint for child visitation; rather, Article 11 contemplates that a termination petition should be brought in a separate action. In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

Because G.S. 7B-1100 et seq. provided the exclusive procedures for a termination of parental rights proceeding and contemplated that a termination petition be brought in a separate action, the trial court lacked subject matter jurisdiction over a termination of parental rights action brought as a counterclaim to a visitation action; although the trial court had tried to rectify the error by having summonses issued under G.S. 7B-1106(a), the issuance of a summons alone did not vest a trial court with subject matter jurisdiction over an action that was never properly commenced. In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

Cited in In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

§ 7B-1101. Jurisdiction.

CASE NOTES

Service Upon Child. — Where no summons had been issued to the juveniles in a termination of parental rights action, as required by G.S. 7B-1106(a)(5), the district court lacked subject matter jurisdiction, and the order terminating parental rights was vacated. In re J.T., — N.C. App. —, 657 S.E.2d 692, 2008 N.C. App. LEXIS 410 (2008).

Court Had Jurisdiction. —
While the original summons was not yet dormant, because the second summons did not conform with the requirements of N.C. R. Civ. P. 4(d), the original action was discontinued, and the trial court's subject matter jurisdiction was reinvoked. Because the parents were properly served with newly issued summons, commencing new actions and reinvoking the trial court's subject matter jurisdiction as of their respective dates of issuance, the contention that the court lacked subject matter jurisdiction over the parties in the termination of parental rights hearing due to ineffective service was without merit. In re D.B., — N.C. App. —, 652 S.E.2d 56, 2007 N.C. App. LEXIS 2257 (2007).

Cited in In re A.F.H-G, — N.C. App. —, 657 S.E.2d 738, 2008 N.C. App. LEXIS 424 (2008).

§ 7B-1101.1. Parent's right to counsel; guardian ad litem.

CASE NOTES

Guardian Ad Litem's Role Limited to One of Assistance, Not One of Substitution. — Pursuant to G.S. 7B-1101.1(e), the guardian ad litem's role was limited to one of assistance, not one of substitution; therefore, the guardian ad litem did not have the authority to sign the notice of appeal in place of the parents challenging the termination of their parental rights. In re L.B., — N.C. App. —, 653 S.E.2d 240, 2007 N.C. App. LEXIS 2456 (2007).

§ 7B-1102. Pending child abuse, neglect, or dependency proceedings.

CASE NOTES

Notice Requirement. —

Because a county agency failed to issue a summons to a minor child or the child's guardian ad litem under G.S. 7B-1106(a)(5), the trial court lacked subject matter jurisdiction over a termination of parental rights proceeding; had the agency filed a motion to terminate under G.S. 7B-1102 in an ongoing juvenile abuse, neglect, and dependency case, the summons would not have been required, and the agency would only have been required to service notice of the motion to terminate on the parties specified in G.S. 7B-1106.1. In re I.D.G., — N.C. App. —, 655 S.E.2d 858, 2008 N.C. App. LEXIS 195 (Feb. 5, 2008).

Applied in In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

Cited in In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007); In re C.M.H., — N.C. App. —, 653 S.E.2d 929, 2007 N.C. App. LEXIS 2567 (2007).

§ 7B-1103. Who may file a petition or motion.

CASE NOTES

Agency Had Standing Since No Other Court Had Exercised Jurisdiction. — County department of social services had standing to file a termination petition under G.S. 7B-1103(a)(3) since the record established that emergency jurisdiction under G.S. 50A-204 existed at the time the department filed its juvenile petition, as a result, the department had been awarded custody by a court of competent jurisdiction, and those orders remained in effect pursuant to G.S. 50A-204(b) because no other orders had been entered by another state with jurisdiction. In re E.X.J., — N.C. App. —, 662 S.E.2d 24, 2008 N.C. App. LEXIS 1172 (June 17, 2008).

Petition Held Sufficient. — Father's claim in termination of parental rights proceeding that the petition to terminate was deficient because the underlying juvenile petition was deficient had to be rejected; the underlying juvenile petition was sufficient to confer jurisdiction on the trial court because it was verified, and the petition to terminate was proper because it was signed and verified. In re D.D.F., — N.C. App. —, 654 S.E.2d 1, 2007 N.C. App. LEXIS 2447 (2007).

Cited in In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

§ 7B-1104. Petition or motion.

CASE NOTES

Order terminating parental rights was vacated on appeal because the failure of the department of social services to verify the petition seeking termination of parental rights as required by G.S. 7B-1104 deprived the trial court of subject matter jurisdiction. In re C.M.H., — N.C. App. —, 653 S.E.2d 929, 2007 N.C. App. LEXIS 2567 (2007).

Petition Held Sufficient. —

Termination petition was sufficient to confer jurisdiction on the trial court; the father asserted no prejudice from the alleged omissions, and none were found. The father had access to all required information and the petition was substantially compliant on its face. In re T.M.H., 186 N.C. App. 451, 652 S.E.2d 1, 2007 N.C. App. LEXIS 2211 (2007).

Father's claim in termination of parental rights proceeding that the petition to terminate was deficient because the underlying juvenile petition was deficient had to be rejected; the underlying juvenile petition was sufficient to confer jurisdiction on the trial court because it was verified, and the petition to terminate was proper because it was signed and verified. In re D.D.F., — N.C. App. —, 654 S.E.2d 1, 2007 N.C. App. LEXIS 2447 (2007).

Petition Held Insufficient. —

Because the trial court erred in allowing the county department of social services to amend the petitions to terminate a mother's parental rights to conform to the evidence, the original petitions failed to put the mother on notice that G.S. 7B-1111(a)(2) would be a possible ground to support termination, and G.S. 1A-1, N.C. R. Civ. P. 15(b) did not apply, the termination order was reversed. In re B.L.H., — N.C. App. —, 660 S.E.2d 255, 2008 N.C. App. LEXIS 831 (2008).

Cited in In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

§ 7B-1105. Preliminary hearing; unknown parent.

CASE NOTES

Service Upon Child. — Where no summons had been issued to the juveniles in a termination of parental rights action, as required by G.S. 7B-1106(a)(5), the district court lacked subject matter jurisdiction, and the order terminating parental rights was vacated. In re J.T., — N.C. App. —, 657 S.E.2d 692, 2008 N.C. App. LEXIS 410 (2008).

Cited in In re S.D.J., — N.C. App. —, 665 S.E.2d 818, 2008 N.C. App. LEXIS 1617 (2008).

§ 7B-1106. Issuance of summons.

CASE NOTES

Service Upon Child. —

Because no summons was issued to the juvenile as required by G.S. 7B-1106(a), the order terminating the father's parental rights had to be vacated. In re K.A.D., — N.C. App. —, 653 S.E.2d 427, 2007 N.C. App. LEXIS 2437 (2007).

Because a county agency failed to issue a summons to a minor child or the child's guardian ad litem under G.S. 7B-1106(a)(5), the trial court lacked subject matter jurisdiction over a termination of parental rights proceeding; had the agency filed a motion to terminate under G.S. 7B-1102 in an ongoing juvenile abuse, neglect, and dependency case, the summons would not have been required, and the agency would only have been required to service notice of the motion to terminate on the parties specified in G.S. 7B-1106.1. In re I.D.G., — N.C. App. —, 655 S.E.2d 858, 2008 N.C. App. LEXIS 195 (Feb. 5, 2008).

Where the summons that was issued in a case involving the termination of parental rights named both the mother and father, but failed to name the juvenile, the trial court lacked jurisdiction to order that their parental rights in the juvenile be terminated. Pursuant to G.S. 7B-1106(a)(5), the summons had to name the juvenile in order for the trial court to acquire subject matter jurisdiction over the juvenile in a case involving the termination of parental rights. In re A.F.H-G, — N.C. App. —, 657 S.E.2d 738, 2008 N.C. App. LEXIS 424 (2008).

Where no summons had been issued to the juveniles in a termination of parental rights action, as required by G.S. 7B-1106(a)(5), the district court lacked subject matter jurisdiction, and the order terminating parental rights was vacated. In re J.T., — N.C. App. —, 657 S.E.2d 692, 2008 N.C. App. LEXIS 410 (2008).

Trial court lacked subject matter jurisdiction over a petition to terminate a mother's parental rights because the record failed to establish that the Buncombe County Department of Social Services issued summonses to the minor children as required by G.S. 7B-1106(a)(5). In re B.L.H, — N.C. App. —, 657 S.E.2d 736, 2008 N.C. App. LEXIS 404 (2008).

Service of Summons. —

When a juvenile's guardian ad litem was represented by an attorney advocate in a termination of parental rights proceeding, the service of a summons on the attorney advocate amounted to service on the guardian ad litem. Therefore, service of the summons on the guardian ad litem constituted service on the juvenile, as expressly stated in G.S. 7B-1106(a). In re of J.A.P., — N.C. App. —, 659 S.E.2d 14, 2008 N.C. App. LEXIS 716 (2008).

Because the captions of the summonses named the children, and because the guardian ad litem (GAL) appointed for the children certified that the GAL was served with a copy of the summonses, pursuant to G.S. 7B-1106(a)(5), the trial court had subject matter jurisdiction over the mother's parental rights termination proceedings. In re N.C.H., — N.C. App. —, 665 S.E.2d 812, 2008 N.C. App. LEXIS 1621 (2008).

Summons Did Not Vest Trial Court With Subject Matter Jurisdiction Over Improperly Commenced Action. — Because G.S.

7B-1100 et seq. provided the exclusive procedures for a termination of parental rights proceeding and contemplated that a termination petition be brought in a separate action, the trial court lacked subject matter jurisdiction over a termination of parental rights action brought as a counterclaim to a visitation action; although the trial court had tried to rectify the error by having summonses issued under G.S. 7B-1106(a), the issuance of a summons alone did not vest a trial court with subject matter jurisdiction over an action that was never properly commenced. In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

Cited in In re M.G., — N.C. App. —, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007).

§ 7B-1106.1. Notice in pending child abuse, neglect, or dependency cases.

CASE NOTES

Required Notice. — Because a county agency failed to issue a summons to a minor child or the child's guardian ad litem under G.S. 7B-1106(a)(5), the trial court lacked subject matter jurisdiction over a termination of parental rights proceeding; had the agency filed a motion to terminate under G.S. 7B-1102 in an ongoing juvenile abuse, neglect, and dependency case, the summons would not have been required, and the agency would only have been required to service notice of the motion to terminate on the parties specified in G.S. 7B-1106.1. In re I.D.G., — N.C. App. —, 655 S.E.2d 858, 2008 N.C. App. LEXIS 195 (Feb. 5, 2008).

Paternity Not Established Prior to Notice. — Termination of a father's parental rights was upheld on appeal since the father failed to challenge any of the findings of fact made by the trial court, namely that prior to the date the motion to terminate his parental rights was filed, he never established paternity over the minor child at issue, never legitimated the child by statute or marriage, nor had he provided any financial support. In re A.R.H.B., 186 N.C. App. 211, 651 S.E.2d 247, 2007 N.C. App. LEXIS 2086 (2007).

§ 7B-1108. Answer or response of parent.

CASE NOTES

Cited in In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

§ 7B-1109. Adjudicatory hearing on termination.

CASE NOTES

Taking of Evidence Needs to Include Oral Testimony. — Although a trial court considering a termination of parental rights petition can consider written reports, prior court order, and oral arguments by the attorneys involved in the case, some oral testimony needs to be taken by the court. In re A.M., — N.C. App. —, 665 S.E.2d 534, 2008 N.C. App. LEXIS 1632 (2008).

Delay in Entering Termination Order. — While a mother claimed that she was prejudiced by the delay in the trial court's filing of the written adjudication order, because she offered no evidence in support of this bare assertion, the state presented clear, cogent, and convincing evidence of her extreme neglect of her two minor children, such supported the termination of her parental rights; moreover, as the trial court announced its adjudication of neglect and its decision to terminate the mother's parental rights in open court, the delay in reducing the trial court's order to writing did not prejudice the mother and, thus, did not warrant reversal of the termination order. In re of J.A.P., — N.C. App. —, 659 S.E.2d 14, 2008 N.C. App. LEXIS 716 (2008).

Termination Order Vacated. — Order terminating a father's parental rights was vacated because the trial court failed to make specific findings of fact or to state in its conclusions of law that the father's actions were willful, and, thus the findings did not conclusively establish grounds for termination of parental rights pursuant to G.S. 7B-1111(a); without an identified basis for the adjudication under G.S. 7B-1109(e), effective review of the termination order was precluded. In re T.M.H., 186 N.C. App. 451, 652 S.E.2d 1, 2007 N.C. App. LEXIS 2211 (2007).

Cited in In re I.J., 186 N.C. App. 298, 650 S.E.2d 671, 2007 N.C. App. LEXIS 2081 (2007); In re R.L., — N.C. App. —, 652 S.E.2d 327, 2007 N.C. App. LEXIS 2314 (2007); In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007); In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007); In re T.H.T., — N.C. —, 665 S.E.2d 54, 2008 N.C. LEXIS 686 (2008).

§ 7B-1110. Determination of best interests of the juvenile.

CASE NOTES

Termination of Parental Rights Supported by Child's Best Interests. — Trial court did not abuse its discretion in finding that the termination of a mother's parental rights was in the best interest of a child, pursuant to G.S. 7B-1110; the trial court in its discretion, properly considered the factors enumerated in G.S. 7B-1110(a) in finding that the child was bonded to his foster parents and that given the age of the child returning the child to respondent would not have been in the child's best interest, and that the child had not developed as many illnesses in foster care as when in the mother's custody and that the child's current placement was appropriate and was in the best interest of the child. In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

Termination order was supported by clear, cogent, and convincing evidence based on the mother's unfitness to have custody, and the overwhelming evidence of neglect, including improper supervision of her children, inappropriate discipline, and the severely unsanitary condition of the family's home due to the many different farm animals living therein, as well as a roach infestation. Further, given evidence of the significant positive progress that the children made since they were taken from the mother's custody, termination was in the children's best interests. In re of J.A.P., — N.C. App. —, 659 S.E.2d 14, 2008 N.C. App. LEXIS 716 (2008).

Cited in In re S.D.W. & H.E.W., — N.C. App. —, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007); In re J.T., — N.C. App. —, 657 S.E.2d 692, 2008 N.C. App. LEXIS 410 (2008); In re T.H.T., — N.C. —, 665 S.E.2d 54, 2008 N.C. LEXIS 686 (2008).

§ 7B-1111. Grounds for terminating parental rights.

CASE NOTES

I. General Consideration.
II. Neglect.
V. Illustrative Cases.
VI. Willfully Leaving Child in Foster Care.
VII. Failure to Establish Paternity, Legitimate Child, or Provide Support or Care.

I. GENERAL CONSIDERATION.

Failure to Give Notice of Grounds for Termination. — Because the trial court erred in allowing the county department of social services to amend the petitions to terminate a mother's parental rights to conform to the evidence, the original petitions failed to put the mother on notice that G.S. 7B-1111(a)(2) would be a possible ground to support termination, and G.S. 1A-1, N.C. R. Civ. P. 15(b) did not apply, the termination order was reversed. In re B.L.H., — N.C. App. —, 660 S.E.2d 255, 2008 N.C. App. LEXIS 831 (2008).

Termination Order Reversed. — Order terminating a father's parental rights was vacated because the trial court failed to make specific findings of fact or to state in its conclusions of law that the father's actions were willful, and, thus the findings did not conclusively establish grounds for termination of parental rights pursuant to G.S. 7B-1111(a); without an identified basis for the adjudication under G.S. 7B-1109(e), effective review of the termination order was precluded. In re T.M.H., 186 N.C. App. 451, 652 S.E.2d 1, 2007 N.C. App. LEXIS 2211 (2007).

Cited in In re S.D.W. & H.E.W., — N.C. App.

—, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007); In re L.B., — N.C. App. —, 653 S.E.2d 240, 2007 N.C. App. LEXIS 2456 (2007); In re J.T., — N.C. App. —, 657 S.E.2d 692, 2008 N.C. App. LEXIS 410 (2008); In re A.F.H-G, — N.C. App. —, 657 S.E.2d 738, 2008 N.C. App. LEXIS 424 (2008).

II. NEGLECT.

Termination of parental rights by reason of neglect upheld.

Termination order was supported by clear, cogent, and convincing evidence based on the mother's unfitness to have custody, and the overwhelming evidence of neglect, including improper supervision of her children, inappropriate discipline, and the severely unsanitary condition of the family's home due to the many different farm animals living therein, as well as a roach infestation. Further, given evidence of the significant positive progress that the children made since they were taken from the mother's custody, termination was in the children's best interests. In re of J.A.P., — N.C. App. —, 659 S.E.2d 14, 2008 N.C. App. LEXIS 716 (2008).

Neglect Shown. —

Where the children were taken into custody based on a referral from a hospital after the parents engaged in a physical fight where not only were the children present, but the mother was holding her youngest child in arms, and the mother failed to complete a required parenting program, failed to attend individual counseling, and failed to address her substance abuse issues, the evidence supported the conclusion that the children were neglected under G.S. 7B-101. In re D.B., — N.C. App. —, 652 S.E.2d 56, 2007 N.C. App. LEXIS 2257 (2007).

Even accepting the parents' argument that they did not inflict a child's broken ribs, because they either failed to notice their baby's extensive injuries and pain, or noticed but ignored them, their failure to obtain medical attention constituted neglect per G.S. 7B-101(15). In re S.W., — N.C. App. —, 653 S.E.2d 425, 2007 N.C. App. LEXIS 2438 (2007).

Trial court properly terminated the mother's parental rights where the unchallenged findings of fact showed that, inter alia, the mother's home had no heat, the mother had not seen the child for a significant period of time, and the mother had begun allowing a sex offender to live with the mother, thereby supporting the finding of neglect. In re S.D.J., — N.C. App. —, 665 S.E.2d 818, 2008 N.C. App. LEXIS 1617 (2008).

V. ILLUSTRATIVE CASES.

Second Petition Not Barred by Res Judicata. — Res judicata did not bar a second petition for the termination of a mother's parental rights as the substantive factual findings upon which the conclusions of law were based as to the grounds for termination of parental rights under subsection (a) of G.S. 7B-1111 all were based on facts that occurred after the first petition was filed; there was not an identity of issues between the first and second petitions. In re I.J., 186 N.C. App. 298, 650 S.E.2d 671, 2007 N.C. App. LEXIS 2081 (2007).

Rights Properly Terminated. —

In terminating parental rights, the trial court only needed to find one basis for termination pursuant to G.S. 7B-1111, and the trial court based its termination on detailed findings and conclusions as to ongoing, severe and repeated abuse of the child, who suffered injuries that were not accidental (including fractures), who had failed to thrive, and who was an abused juvenile as defined by G.S. 7B-101(a); thus, respondent mother's argument that the termination was based solely on felonious child abuse charges lacked merit. In re R.B.B., — N.C. App. —, 654 S.E.2d 514, 2007 N.C. App. LEXIS 2570 (2007).

Termination of a mother's parental rights for willful abandonment under G.S. 7B-1111(a)(2) was supported by the evidence as: (1) the mother was required to complete a domestic violence program and a mental health assessment, and to follow through with recommendations; (2) the mother entered the domestic violence program, but was terminated for lack of attendance; (3) the mother reentered, and attended 25 sessions, but was terminated for dishonesty because she did not disclose to the program administrators that she was pregnant, and actively hid her pregnancy; (4) the mother failed to attend therapy sessions on a regular basis as recommended; and (5) a finding that the mother continued her relationship with the father was supported. In re J.Z.M., — N.C. App. —, 663 S.E.2d 435, 2008 N.C. App. LEXIS 1133 (2008).

VI. WILLFULLY LEAVING CHILD IN FOSTER CARE.

Leaving Held "Willful". —

Termination of a mother's parental rights to her two minor children was upheld on appeal where the unchallenged findings of fact made by the trial court established by clear, cogent, and convincing evidence in the record that the mother had willfully left her children in foster care without making reasonable progress to correct the conditions that led to their placement. The findings supporting that conclusion included: the children were in foster care for over 12 months; the mother missed seven out of eleven appointments and failed to complete a substance abuse treatment program; missed five out of ten parenting classes; tested positive for drugs several times; failed to establish a permanent residence and had been moving around from family and friends for a total of eight separate residences; failed to obtain employment; and failed to stay in contact with the Department of Social Services. In re A.R.H.B., 186 N.C. App. 211, 651 S.E.2d 247, 2007 N.C. App. LEXIS 2086 (2007).

VII. FAILURE TO ESTABLISH PATERNITY, LEGITIMATE CHILD, OR PROVIDE SUPPORT OR CARE.

Lack of Paternity or Legitimacy Must Be Proved as of Filing Date. — Termination of a father's parental rights was upheld on appeal since the father failed to challenge any of the findings of fact made by the trial court, namely that prior to the date the motion to terminate his parental rights was filed, he never established paternity over the minor child at issue, never legitimated the child by statute or marriage, nor had he provided any financial support. In re A.R.H.B., 186 N.C. App. 211, 651 S.E.2d 247, 2007 N.C. App. LEXIS 2086 (2007).

SUBCHAPTER II. UNDISCIPLINED AND DELINQUENT JUVENILES.

Article 15.

Purposes; Definitions.

§ 7B-1500. Purpose.

Editor's Note. — Session Laws 2008-56, s. 7, as amended by Session Laws 2008-187, s. 44.5(b), provides, in part: "The Governor's Crime Commission shall develop the criteria for eligibility for funds appropriated for gang prevention and intervention. The criteria shall include a matching requirement of twenty-five percent (25%), one-half of which may be in in-kind contributions, and presentation of a written plan for the services to be provided by the funds. Funds shall be available to public and private entities or agencies for juvenile and adult programs that meet the criteria established by the Governor's Crime Commission. The Commission shall identify the cities and towns that do not have full-time parks and recreation staff, and provide targeted outreach and information to public and private agencies, and non-profit organizations, in those cities, towns, and unincorporated areas about their eligibility for these funds.

"The Governor's Crime Commission shall report to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety by April 15, 2009, on this program. The report shall include all of the following:

"(1) The grant award process.

"(2) A description of each grant awarded.

"(3) The performance criteria for evaluating grant programs.

"(4) A list of State grants awarded in the 2008 grant cycle."

CASE NOTES

Cited in In re K.W., — N.C. App. —, 664 S.E.2d 66, 2008 N.C. App. LEXIS 1477 (Aug. 5, 2008).

§ 7B-1501. Definitions.

Editor's Note. — Session Laws 2008-107, s. 18.1, provides: "(a) The Governor's Crime Commission and its adjunct committees shall study the legal, systematic, and organizational impact of expanding the jurisdiction of the Department of Juvenile Justice and Delinquency Prevention to include persons 16 and 17 years of age who commit crimes or infractions under State law or under an ordinance of local government. In particular, the Commission shall perform the following functions regarding the proposed expansion of the jurisdiction of the

Department of Juvenile Justice and Delinquency Prevention to include 16- and 17-year-olds who commit crimes or infractions under State or local law:

"(1) Identify the costs to the State court system and State and local law enforcement.

"(2) Review the relevant State laws that should be conformed or amended, including, but not limited to, the motor vehicle and criminal laws, the laws regarding expunction of criminal records, and other juvenile laws.

"(3) Review the experience of any other states which have within recent years expanded the juvenile justice jurisdiction to 16- and 17-year-olds.

"(4) Identify the practical issues for the Department of Juvenile Justice and Delinquency Prevention to implement best practices for programs and facilities that would meet the unique needs of the older youth under the proposal without adversely affecting the existing departmental programming.

"(5) Review the relevant State laws on sharing of juvenile information with other State departments and agencies.

"(6) Create a specific plan of the actions that are necessary to implement the expansion of the jurisdiction of the Department of Juvenile Justice and Delinquency Prevention.

"(7) Determine the total cost of expanding the jurisdiction of the Department of Juvenile Justice and Delinquency Prevention.

"(8) Conduct a cost benefit analysis of expanding the jurisdiction of the Department of Juvenile Justice and Delinquency Prevention with specific information on possible future fiscal savings anywhere within State government as a result of expenditures necessary to implement the expansion.

"(9) Determine whether federal or other funds are available to aid in the transition and expansion, or both, of the age of juvenile jurisdiction to 16- and 17-year-olds.

"(b) The Commission may contract with an independent group or groups for the oversight and management of this study project, a service needs study, and a courts study, and to periodically report those findings to the Commission.

"(c) The Department of Juvenile Justice and Delinquency Prevention and all other departments, agencies, institutions, or officers of the State or any political subdivision of the State, shall cooperate with the Commission in this study, shall provide the Commission with any requested facilities, data, or other assistance, and help the Commission identify any collateral effect which might result from implementation of the proposal on the program and operations of the relevant State department, agency, or the political subdivision.

"(d) The Commission shall submit a report of its findings and legislative, administrative, and funding recommendations by April 1, 2009, to the General Assembly and the Governor.

"In addition to its final report, the Commission shall report in writing on the progress of this study on a quarterly basis beginning on October 1, 2008, and by the first day of every quarter thereafter until the Commission submits its final report to the General Assembly, to the chairs and cochairs, as applicable, of the standing committees or subcommittees of the General Assembly listed in subsections (e) and (f) of this section. A copy of each progress report made to the standing committee and subcommittee chairs shall also be filed in the Legislative Library.

"(e) The Commission shall report to all of the following standing committees or subcommittees in the House of Representatives pursuant to this section:

"(1) Appropriations: Justice and Public Safety.

"(2) Children, Youth, and Families.

"(3) Education: Preschool, Elementary, and Secondary Education.

"(4) Juvenile Justice.

"(5) All of the Judiciary Committees.

"(f) The Commission shall report to all of the following standing committees or subcommittees in the Senate pursuant to this section:

"(1) Appropriations: Justice and Public Safety.

"(2) Education and Higher Education.

"(3) All of the Judiciary Committees.

"(g) Of the funds appropriated by this act to the Department of Crime Control and Public Safety, the Governor's Crime Commission for the 2008-2009 fiscal year, the Commission may use up to two hundred thousand dollars ($200,000) to conduct the study authorized by this section. The Commission may also apply for, receive, or accept grants and contributions from any source of money or any other thing of value to be held and used for the purposes of the study authorized by this section."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Article 17.

Screening of Delinquency and Undisciplined Complaints.

§ 7B-1703. Evaluation decision.

CASE NOTES

Untimely Petition. — Trial court did not have jurisdiction over a juvenile petition because the petition was not filed in the office of the clerk of superior court until more than thirty days after receipt of the complaint and thus was untimely pursuant to G.S. 7B-1703; the timely filing of a petition seeking judicial action was jurisdictional. In re J.B., 186 N.C. App. 301, 650 S.E.2d 457, 2007 N.C. App. LEXIS 2231 (2007).

Trial court erred by adjudicating a juvenile delinquent as a result of the juvenile court counselor failing to file the petition within the 15-day period following the filing of the complaint as mandated by G.S. 7B-1703(b); thus, the trial court lacked jurisdiction to decide the matter. In re K.W., — N.C. App. —, 664 S.E.2d 66, 2008 N.C. App. LEXIS 1477 (Aug. 5, 2008).

§ 7B-1706. Diversion plans and referral.

CASE NOTES

Cited in In re K.W., — N.C. App. —, 664 S.E.2d 66, 2008 N.C. App. LEXIS 1477 (Aug. 5, 2008).

Article 18.

Venue; Petition; Summons.

§ 7B-1801. Pleading and process.

CASE NOTES

Jurisdiction. —

Trial court did not have jurisdiction over a juvenile petition because the petition was not filed in the office of the clerk of superior court until more than thirty days after receipt of the complaint and thus was untimely pursuant to G.S. 7B-1703; the timely filing of a petition seeking judicial action was jurisdictional. In re J.B., 186 N.C. App. 301, 650 S.E.2d 457, 2007 N.C. App. LEXIS 2231 (2007).

§ 7B-1804. Commencement of action.

CASE NOTES

Timely Filing Jurisdictional. — Trial court did not have jurisdiction over a juvenile petition because the petition was not filed in the office of the clerk of superior court until more than thirty days after receipt of the complaint and thus was untimely pursuant to G.S. 7B-1703; the timely filing of a petition seeking judicial action was jurisdictional. In re J.B., 186 N.C. App. 301, 650 S.E.2d 457, 2007 N.C. App. LEXIS 2231 (2007).

Article 22.

Probable Cause Hearing and Transfer Hearing.

§ 7B-2200. Transfer of jurisdiction of juvenile to superior court.

CASE NOTES

Cited in In re E.S., — N.C. App. —, 663 S.E.2d 475, 2008 N.C. App. LEXIS 1501 (Aug. 5, 2008).

§ 7B-2203. Transfer hearing.

CASE NOTES

Transfer of Case Was Abuse of Discretion. — Superior court erred in finding that a district court abused the court's discretion in transferring a juvenile's case to the superior court because the superior court failed to properly apply the abuse of discretion standard of review and effectively engaged in de novo review by making findings on the evidence relating to the factors set forth in G.S. 7B-2203(b); the superior court chose to give more weight than the district court did to the expert testimony addressing the facilities and programs available in the juvenile system and the likelihood that the juvenile would benefit from such treatment, but the district court found other factors to be more compelling and entitled to greater weight, including the juvenile's age, his average to above average cognitive abilities, the aggressive, violent, premeditated, and willful manner in which the alleged crimes were committed, and the seriousness of the crimes. In re E.S., — N.C. App. —, 663 S.E.2d 475, 2008 N.C. App. LEXIS 1501 (Aug. 5, 2008).

Article 24.

Hearing Procedures.

§ 7B-2405. Conduct of the adjudicatory hearing.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in In re B.E., — N.C. App. —, 652 S.E.2d 344, 2007 N.C. App. LEXIS 2255 (2007).

§ 7B-2407. When admissions by juvenile may be accepted.

CASE NOTES

Acceptance of Admission Was Erroneous. —

Since the State failed to provide information in compliance with G.S. 7B-2407 to establish a factual basis for admitting defendant, a juvenile's, plea, as the prosecutor's statement of facts did not contain any statement or evidence that the pickup truck was worth more than $1,000, and the record included no written statement of defendant or sworn testimony or a statement of facts by his attorney that indicated that the truck was valued at more than $1,000, defendant's admission of guilt as to the stolen vehicle had to be vacated. In re Mecklenburg County., — N.C. App. —, 662 S.E.2d 570, 2008 N.C. App. LEXIS 1189 (July 1, 2008).

Testimony as to Juvenile's Statements Properly Admitted. — Officer's testimony about juvenile defendant's statements was properly admitted under G.S. 7B-2407 and G.S. 8C-1, N.C. R. Evid. 801(d); the officer interviewed defendant with his mother present, defendant was not in custody, and the juvenile rights warning was read to defendant and his mother, who both signed a statement indicating they understood the rights. In re J.J.D.L., — N.C. App. —, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

§ 7B-2408. Rules of evidence.

CASE NOTES

Applied in In re Z.A.K., — N.C. App. —, 657 S.E.2d 894, 2008 N.C. App. LEXIS 539 (Mar. 18, 2008).

§ 7B-2409. Quantum of proof in adjudicatory hearing.

CASE NOTES

The proper quantum of proof in a juvenile hearing, etc.

Adjudication order contained an ambiguity that could not be resolved as to the standard of proof used for purposes of G.S. 7B-2409 and G.S. 7B-2411 because in its findings after a juvenile delinquency adjudication hearing, the trial court correctly stated the burden of proof as proof proven beyond a reasonable doubt, but in the portion of the order that referenced an assault inflicting serious injury, a clear, cogent and convincing evidence burden of proof was stated. In re C.B., — N.C. App. —, 654 S.E.2d 21, 2007 N.C. App. LEXIS 2521 (2007).

Trial court did not err in failing to adjudicate a juvenile delinquent based on proof beyond a reasonable doubt because the adjudication order stated that the facts were proven beyond a reasonable doubt; although the trial court ultimately determines the existence of proof beyond a reasonable doubt of a respondent's guilt, in considering a motion to dismiss, the evidence is examined in the light most favorable to the State. In re S.M., — N.C. App. —, 660 S.E.2d 653, 2008 N.C. App. LEXIS 992 (2008).

Trial Court Must Unequivocally State Standard of Proof Used in Adjudication Order. — Case was remanded for clarification of the standard of proof used in the order adjudicating a juvenile defendant delinquent for committing indecent liberties between children, in violation of G.S. 14-202.2, because the trial court did not unequivocally state that it found the facts underlying the adjudication order to be true beyond a reasonable doubt, as required under G.S. 7B-2411. In re B.E., — N.C. App. —, 652 S.E.2d 344, 2007 N.C. App. LEXIS 2255 (2007).

§ 7B-2411. Adjudication.

CASE NOTES

Trial Court Must Unequivocally State Standard of Proof Used in Adjudication Order. — Case was remanded for clarification of the standard of proof used in the order adjudicating a juvenile defendant delinquent for committing indecent liberties between children, in violation of G.S. 14-202.2, because the trial court did not unequivocally state that it found the facts underlying the adjudication order to be true beyond a reasonable doubt, as required under G.S. 7B-2411. In re B.E., — N.C. App. —, 652 S.E.2d 344, 2007 N.C. App. LEXIS 2255 (2007).

Standard of Proof Beyond a Reasonable Doubt. — Trial court did not err in failing to adjudicate a juvenile delinquent based on proof beyond a reasonable doubt because the adjudication order stated that the facts were proven beyond a reasonable doubt; although the trial court ultimately determines the existence of proof beyond a reasonable doubt of a respondent's guilt, in considering a motion to dismiss, the evidence is examined in the light most favorable to the State. In re S.M., — N.C. App. —, 660 S.E.2d 653, 2008 N.C. App. LEXIS 992 (2008).

Ambiguity as to Burden of Proof. — Adjudication order contained an ambiguity that could not be resolved as to the standard of proof used for purposes of G.S. 7B-2409 and G.S.

7B-2411 because in its findings after a juvenile delinquency adjudication hearing, the trial court correctly stated the burden of proof as proof proven beyond a reasonable doubt, but in the portion of the order that referenced an assault inflicting serious injury, a clear, cogent and convincing evidence burden of proof was stated. In re C.B., — N.C. App. —, 654 S.E.2d 21, 2007 N.C. App. LEXIS 2521 (2007).

ARTICLE 25.

Dispositions.

§ 7B-2500. Purpose.

CASE NOTES

Cited in In re Z.A.K., — N.C. App. —, 657 S.E.2d 894, 2008 N.C. App. LEXIS 539 (Mar. 18, 2008).

§ 7B-2501. Dispositional hearing.

CASE NOTES

Failure to preserve objection to juvenile dispositional hearing, even acknowledging the informality allowed in a dispositional hearing, the record gave no indication that juvenile defendant contested the continuance of the dispositional hearing on the grounds that a sex offender specific evaluation was unavailable; defendant was procedurally barred from asserting this argument on appeal. In re J.J.D.L., — N.C. App. —, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

§ 7B-2506. Dispositional alternatives for delinquent juveniles.

CASE NOTES

Remand Required for New Disposition. — Although the most lenient sentencing alternatives for juveniles was imposed under G.S. 7B-2506 for the nine petitions, it was unclear whether the trial court would have altered the disposition order had the trial court properly adjudicated the juvenile delinquent based solely upon the two petitions in support of which the State submitted sufficient evidence. Even though remand might result in the same disposition based solely upon the two valid adjudications, remand was required for a new disposition. In re R.D.L., — N.C. App. —, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (Aug. 5, 2008).

§ 7B-2508. Dispositional limits for each class of offense and delinquency history level.

CASE NOTES

Sentencing for First Degree Sex Offenses With a Child. — Juvenile defendant failed to argue how the absence of a sex offender specific evaluation hindered the trial court's ability to properly sentence him on his adjudication for first degree sex offenses with a child, which was a violent felony. In re J.J.D.L., — N.C. App. —, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

Cited in In re R.D.L., — N.C. App. —, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (Aug. 5, 2008).

§ 7B-2510. Conditions of probation; violation of probation.

CASE NOTES

Delegation of Authority. —
Where a trial court ordered defendant juvenile to continue on probation with the new condition that defendant cooperate with an out of home placement and be placed in detention until the placement was available, the court did not violate G.S. 7B-2510(e) as it did not leave the determination of whether the out of home placement was necessary to another; while it might have left the specific details of the out of home placement with an organization, it did not delegate its authority as to which dispositional alternatives were imposed in the new juvenile order. In re V.A.L., — N.C. App. —, 652 S.E.2d 726, 2007 N.C. App. LEXIS 2356 (2007).

Article 26.

Modification and Enforcement of Dispositional Orders; Appeals.

§ 7B-2600. Authority to modify or vacate.

CASE NOTES

Modification Upheld. —
Trial court properly modified a juvenile's dispositional order because the court could not compel the provision of a residential sex offender treatment in violation of federal law after having initially ordered the treatment based upon erroneous information, and the facts constituted a change in circumstance under G.S. 7B-2600(a). In re D.G., — N.C. App. —, 663 S.E.2d 458, 2008 N.C. App. LEXIS 1478 (Aug. 5, 2008).

§ 7B-2603. Right to appeal transfer decision.

CASE NOTES

Transfer of Case Inappropriate. — Superior court erred in finding that a district court abused the court's discretion in transferring a juvenile's case to the superior court because the superior court failed to properly apply the abuse of discretion standard of review and effectively engaged in a de novo review by making findings on the evidence relating to the factors set forth in G.S. 7B-2203(b); the superior court did not explain in what way the district court's decision was manifestly unreasonable but simply concluded, based on the court's de novo view of the evidence, that transfer was inappropriate. In re E.S., — N.C. App. —, 663 S.E.2d 475, 2008 N.C. App. LEXIS 1501 (Aug. 5, 2008).

§ 7B-2605. Disposition pending appeal.

CASE NOTES

Denial of juvenile defendant's motion for release pending appeal was not improper, given that defendant did not challenge the trial court's findings of fact supporting its reason for denying defendant's motion, which was that he committed first degree sex offenses with a child. In re J.J.D.L., — N.C. App. —, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

ARTICLE 28.

Interstate Compact on Juveniles.

§ 7B-2800. (For contingent repeal — see note) Execution of Compact.

Cross References. — For compact with states that have adopted the Interstate Compact for Juveniles, see Article 40 of this Chapter, G.S. 7B-4000 et seq.

SUBCHAPTER III. JUVENILE RECORDS.

ARTICLE 31.

Disclosure of Juvenile Information.

§ 7B-3102. Disclosure of information about juveniles who escape.

(a) Notwithstanding G.S. 7B-2102(d) or any other law to the contrary, within 24 hours of the time a juvenile escapes from custody the Department shall release to the public the juvenile's first name, last initial, and photograph; the name and location of the institution from which the juvenile escaped, or if the juvenile's escape was not from an institution, the circumstances and location of the escape; and a statement, based on the juvenile's record, of the level of concern of the Department as to the juvenile's threat to self or to others, if the juvenile escapes from a detention facility, secure custody, or a youth development center and the juvenile has been adjudicated delinquent.

(b) When a juvenile escapes from a detention facility or secure custody, the Department may release to the public within 24 hours the juvenile's first name, last initial, and photograph; the name and location of the institution from which the juvenile escaped, or if the juvenile's escape was not from an institution, the circumstances and location of the escape; and a statement, based on the juvenile's record, of the level of concern of the Department as to the juvenile's threat to self or to others if both of the following apply:

(1) The juvenile is alleged to have committed an offense that would be a felony if committed by an adult.

(2) The Department determines, based on the juvenile's record, that the juvenile presents a danger to self or others.

(c) If a juvenile subject to subsection (a) or (b) of this section is returned to custody before the disclosure required or permitted is made, the Department shall not make the disclosure.

(d) The Department shall maintain a photograph of every juvenile in its custody.

(e) Before information is released to the public under this section, the Department shall make a reasonable effort to notify a parent, legal guardian, or custodian of the juvenile. (2007-458, s. 2; 2008-169, s. 1.)

Effect of Amendments. — Session Laws 2008-169, s. 1, effective October 1, 2008, rewrote the section.

ARTICLE 40.

Interstate Compact for Juveniles.

§ 7B-4000. (For effective date — see note) Short title.

Cross References. — For compact with states that have not adopted this compact but adopted the Interstate Compact on Juveniles, see Article 28 of this Chapter, see G.S. 7B-2800 et seq.

Editor's Note. — Session Laws 2005-194, which enacted this Article, in s. 5, states in part, that this Article becomes effective only when 35 states have adopted The Interstate Compact for Juveniles, as set forth in the Compact. By letter dated September 29, 2008, the Secretary of Juvenile Justice and Delinquency Prevention notified the Revisor of Statutes that the Interstate Compact for Juveniles has become effective under the terms of the Compact because 35 states have now adopted it. Illinois became the 35th state when the Governor signed the legislation adopting the Compact in Illinois on August 26, 2008.

§ 7B-4001. (For effective date — see note) Governor to execute Compact; form of Compact.

Editor's Note. — For effective date of Article 40, see the Editor's note under G.S. 7B-4000.

§ 7B-4002. Implementation of the Compact (For effective date — see note).

Editor's Note. — For effective date of Article 40, see the Editor's note under G.S. 7B-4000.

Chapter 8.

Evidence.

Article 7.

Competency of Witnesses.

§ 8-53. Communications between physician and patient.

CASE NOTES

III. Waiver.

III. WAIVER.

Privilege May Be Waived. — Patient-physician privilege conferred by G.S. 8-53 was impliedly waived because the decedent and later the executor of the decedent's estate placed the decedent's mental health and history of substance abuse at issue by bringing a claim for emotional distress. Spangler v. Olchowski, — N.C. App. —, 654 S.E.2d 507, 2007 N.C. App. LEXIS 2575 (2007).

§ 8-53.3. Communications between psychologist and client or patient.

CASE NOTES

Cited in Spangler v. Olchowski, — N.C. App. —, 654 S.E.2d 507, 2007 N.C. App. LEXIS 2575 (2007).

§ 8-53.7. Social worker privilege.

CASE NOTES

Cited in Spangler v. Olchowski, — N.C. App. —, 654 S.E.2d 507, 2007 N.C. App. LEXIS 2575 (2007).

§ 8-53.8. Counselor privilege.

CASE NOTES

Cited in Spangler v. Olchowski, — N.C. App. —, 654 S.E.2d 507, 2007 N.C. App. LEXIS 2575 (2007).

§ 8-57. Husband and wife as witnesses in criminal actions.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Spousal Privilege Not Bar to Statement. — Defendant's counsel did not provide ineffective assistance of counsel by not renewing an objection to the admissibility of a statement that defendant made to the defendant's spouse regarding the killing of the victim; the statement did not involve a confidential communication pursuant to G.S. 8-57(c) because it was made within the hearing of a third person and, thus, the statement was admissible. State v. Kirby, — N.C. App. —, 653 S.E.2d 174, 2007 N.C. App. LEXIS 2450 (2007).

Conversations between defendant and his wife in the visiting areas of three correctional facilities were not admissible into evidence, based upon the marital privilege under G.S. 8-57(c), because the wife, as a result of the marital relationship, induced defendant to make the statements, which were not overheard by a third party and were only obtained through the wife's participation with the police in getting defendant to make the statements. State v. Rollins, — N.C. App. —, 658 S.E.2d 43, 2008 N.C. App. LEXIS 547 (Mar. 18, 2008).

Cited in Rogers v. State, 189 P.3d 265, 2008 Wyo. LEXIS 94 (Wyo. July 31, 2008).

ARTICLE 10.

Depositions.

§ 8-83. When deposition may be read on the trial.

CASE NOTES

Applied in Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co., — N.C. App. —, 665 S.E.2d 505, 2008 N.C. App. LEXIS 1628 (2008).

Chapter 8C.

Evidence Code.

ARTICLE 1.

General Provisions.

Rule 103. Rulings on evidence.

CASE NOTES

Failure to Offer Proof Precludes Appellate Review. —

Codefendant's answer to a question was not readily apparent from the context within which the question was asked, pursuant to G.S. 8C-1, N.C. R. Evid. 103(a)(2), the appellate court would not speculate as to what codefendant's answer might have been. State v. Cousar, — N.C. App. —, 660 S.E.2d 902, 2008 N.C. App. LEXIS 1076 (June 3, 2008).

Admission of Twelve Video Clips was not Unfairly Prejudicial. — In a trial charging defendant with twelve counts of third degree sexual exploitation of a minor in violation of G.S. 14-190.17A, the admission into evidence of 12 video clips from defendant's computer depicting children engaged in sexual activity was not unfairly prejudicial where the State showed only a few seconds from each clip, each clip was presented for one of the charges levied against defendant, the images were not duplicative, and the images were not shown on an unusually large screen. State v. Riffe, — N.C. App. —, 661 S.E.2d 899, 2008 N.C. App. LEXIS 1166 (June 17, 2008).

ARTICLE 2.

Judicial Notice.

Rule 201. Judicial notice of adjudicative facts.

CASE NOTES

Sunset and Moon Phase. —

Nighttime element of burglary was satisfied as: (1) judicial notice under N.C. R. Evid. 201 was taken of the end of twilight, (2) by the end of twilight, the victim had returned home, and the perpetrators were only in the victim's home a short time, (3) a call to a police officer shortly after the incident was placed during the nighttime, and (4) defendant's testimony that the men returned to their car when it was "just turning dark," alone, was insufficient to negate the nighttime element. State v. Jordan, — N.C. App. —, 651 S.E.2d 917, 2007 N.C. App. LEXIS 2270 (2007).

Judicial Notice of Co-Defendant's Guilty Plea. — Co-defendant's guilty plea was properly excluded under G.S. 8C-1, N.C. R. Evid. 201(d), because it was not an adjudicative fact; the co-defendant did not testify at defendant's trial for breaking or entering a motor vehicle with intent to commit larceny and the plea was irrelevant. It was improper to place irrelevant facts before a jury, by judicial notice or otherwise under G.S. 8C-1, N.C. R. Evid. 402. State v. Baskin, — N.C. App. —, 660 S.E.2d 566, 2008 N.C. App. LEXIS 895 (2008).

ARTICLE 4.

Relevancy and Its Limits.

Rule 401. Definition of "relevant evidence."

CASE NOTES

I. General Consideration.
II. Relevant Evidence.
III. Irrelevant Evidence.

I. GENERAL CONSIDERATION.

Applied in State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007); State v. Jones, — N.C. App. —, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (Feb. 5, 2008); State v. Garris, — N.C. App. —, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008); State v. Little, — N.C. App. —, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008); Yorke v. Novant Health, Inc., — N.C. App. —, 666 S.E.2d 127, 2008 N.C. App. LEXIS 1620 (2008).

Cited in State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007); State v. Beatty, — N.C. App. —, 658 S.E.2d 508, 2008 N.C. App. LEXIS 651 (Apr. 1, 2008).

II. RELEVANT EVIDENCE.

Testimony Defendant Attempted to Procure False Alibi. — Evidence that defendant attempted to procure a false alibi from a former girlfriend was relevant and, thus, admissible. State v. Rankin, — N.C. App. —, 663 S.E.2d 438, 2008 N.C. App. LEXIS 1320 (2008).

Testimony Regarding Mental State. — In defendant's criminal trial on a variety of charges, arising from a vehicular incident that resulted in deaths, a trial court properly allowed admission of testimony regarding defendant's prior failure to take a breath test and defendant's conviction for driving while intoxicated, as such was relevant under N.C. R. Evid. 401 and 402 to show defendant's knowledge that the driver's license was suspended and to show malice, which was an element of one of the charged offenses; further, the evidence was properly admitted for the purpose of showing defendant's intent and it was not unfairly prejudicial under N.C. R. Evid. 404(b) and 403. State v. Lloyd, — N.C. App. —, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

Victim's Character. — Evidence that the murder victim's last words were "I'm not scared of you. I'm a Christian," was admissible because it was offered not to show the good character of the victim, but instead it was offered as circumstantial evidence of defendant's state of mind when he was approaching the victim before he shot and killed the victim. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

Trial court did not err in admitting the testimony of the victim's mother about the victim's involvement with drugs or a photo showing the victim before the victim started using drugs. Pursuant to G.S. 8C-1, N.C. R. Evid. 401, the evidence was relevant to support the State's theory that the murder of the victim by defendant and another man was drug-related and to show the victim's health before the victim became involved with drugs. State v. Hope, — N.C. App. —, 657 S.E.2d 909, 2008 N.C. App. LEXIS 544 (Mar. 18, 2008).

Weapons Evidence Admissible. — Victim's testimony regarding the shiny object in defendant's hand, which the victim thought to be a knife, was relevant to the first-degree rape charge. State v. Lawrence, — N.C. App. —, 663 S.E.2d 898, 2008 N.C. App. LEXIS 1509 (2008).

Evidence Held Relevant. — Statements referring to an officer's testimony given during trial and introduced to challenge the credibility of defendant's testimony were relevant and thus, admissible. State v. Parker, — N.C. App. —, 653 S.E.2d 6, 2007 N.C. App. LEXIS 2239 (2007).

Testimony of a trooper and a witness regarding an employee's actions in fleeing the scene of a motor vehicle accident was relevant to show the employee's motivation for leaving the scene as the evidence related to the possibility that the employee was acting as an agent for the employee's employer. Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

Evidence of the victims' state of mind, including the victim's fear that defendant would abuse the victim's younger sister, kill the victim, and kill the victim's family, and evidence concerning the treatment plan developed for the victim were all relevant to whether the victim had been sexually abused by defendant. State v. Davis, — N.C. App. —, 664 S.E.2d 21, 2008 N.C. App. LEXIS 1508 (Aug. 5, 2008).

Evidence of defendant's extra-marital affair was admissible because the evidence was relevant and helped explain why the child victim waited to come forward and report a sexual assault by defendant. State v. Tadeja, — N.C. App. —, 664 S.E.2d 402, 2008 N.C. App. LEXIS 1503 (2008).

As the trial court's preclusion of evidence regarding defendant's peaceful and law-abiding character prevented defendant from offering evidence of two character traits which were both relevant and admissible as to his self-defense claim, and defendant demonstrated a reasonable possibility that, had the trial court not committed the error, the result at trial would have been different; thus, the defendant was prejudiced by the error. State v. Ledarius Montreal Banks, — N.C. App. —, 664 S.E.2d 355, 2008 N.C. App. LEXIS 1484 (2008).

Repetition of Evidence During Closing Argument. — Defendant waived his right to object to the admission of testimony of a prosecution witness that he was afraid to testify for fear of gangs and to the prosecutor's reference to that testimony during closing arguments; because the evidence was previously admitted under G.S. 8C-1, N.C. R. Evid. 401, allowing repetition of the evidence by the State in closing arguments was not an abuse of discretion. State v. Bodden, — N.C. App. —, 661 S.E.2d 23, 2008 N.C. App. LEXIS 1022 (2008).

III. IRRELEVANT EVIDENCE.

Evidence Properly Excluded. —

In an involuntary manslaughter case, the trial court did not err in excluding the testimony of a nurse and a trooper, that defendant's brother told him he was a passenger in defendant's car at the time of the accident, because it was irrelevant; the excluded evidence did not point directly to the guilt of defendant's brother, did not tend to implicate defendant's borther in the commission of the crimes, and was not inconsistent with defendant's guilt. State v. Lopez, — N.C. App. —, 655 S.E.2d 895, 2008 N.C. App. LEXIS 199 (Feb. 5, 2008).

Evidence Held Irrelevant. —

In the absence of evidence connecting a nine-millimeter bullet to a murder victim or to the defendant, the bullet was not relevant evidence, G.S. 8C-1, N.C. R. Evid. 401; the bullet did not have any tendency to prove that defendant committed the crime. State v. Bodden, — N.C. App. —, 661 S.E.2d 23, 2008 N.C. App. LEXIS 1022 (2008).

Erroneously But Not Prejudicially Admitted. —

Trial court abused its discretion in allowing the state, over defendant's objection, to make arguments referencing the amount of punishment that the finding of an aggravating factor would empower a judge to impose and the effect of the merger doctrine on defendant's convictions in the closing argments, as those issues were irrelevant to the issue of a factor's presence in an offense; however, based on the overwhelming evidence that defendant was operating his vehicle at a dangerously high rate of speed while legally intoxicated, there was no reasonable possibility that, had the error in question not been committed, a different result would have been reached, and the error was therefore not prejudicial. State v. Lopez, — N.C. App. —, 655 S.E.2d 895, 2008 N.C. App. LEXIS 199 (Feb. 5, 2008).

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

CASE NOTES

Evidence Not Probative. —

In an involuntary manslaughter case, the trial court did not err in excluding the testimony of a nurse and a trooper, that defendant's brother told him he was a passenger in defendant's car at the time of the accident, because it was irrelevant; the excluded evidence did not point directly to the guilt of defendant's brother, did not tend to implicate defendant's borther in the commission of the crimes, and was not inconsistent with defendant's guilt. State v. Lopez, — N.C. App. —, 655 S.E.2d 895, 2008 N.C. App. LEXIS 199 (Feb. 5, 2008).

Evidence Held Relevant. —

In defendant's criminal trial on a variety of charges, arising from a vehicular incident that resulted in deaths, a trial court properly allowed admission of testimony regarding defendant's prior failure to take a breath test and defendant's conviction for driving while intoxicated, as such was relevant under N.C. R. Evid. 401 and 402 to show defendant's knowledge that the driver's license was suspended and to show malice, which was an element of one of the charged offenses; further, the evidence was properly admitted for the purpose of showing defendant's intent and it was not unfairly prejudicial under N.C. R. Evid. 404(b) and 403. State v. Lloyd, — N.C. App. —, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

Admission of testimony of victim's mother about the victim's involvement with drugs and admission of a photo of the victim before the victim started using drugs were proper since the testimony and the photo were relevant evidence pursuant to G.S. 8C-1-402, N.C. R.

Evid. 402. The evidence was admitted to support the State's theory that the murder of the victim by defendant and another man was drug related and to show how the victim looked before the victim became caught up in drug use. State v. Hope, — N.C. App. —, 657 S.E.2d 909, 2008 N.C. App. LEXIS 544 (Mar. 18, 2008).

Evidence Held Irrelevant. —

Co-defendant's guilty plea was properly excluded under G.S. 8C-1, N.C. R. Evid. 201(d), because it was not an adjudicative fact; the co-defendant did not testify at defendant's trial for breaking or entering a motor vehicle with intent to commit larceny and the plea was irrelevant. It was improper to place irrelevant facts before a jury, by judicial notice or otherwise under G.S. 8C-1, N.C. R. Evid. 402. State v. Baskin, — N.C. App. —, 660 S.E.2d 566, 2008 N.C. App. LEXIS 895 (2008).

Subsequent Payment on Taxes Irrelevant Evidence. — Trial court could have properly excluded evidence that defendant filed amended tax returns following defendant's arrest for attempting to evade or defeat tax because, whether or not defendant subsequently satisfied defendant's tax liability to the State of North Carolina had no bearing on whether defendant willfully evaded defendant's tax obligations at the times when those taxes were due. Such evidence was therefore irrelevant and properly excluded under G.S. 8C-1, N.C. R. Evid. 402. State v. Howell, — N.C. App. —, 662 S.E.2d 922, 2008 N.C. App. LEXIS 1312 (July 15, 2008).

Evidence Properly Admitted. —

Evidence that the murder victim's last words were "I'm not scared of you. I'm a Christian," was admissible because it was offered not to show the good character of the victim, but instead it was offered as circumstantial evidence of defendant's state of mind when he was approaching the victim before he shot and killed the victim. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

Because a trial court had discretion to admit all relevant evidence under N.C. R. Evid. 402, as well as to exclude evidence under N.C. R. Evid. 403, based on confusion or unfair prejudice, it had discretion to admit testimony of plaintiff former employee's coworkers, who suffered symptoms similar to that of the employee, who sought to recover damages based on his exposure to an allegedly toxic workplace. Absent an abuse of discretion, which was not shown, that ruling would not be overturned. Cameron v. Merisel Props., — N.C. App. —, 652 S.E.2d 660, 2007 N.C. App. LEXIS 2318 (2007).

Trial court's denial of creditor's and auctioneer's motion to exclude any evidence that they failed to escrow the auction funds in violation of an agreement made between the parties was not an abuse of discretion as that evidence was highly relevant to the secured creditor's claims, and was not substantially outweighed by any prejudice to the creditors and the auctioneer. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

Applied in State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007); State v. Cunningham, — N.C. App. —, 656 S.E.2d 697, 2008 N.C. App. LEXIS 260 (2008); State v. Little, — N.C. App. —, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008).

Cited in State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007); State v. Parker, — N.C. App. —, 653 S.E.2d 6, 2007 N.C. App. LEXIS 2239 (2007); State v. Beatty, — N.C. App. —, 658 S.E.2d 508, 2008 N.C. App. LEXIS 651 (Apr. 1, 2008).

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

CASE NOTES

I. General Consideration.
III. Prejudicial Evidence, Evidence Excluded Based on Confusion, Etc.
IV. Admission or Exclusion of Evidence Not Prejudicial.

I. GENERAL CONSIDERATION.

Prior Bad Act. —

Trial court did not err in admitting the testimony of a witness that defendant had touched the witness, a minor at the time, in a sexual manner without the consent of the witness. The evidence pursuant to the balancing test of G.S. 8C-1, N.C. R. Evid. 403 was not more prejudicial than probative since there was a similarity and temporal proximity regarding that incident and the present charges against defendant. State v. Bowman, — N.C. App. —, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

Discretion of Trial Judge. —

Because the issue of whether to exclude evidence under G.S. 8C-1, N.C. R. Evid. 403 was within the sound discretion of the trial court, and the plain error standard of review did not apply to issues that fell within the realm of the trial court's discretion, defendant's assertion of error based on a stipulation was overruled. State v. Cunningham, — N.C. App. —, 656 S.E.2d 697, 2008 N.C. App. LEXIS 260 (2008).

Error Not Properly Preserved. — Trial court did not err by excluding evidence of a sexual assault victim's allegedly delinquent child support payments as not relevant to the sexual assault trial under G.S. 8C-1, N.C. R. Evid. 403; however, defendant had abandoned his argument because he only referenced it in a heading of his brief and did not provide a reason, argument, or authority to support his claim, as required by N.C. R. App. P. 28(b)(6). State v. Harris, — N.C. App. —, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Cited in State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007); State v. Maready, — N.C. App. —, 654 S.E.2d 769, 2008 N.C. App. LEXIS 96 (2008); State v. Jones, — N.C. App. —, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (Feb. 5, 2008); State v. Hope, — N.C. App. —, 657 S.E.2d 909, 2008 N.C. App. LEXIS 544 (Mar. 18, 2008); State v. Davis, — N.C. App. —, 664 S.E.2d 21, 2008 N.C. App. LEXIS 1508 (Aug. 5, 2008); State v. Washington, — N.C. App. —, 665 S.E.2d 799, 2008 N.C. App. LEXIS 1625 (2008).

III. PREJUDICIAL EVIDENCE, EVIDENCE EXCLUDED BASED ON CONFUSION, ETC.

Evidence Properly Excluded. — Trial court properly excluded mental health expert's testimony as to the likelihood of defendant's release from the hospital if the jury found defendant not guilty by reason of insanity after finding that the expert's testimony could confuse the issues of the case with the possible consequences, and the expert's testimony would not assist the jury in regard to any matter in issue or fact. State v. Hall, — N.C. App. —, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007).

It was error to exclude under G.S. 8C-1, N.C. R. Evid. 403, testimony that in a questionnaire the victim had stated that she sometimes saw herself as if she were looking at someone else, that she was sometimes not sure whether something that happened was real or a dream, and that she sometimes heard voices inside her head; the evidence should have been admitted under G.S. 8C-1, N.C. R. Evid. 611(b), because it went to the credibility of the victim, whose testimony was crucial to the state's case, because the victim's testimony was contradicted by two eyewitnesses, and because attacking the victim's credibility was the defense's main theory. State v. Whaley, 362 N.C. 156, 655 S.E.2d 388, 2008 N.C. LEXIS 31 (2008).

Trial court properly sustained the State's objection under G.S. 8C-1, N.C. R. Evid. 403, on the basis that the prejudicial effect of testimony, that defendant and his sexual assault victim previously had rented motel rooms together, outweighed its probative benefit. The evidence was not relevant and admissible under G.S. 8C-1, N.C. R. Evid. 412(b)(1) because defendant had not raised the victim's consent as a defense. State v. Harris, — N.C. App. —, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Evidence Properly Admitted. — Because a trial court had discretion to admit all relevant evidence under N.C. R. Evid. 402, as well as to exclude evidence under N.C. R. Evid. 403, based on confusion or unfair prejudice, it had discretion to admit testimony of plaintiff former employee's coworkers, who suffered symptoms similar to that of the employee, who sought to recover damages based on his exposure to an allegedly toxic workplace. Absent an abuse of discretion, which was not shown, that ruling would not be overturned. Cameron v. Merisel Props., — N.C. App. —, 652 S.E.2d 660, 2007 N.C. App. LEXIS 2318 (2007).

Trial court's denial of creditor's and auctioneer's motion to exclude any evidence that they failed to escrow the auction funds in violation of an agreement made between the parties was not an abuse of discretion as that evidence was highly relevant to the secured creditor's claims, and was not substantially outweighed by any prejudice to the creditors and the auctioneer. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

Evidence of defendant's extra-marital affair was admissible because the evidence was relevant and helped explain why the child victim waited to come forward and report what was happening. State v. Tadeja, — N.C. App. —, 664 S.E.2d 402, 2008 N.C. App. LEXIS 1503 (2008).

Admission of evidence identifying defendant as Muslim was not error since defendant could not show that, without such evidence, a different result would likely have been reached; the subject testimony was provided by defendant's prior girlfriend and indicated that the girlfriend provided a false alibi for defendant after defendant asked the witness to do so and the witness felt that such help was what the girlfriend was supposed to do for defendant. State v. Rankin, — N.C. App. —, 663 S.E.2d 438, 2008 N.C. App. LEXIS 1320 (2008).

Testimony of a trooper and a witness regarding an employee's actions in fleeing the scene of a motor vehicle accident was relevant and properly admitted to show the employee's motivation for leaving the scene as the evidence related to the possibility that the employee was acting as an agent for the employee's employer. Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

IV. ADMISSION OR EXCLUSION OF EVIDENCE NOT PREJUDICIAL.

Admission of Improper Evidence Not Prejudicial. —

Defendant's assignment of plain error to the admission into evidence of a photograph of the victim when she was alive, the victim's bloody eyeglasses, and the victim's key chain was overruled because the evidence against defendant was substantial and any prejudice arising from the admission of this physical evidence was de minimis. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

Evidence Properly Admitted. —

Trial court properly allowed defendant's alleged co-conspirator to testify that defendant and another person had sent him threats and to read to the jury three threatening letters that he testified he had received while in prison, as defendant could not show that without them a different result would likely have been reached, and thus exclusion was not required under N.C. R. Evid. 403. State v. Carter, 186 N.C. App. 259, 650 S.E.2d 650, 2007 N.C. App. LEXIS 2089 (2007).

Evidence that the murder victim's last words were "I'm not scared of you. I'm a Christian," was admissible because it was offered not to show the good character of the victim, but instead it was offered as circumstantial evidence of defendant's state of mind when he was approaching the victim before he shot and killed the victim. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

In defendant's criminal trial on a variety of charges, arising from a vehicular incident that resulted in deaths, a trial court properly allowed admission of testimony regarding defendant's prior failure to take a breath test and defendant's conviction for driving while intoxicated, as such was relevant under N.C. R. Evid. 401 and 402 to show defendant's knowledge that the driver's license was suspended and to show malice, which was an element of one of the charged offenses; further, the evidence was properly admitted for the purpose of showing defendant's intent and it was not unfairly prejudicial under N.C. R. Evid. 404(b) and 403. State v. Lloyd, — N.C. App. —, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

Trial court neither erred nor abused its discretion by allowing witnesses to testify to the victim's statements concerning her and defendant's financial situation and defendant's alleged acts of domestic violence against the victim. Furthermore, the evidence of the victim's state of mind was relevant and related directly to the victim's relationship with defendant before she was killed and his motive, intent, plan, or absence of mistake or accident in the victim's death. State v. Petrick, — N.C. App. —, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007).

Trial court did not abuse its discretion by permitting testimony of evidence of defendant's financial dealings with other people, depletion of the victim's bank accounts, violent acts toward the victim, and his adulterous relationships because the evidence tended to show defendant's motive, intent, preparation, plan, absence of mistake, and knowledge under N.C. R. Evid. 404(b). Moreover, the relevancy of the evidence outweighed its danger of unfair prejudice under N.C. R. Evid. 403. State v. Petrick, — N.C. App. —, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007).

Evidence of a later incident between defendant and a witness was properly admitted under G.S. 8C-1, N.C. R. Evid. 404(b) and 403 as: (1) the later incident occurred 20 days after the incident with a victim, (2) the two incidents occurred in the early morning hours, (3) defendant told both victims that defendant's vehicle would not start, (4) defendant told the victim defendant would let the victim live if the victim stopped struggling, and told the witness that the defendant would kill the witness if the witness made any noise, and (5) defendant tried to restrain and silence the victim and the witness, and defendant ceased defendant's efforts when the victim and the witness forcefully resisted defendant's advances; the prejudicial effect of the witness's testimony did not substantially outweigh its probative value. State v. Simpson, — N.C. App. —, 653 S.E.2d 249, 2007 N.C. App. LEXIS 2431 (2007).

On appeal from convictions including rape and kidnapping, the trial court did not err or abuse its discretion in admitting into evidence a receipt for pornographic movies that listed the movie titles, and for admitting evidence of defendant's alleged prior acts of domestic violence against the victim, as: (1) defendant failed to state his grounds for objection to the admission of physical evidence; (2) the evidence was relevant; (3) the prior acts evidence was properly admitted to show defendant's motive, intent or purpose, opportunity, and plan; (4) defendant failed to request a limiting instruction at the time of the admission of the receipt, and failed to request that the trial court redact the movie titles from the receipt; and (5) even assuming that defendant's general objection preserved the matter for appellate review, the record revealed that the admission of the receipt into evidence did not prejudice defendant. State v. Daniels, — N.C. App. —, 659 S.E.2d 22, 2008 N.C. App. LEXIS 711 (2008).

Trial court did not err when it overruled defendant's objection to the admission of a red notebook containing gang information found in defendant's brother's room. As the jury did not find that gang involvement was an aggravating factor of the crime, there was no undue prejudice from the introduction of the notebook into evidence. State v. Beatty, — N.C. App. —, 658 S.E.2d 508, 2008 N.C. App. LEXIS 651 (Apr. 1, 2008).

Victim's testimony regarding the shiny object in defendant's hand was relevant to the first-degree rape charge and admission of the testimony was not unfairly prejudicial; any question as to the testimony's speculative nature went to the weight of the evidence. State v. Lawrence, — N.C. App. —, 663 S.E.2d 898, 2008 N.C. App. LEXIS 1509 (2008).

Admission of the testimony of three witnesses that the alleged assault against each witness took place within one year of the attack on a victim, and that defendant used substantially the same method of restraining each witness during the attack, employing defendant's greater size and strength, limiting the witness's breathing, making dire threats against the witness, and calling each witness after the attack was not plain error under N.C. R. App. P. 10(c)(4), and was proper under G.S. 8C-1, N.C. R. Evid. 403 and 404(b). State v. Simmons, — N.C. App. —, 662 S.E.2d 559, 2008 N.C. App. LEXIS 1188 (July 1, 2008).

Testimony on Chain of Custody Procedures by SBI Not Prejudicial. — Admission of testimony referring to the chain of custody procedures followed by the state bureau of investigation (SBI), stating that the evidence from a crime scene is transferred back to the local police department once the district attorney clears the police officer of any wrongdoing, was not prejudicial since defendant failed to show a reasonable possibility that, had the testimony not been allowed, the result would have been different; the testimony referred to all items collected for evidence and was allowed only to show the SBI's general procedure regarding evidence. State v. Garris, — N.C. App. —, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008).

Exclusion of Evidence Held Not Prejudicial. —

Because a steamroller driver's convictions for driving without a license and driving with a revoked license were admissible under G.S. 8C-1, N.C. R. Evid. 609(a), and because the trial court had no discretion to exclude such evidence under G.S. 8C-1, N.C. R. Evid. 403, the trial court erred in granting the driver's motion in limine, but defendants had not demonstrated how they were specifically prejudiced by the trial court's error, nor had they alleged the jury verdict would have been different had the convictions been admitted. Therefore, the trial court's error was harmless. Outlaw v. Johnson, — N.C. App. —, 660 S.E.2d 550, 2008 N.C. App. LEXIS 907 (2008).

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

CASE NOTES

I. General Consideration.
II. Character Evidence Generally.
III. Other Crimes and Wrongs.
IV. Illustrative Cases.

I. GENERAL CONSIDERATION.

Applied in Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

II. CHARACTER EVIDENCE GENERALLY.

Accused May Introduce Evidence of Specific Traits. —

As the trial court's preclusion of evidence regarding defendant's peaceful and law-abiding character prevented defendant from offering evidence of two character traits which were both relevant and admissible as to his self-defense claim, and defendant demonstrated a reasonable possibility that, had the trial court not committed the error, the result at trial would have been different; thus, the defendant was prejudiced by the error. State v. Ledarius Montreal Banks, — N.C. App. —, 664 S.E.2d 355, 2008 N.C. App. LEXIS 1484 (2008).

III. OTHER CRIMES AND WRONGS.

Admissibility. —

In defendant's criminal trial on a variety of charges, arising from a vehicular incident that resulted in deaths, a trial court properly allowed admission of testimony regarding defendant's prior failure to take a breath test and defendant's conviction for driving while intoxicated, as such was relevant under N.C. R. Evid. 401 and 402 to show defendant's knowledge that the driver's license was suspended and to show malice, which was an element of one of the charged offenses; further, the evidence was properly admitted for the purpose of showing defendant's intent and it was not unfairly prejudicial under N.C. R. Evid. 404(b) and 403. State v. Lloyd, — N.C. App. —, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

Trial court did not err in admitting the testimony of a witness that defendant on a previous occasion had sexually touched the witness, who was a minor at the time, without the consent of the witness. The evidence was admitted not to show defendant's character, but, instead was admitted pursuant to G.S. 8C-1, N.C. R. Evid. 404(b) to show absence of mistake of age, specific intent in regard to a kidnapping charge, and an intent for sexual gratification in defendant's current case. State v. Bowman, — N.C. App. —, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

Evidence of defendant's prior conduct was admissible under G.S. 8C-1, N.C. R. Evid. 404(b) to prove motive, intent, knowledge, and absence of mistake, and the appellate court could not say that its admission or the limiting instructions were erroneous or influenced the jury such that, without them, a different verdict would have been reached. State v. Cousar, — N.C. App. —, 660 S.E.2d 902, 2008 N.C. App. LEXIS 1076 (June 3, 2008).

Trial Court's Unintentional Misstatement While Giving "Other Crimes" Instruction Was Not Plain Error. — Considered in the context of the entire jury instruction addressing "other crimes" evidence, it was clear that the trial court's misstatement of the law was an unintentional slip of the tongue and did not amount to plain error; the trial court apparently intended to mirror the language of N.C. R. Evid. 404(b), but used the incorrect phrase "but to show," rather than the correct phrase "in order to show." In light of the trial court's previous instruction regarding the only proper use of the evidence, the trial court's subsequent misstatement concerning the purposes for which the jury may have considered the evidence was immaterial, and, when taken as a whole, the jury could not have been misled by the trial court's charge. State v. Hazelwood, — N.C. App. —, 652 S.E.2d 63, 2007 N.C. App. LEXIS 2311 (2007).

When Evidence of Other Crimes May Be Admitted. —

Because the admission of defendant's prior felony conviction established an element of the crime charged, it was not inadmissible propensity evidence. State v. Little, — N.C. App. —, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008).

Evidence of Husband's Prior Misconduct Toward His Wife. —

Trial court neither erred nor abused its discretion by allowing witnesses to testify to the victim's statements concerning her and defendant's financial situation and defendant's alleged acts of domestic violence against the victim. Furthermore, the evidence of the victim's state of mind was relevant and related directly to the victim's relationship with defendant before she was killed and his motive, intent, plan, or absence of mistake or accident in the victim's death. State v. Petrick, — N.C. App. —, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007).

Prior Bad Act Showing Intent, Malice, Premeditation, and Deliberation. —

Trial court did not abuse its discretion by permitting testimony of evidence of defendant's financial dealings with other people, depletion of the victim's bank accounts, violent acts toward the victim, and his adulterous relationships because the evidence tended to show defendant's motive, intent, preparation, plan, absence of mistake, and knowledge under N.C. R. Evid. 404(b). Moreover, the relevancy of the evidence outweighed its danger of unfair prejudice under N.C. R. Evid. 403. State v. Petrick, — N.C. App. —, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007).

Evidence of Other Crimes, etc., Is Not Admissible to Prove Character. —

Defendant was prejudiced pursuant to G.S. 15A-1443(a) by the trial court's decision to allow the State to cross-examine defendant regarding two prior criminal charges that had been voluntarily dismissed against him, as the State sought to show that defendant had engaged in violent conduct previously with only slight provocation and that he then claimed self-defense against those charges; however, such evidence of an alleged violent propensity was specifically not allowed under N.C. R. Evid. 404(b), and there was insufficient evidence regarding the factual circumstances of the other incidents to determine whether defendant acted similarly in the charge that defendant was on trial for. State v. Goodwin, — N.C. App. —, 652 S.E.2d 36, 2007 N.C. App. LEXIS 2266 (2007).

Evidence Properly Admitted. —

Trial court did not err in admitting evidence of drug transactions subsequent to the drug transaction for which defendant was charged. The subsequent transaction evidence was not admitted to show defendant's propensity to commit such an offense, but represented a substantial basis upon which a jury could find that defendant had committed a similar act. State v. Mack, — N.C. App. —, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

On appeal from convictions including rape and kidnapping, the trial court did not err or abuse its discretion in admitting into evidence a receipt for pornographic movies that listed the movie titles, and for admitting evidence of defendant's alleged prior acts of domestic violence against the victim, as: (1) defendant failed to state his grounds for objection to the admission of physical evidence; (2) the evidence was relevant; (3) the prior acts evidence was properly admitted to show defendant's motive, intent or purpose, opportunity, and plan; (4) defendant failed to request a limiting instruction at the time of the admission of the receipt, and failed to request that the trial court redact the movie titles from the receipt; and (5) even assuming that defendant's general objection preserved the matter for appellate review, the record revealed that the admission of the receipt into evidence did not prejudice defendant. State v. Daniels, — N.C. App. —, 659 S.E.2d 22, 2008 N.C. App. LEXIS 711 (2008).

IV. ILLUSTRATIVE CASES.

Evidence Held Admissible. —

Even assuming that the prosecutor's closing argument, which contained statements that defendant alleged were made to prove defendant's bad character, was grossly improper, any prejudice to defendant was cured by the trial court's instructions to the jury stating, inter alia, that the testimony of defendant's cell mate could only be considered for the limited purpose of showing defendant's consciousness of guilt. State v. Goss, 361 N.C. 610, 651 S.E.2d 867, 2007 N.C. LEXIS 1106 (2007).

Admission of evidence concerning the death of an old neighbor of defendant was proper because there were significant similarities between the death of the old neighbor and defendant's wife, the victim in the instant action, and there was sufficient circumstantial evidence that defendant was involved in the prior death; the prosecution was not required to present direct evidence of defendant's involvement in the prior death, but could present circumstantial evidence tending to support a reasonable inference that the same person committed both the earlier and later acts. State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007).

Evidence of a later incident between defendant and a witness was properly admitted under G.S. 8C-1, N.C. R. Evid. 404(b) and 403 as: (1) the later incident occurred 20 days after the incident with a victim, (2) the two incidents occurred in the early morning hours, (3) defendant told both victims that defendant's vehicle would not start, (4) defendant told the victim defendant would let the victim live if the victim stopped struggling, and told the witness that the defendant would kill the witness if the witness made any noise, and (5) defendant tried to restrain and silence the victim and the witness, and defendant ceased defendant's efforts when the victim and the witness forcefully resisted defendant's advances; the prejudicial effect of the witness's testimony did not substantially outweigh its probative value. State v. Simpson, — N.C. App. —, 653 S.E.2d 249, 2007 N.C. App. LEXIS 2431 (2007).

Admission of the testimony of three witnesses that the alleged assault against each witness took place within one year of the attack on a victim, and that defendant used substantially the same method of restraining each witness during the attack, employing defendant's greater size and strength, limiting the witness's breathing, and making dire threats against the witness, and called each witness after the attack was not plain error under N.C. R. App. P. 10(c)(4), and was proper under G.S. 8C-1, N.C. R. Evid. 403 and 404(b). State v. Simmons, — N.C. App. —, 662 S.E.2d 559, 2008 N.C. App. LEXIS 1188 (July 1, 2008).

Evidence Held Inadmissible. —

Convictions that occurred beyond the 16-year time frame held permissible for admission of prior convictions were improperly admitted in defendant's criminal trial and necessitated a new trial on the charge of second-degree murder because the prosecution was improperly allowed to argue that the evidence established malice. State v. Maready, — N.C. App. —, 654 S.E.2d 769, 2008 N.C. App. LEXIS 96 (2008).

Testimony by a witness as to defendant's having lied to the witness about an unrelated matter was not admissible under G.S. 8C-1, N.C. R. Evid. 404 because the testimony was not to establish defendant's intent or motive, but was to attack defendant's credibility. State v. Lee, — N.C. App. —, 658 S.E.2d 294, 2008 N.C. App. LEXIS 647 (Apr. 1, 2008).

Admission of Irrelevant Evidence Not Prejudicial. —

Although a detective's testimony concerning defendant's statement concerning an unrelated robbery was inadmissible under G.S. 8C-1, N.C. R. Evid. 404, defendant was not entitled to a mistrial because the curative instruction given was sufficient to cure the error, and there was no evidence that the statement had any impact on the trial, particularly in light of the fact that defendant admitted participating in the charged robberies. State v. McCallum, — N.C. App. —, 653 S.E.2d 915, 2007 N.C. App. LEXIS 2561 (2007).

Rule 412. Rape or sex offense cases; relevance of victim's past behavior.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Exclusion of Evidence Upheld. — Where defendant had never argued that he had a consensual sexual encounter with his sexual assault victim and repeatedly denied having such an encounter, consensual or otherwise, the exception to the rape shield did not apply, rendering the contested evidence irrelevant under G.S. 8C-1, N.C. R. Evid. 412(b). The trial court therefore did not err in excluding evidence of the victim's prior sexual behavior with persons other than defendant. State v. Harris, — N.C. App. —, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Trial court properly sustained the State's objection under G.S. 8C-1, N.C. R. Evid. 403, on the basis that the prejudicial effect of testimony, that defendant and his sexual assault victim previously had rented motel rooms together, outweighed its probative benefit. The evidence was not relevant and admissible under G.S. 8C-1, N.C. R. Evid. 412(b)(1) because defendant had not raised the victim's consent as a defense. State v. Harris, — N.C. App. —, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Article 6.

Witnesses.

Rule 606. Competency of juror as witness.

CASE NOTES

Extraneous Information. — Defendant was entitled to a new trial because a detective's comments to a deputy, who was serving on the jury, about the deputy doing the right thing and notifying the deputy that defendant had flunked a polygraph, were intended to influence the verdict in defendant's case. State v. Lewis, — N.C. App. —, 654 S.E.2d 808, 2008 N.C. App. LEXIS 65 (2008).

Rule 607. Who may impeach.

CASE NOTES

Cited in State v. Batchelor, — N.C. App. —, 660 S.E.2d 158, 2008 N.C. App. LEXIS 894 (2008).

Rule 608. Evidence of character and conduct of witness.

CASE NOTES

I. General Consideration.
III. Specific Instances of Conduct.

I. GENERAL CONSIDERATION.

Cited in State v. Whaley, 362 N.C. 156, 655 S.E.2d 388, 2008 N.C. LEXIS 31 (2008).

III. SPECIFIC INSTANCES OF CONDUCT.

Admissibility of Evidence Under Subsection (b). — Trial court did not err in permitting witnesses to testify regarding an employee's conduct at the time of a motor vehicle accident as the testimony was relevant to show the employee's motivation in leaving the scene of the accident, G.S. 8C-1, N.C. R. Evid. 608(b). Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

Veracity or Lack Thereof Is Only Relevant Trait Under Subsection (b). — Defendant's testimony as to his sexual assault victim's prior drug use could have been excluded under G.S. 8C-1, N.C. R. Evid. 608(b), because the fact of the victims's prior placement in a drug rehabilitation program was not probative of her character for truthfulness or untruthfulness. State v. Harris, — N.C. App.

—, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Admission of Evidence Not Prejudicial Error. —

Testimony by a witness as to defendant's having lied to the witness about an unrelated matter was not admissible under G.S. 8C-1, N.C. R. Evid. 608 because there was no other purpose for the testimony than to attack defendant's credibility. However, the error was not reversible under G.S. 15A-1447(a), because defendant failed to show prejudice resulting from the admission of the evidence given the other evidence presented by witnesses at defendant's trial. State v. Lee, — N.C. App. —, 658 S.E.2d 294, 2008 N.C. App. LEXIS 647 (Apr. 1, 2008).

Rule 609. Impeachment by evidence of conviction of crime.

CASE NOTES

When Evidence of Defendant's Prior Convictions Is Admissible. —

Trial court did not err by admitting into evidence at defendant's first degree murder trial defendant's prior conviction from more than ten years earlier because (1) the prior conviction showed that defendant's status as a convicted felon made it illegal for him to possess the firearm with which he shot the victim; (2) the prior conviction, as did defendant's trial, involved eluding the police; and (3) the prior conviction was for aggravated assault, manifesting extreme indifference to the value of human life, and recklessly causing serious bodily injury. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

Error Not Prejudicial. —

Because a steamroller driver's convictions for driving without a license and driving with a revoked license were admissible under G.S. 8C-1, N.C. R. Evid. 609(a), and because the trial court had no discretion to exclude such evidence under G.S. 8C-1, N.C. R. Evid. 403, the trial court erred in granting the driver's motion in limine, but defendants had not demonstrated how they were specifically prejudiced by the trial court's error, nor had they alleged the jury verdict would have been different had the convictions been admitted. Therefore, the trial court's error was harmless. Outlaw v. Johnson, — N.C. App. —, 660 S.E.2d 550, 2008 N.C. App. LEXIS 907 (2008).

Cited in State v. Lee, — N.C. App. —, 658 S.E.2d 294, 2008 N.C. App. LEXIS 647 (Apr. 1, 2008); State v. Little, — N.C. App. —, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008); Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

Rule 611. Mode and order of interrogation and presentation.

CASE NOTES

Discretion of Trial Judge to Allow Leading Questions on Direct Examination. —

Trial court did not abuse its discretion in allowing the state to use leading questions in its direct examination of one of its witnesses because the witness's testimony demonstrated her bias in favor of defendant, and, therefore, her adversity to the state; the witness testified that she had been defendant's girlfriend for eleven years, that she loved defendant, that they had two children together, and that she did not want defendant to go to jail. State v. Applewhite, — N.C. App. —, 660 S.E.2d 240, 2008 N.C. App. LEXIS 822 (2008).

Cross-Examination of Defendant Upheld. —

Prosecutor was entitled to cross-examine defendant regarding statements referring to an officer's testimony given during trial to challenge the credibility of defendant's testimony. State v. Parker, — N.C. App. —, 653 S.E.2d 6, 2007 N.C. App. LEXIS 2239 (2007).

Illustrative Cases. —

It was error to exclude under G.S. 8C-1, N.C. R. Evid. 403, testimony that in a questionnaire the victim had stated that she sometimes saw herself as if she were looking at someone else, that she was sometimes not sure whether something that happened was real or a dream, and that she sometimes heard voices inside her head; the evidence should have been admitted under G.S. 8C-1, N.C. R. Evid. 611(b), because it went to the credibility of the victim, whose testimony was crucial to the state's case, because the victim's testimony was contradicted by two eyewitnesses, and because attacking the victim's credibility was the defense's main theory. State v. Whaley, 362 N.C. 156, 655 S.E.2d 388, 2008 N.C. LEXIS 31 (2008).

Rule 612. Writing or object used to refresh memory.

CASE NOTES

Records Prepared in Normal Course of Business. — An accident report was subject to disclosure under G.S. 8C-1, N.C. R. Evid. 612(b), as discovery material because it was prepared as part of a corporation's accident control program in the ordinary course of business and not for the purpose of obtaining legal advice or in anticipation of litigation. Fulmore v. Howell, — N.C. App. —, 657 S.E.2d 437, 2008 N.C. App. LEXIS 429 (2008).

Trial court did not abuse its discretion in compelling, in accordance with G.S. 8C-1, N.C. R. Evid. 612, the discovery of non-privileged documents the employee reviewed in anticipation of his deposition because, although defendants argued that documents reviewed by the employee were either protected by the attorney-client privilege or the doctrine of work product, defendants failed to submit the allegedly privileged documents to either the trial court, in camera, or to the court of appeals, offering a specific explanation as to why the documents were protected. Fulmore v. Howell, — N.C. App. —, 657 S.E.2d 437, 2008 N.C. App. LEXIS 429 (2008).

ARTICLE 7.

Opinions and Expert Testimony.

Rule 701. Opinion testimony by lay witness.

CASE NOTES

Shorthand Statements of Fact. —

In defendant's trial for burglary and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err by admitting testimony from two officers that when they approached the victim's house they saw the door standing ajar but still bolted with a splintered door frame as the testimonial statements were simply instantaneous conclusions drawn by the witnesses upon seeing the door and were shorthand statements of fact not barred by N.C. R. Evid. 701. State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007).

Instantaneous Conclusions of the Mind. —

Detective's testimony about his observations regarding the demeanor of the State's main witness, a co-perpetrator of the sex crimes that were charged against defendant, was lay opinion testimony because it was based on the detective's observations of defendant and was not expert testimony because the detective was not testifying to anything concerning specialized knowledge; while that testimony should not have been admitted because the detective vouched for the veracity of the witness and the detective's testimony was thus not helpful to the jury, the error in admitting the testimony was not plain error since defendant was impeached by other evidence apart from the detective's testimony. State v. Gobal, 186 N.C. App. 308, 651 S.E.2d 279, 2007 N.C. App. LEXIS 2199 (2007).

Lay Opinion On Drugs. —

Trial court did not err in admitting the testimony in defendant's drug trafficking cases of two detectives who testified as lay witnesses regarding identification of a substance found at defendant's second residence. The testimony was admissible pursuant to G.S. 8C-1, N.C. R. Evid. 701 because it was rationally based on their training and experience with controlled substances, and was helpful regarding the issue of identification of the substance as cocaine. State v. Llamas-Hernandez, — N.C. App. —, 659 S.E.2d 79, 2008 N.C. App. LEXIS 714 (2008).

Police Officer's Testimony Regarding Intoxication. —

Trial court did not err in allowing a deputy to testify as to the deputy's opinion that defendant was impaired because there was no dispute that the deputy personally observed defendant and that the deputy's opinion was based on those observations. State v. Johnson, — N.C. App. —, 651 S.E.2d 907, 2007 N.C. App. LEXIS 2305 (2007).

Testimony Upheld. —

In a suit between a lender and a broker who shared ownership of a corporation, where it was found that the lender breached fiduciary duties by depreciating the value of properties, it was not an abuse of discretion to admit the broker's lay testimony as to the value of the properties, because the broker had an extensive real estate background and specific knowledge of the properties. Bluebird Corp. v. Aubin, — N.C. App. —, 657 S.E.2d 55, 2008 N.C. App. LEXIS 279 (2008).

Trial court did not abuse the court's discretion in allowing plaintiff's employer to testify concerning plaintiff's diminished earning capacity as the employer testified to working with plaintiff, both before and after plaintiff's injury; thus, the employer was familiar with the duties associated with plaintiff's position, as well as plaintiff's limitations with respect to the fulfillment of those duties. Based on this knowledge, the employer delivered opinions as to plaintiff's ability to perform plaintiff's job and plaintiff's earning capacity. Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

Admission of Testimony Erroneous But Not Prejudicial. —

Defendant failed to show that, but for the erroneous admission of an officer's opinion statements under G.S. 8C-1, N.C. R. Evid. 701 regarding defendant's possession of implements that were used for housebreaking, the jury would have reached a different verdict on the charge against defendant of possession of implements of housebreaking. State v. Turnage, — N.C. App. —, 660 S.E.2d 129, 2008 N.C. App. LEXIS 886 (2008).

Cited in State v. Hall, 186 N.C. App. 267, 650 S.E.2d 666, 2007 N.C. App. LEXIS 2085 (2007).

Rule 702. Testimony by experts.

CASE NOTES

I. General Consideration.
II. Qualification of Expert.
III. Expert Opinion Not Admissible.
IV. Expert Opinion Admissible.

I. GENERAL CONSIDERATION.

Basis of Opinion. —

Detective's testimony about his observations regarding the demeanor of the State's main witness, a co-perpetrator of the sex crimes that were charged against defendant, was lay opinion testimony because it was based on the detective's observations of defendant and was not expert testimony because the detective was not testifying to anything concerning specialized knowledge; while that testimony should not have been admitted because the detective vouched for the veracity of the witness and the detective's testimony was thus not helpful to the jury, the error in admitting the testimony was not plain error since defendant was impeached by other evidence apart from the detective's testimony. State v. Gobal, 186 N.C. App. 308, 651 S.E.2d 279, 2007 N.C. App. LEXIS 2199 (2007).

Cited in State v. Hall, 186 N.C. App. 267, 650 S.E.2d 666, 2007 N.C. App. LEXIS 2085 (2007); Sturgill v. Ashe Mem'l Hosp., Inc., — N.C. App. —, 652 S.E.2d 302, 2007 N.C. App. LEXIS 2256 (2007); State v. Llamas-Hernandez, — N.C. App. —, 659 S.E.2d 79, 2008 N.C. App. LEXIS 714 (2008).

II. QUALIFICATION OF EXPERT.

Trial Court Abused its Discretion. — Because the estate's expert witnesses were in a better position than the trier of fact to have an opinion on the subject of whether decedent would have suffered a stroke but for the doctor's failure to read an MRI, the trial court erred by granting the doctor's motion in limine to exclude the expert witnesses in the medical malpractice action. Hamilton v. Thomasville Med. Assocs., — N.C. App. —, 654 S.E.2d 708, 2007 N.C. App. LEXIS 2565 (2007).

Doctor in Medical Malpractice. —

Expert could not reasonably be expected to qualify as an expert witness as required by G.S. 1A-1, N.C. R. Civ. P. 9(j), and did not qualify as an expert witness under G.S. 8C-1, N.C. R. Evid. 702(b) or (c) as: (1) the expert was a board certified obstetrician, (2) doctor one was a board certified emergency room physician and doctor two was a board certified trauma surgeon, (3) both doctors were acting within their capacities as specialists in treating a decedent as a trauma patient, (4) both doctor one and doctor two were properly deemed as specialists under Rule 702, and (5) the expert was not certified as either an emergency room physician or a trauma surgeon, nor did the expert practice in either of these areas. Knox v. Univ. Health Sys. of E. Carolina, Inc., — N.C. App. —, 652 S.E.2d 722, 2007 N.C. App. LEXIS 2363 (2007).

Wife's proposed expert could not be accepted under G.S. 8C-1, N.C. R. Evid. 702(e), as there were no extraordinary circumstances to support the certification of the expert under Rule 702(e), nor did the wife argue such circumstances existed. Knox v. Univ. Health Sys. of E. Carolina, Inc., — N.C. App. —, 652 S.E.2d 722, 2007 N.C. App. LEXIS 2363 (2007).

In a medical malpractice suit against an oral surgeon, the trial court erred by striking the patient's standard of care witness because (1) the expert fulfilled the "performance of the procedure" and "prior experience" requirements since the expert was licensed to perform oral surgery and performed the surgical extraction of molars, (2) the expert was a general dentist who specialized in the practice of oral surgery, and (3) the expert possessed sufficient familiarity with the city of Charlotte and the practice of dentistry therein. Roush v. Kennon, — N.C. App. —, 656 S.E.2d 603, 2008 N.C. App. LEXIS 216 (2008).

III. EXPERT OPINION NOT ADMISSIBLE.

Insurance Adjuster. — Where a home was flooded and the homeowner asserted breach of contract and unfair and deceptive trade practices against an insurer and an adjusting company, the testimony of the homeowner's expert was properly excluded because (1) the homeowner's attorney did not offer any case that directly stood for the proposition that insurance adjusters could testify as experts, and (2) the expert only offered legal conclusions. Burrell v. Sparkkles Reconstruction Co., — N.C. App. —, 657 S.E.2d 712, 2008 N.C. App. LEXIS 422 (2008).

Likely to Confuse Jury. —

Trial court properly excluded mental health expert's testimony as to the likelihood of defendant's release from the hospital if the jury found defendant not guilty by reason of insanity after finding that the expert's testimony could confuse the issues of the case with the possible consequences, and the expert's testimony would not assist the jury in regard to any matter in issue or fact. State v. Hall, — N.C. App. —, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007).

Opinion on Actual Speed Based on Physical Evidence. — Because defendant's crime occurred before December 1, 2006, N.C. R. Evid. 702(i) did not apply, and Shaw rule barred expert opinion as to the speed of defendant's vehicle. State v. Hazelwood, — N.C. App. —, 652 S.E.2d 63, 2007 N.C. App. LEXIS 2311 (2007).

IV. EXPERT OPINION ADMISSIBLE.

Testimony of Expert Satisfied Helpfulness Test. —

Although the three experts who testified for plaintiffs were not qualified in neurosurgery, but in neurology and emergency medicine, their testimony that an earlier diagnosis would have led to a better outcome for the patient, who was ultimately diagnosed with a herniated disk accompanied by significant compression of the spinal cord, was competent because it was helpful for the jury in determining the proximate cause element of plaintiffs' negligence action. Weaver v. Sheppa, 186 N.C. App. 412, 651 S.E.2d 395, 2007 N.C. App. LEXIS 2206 (2007).

Rule 703. Bases of opinion testimony by experts.

CASE NOTES

Foundation. — Although medical records were admitted (in reliance on Rule 10.3, Twelfth Judicial District Juvenile Case Management Plan) into evidence without proper foundation, as required by G.S. 8C-1, N.C. R. Evid. 703, 803(6), in order to fit within the exceptions to the hearsay rule, G.S. 8C-1, N.C. R. Evid. 801(c), 802, because — pursuant to G.S. 7B-804 — the rules of evidence in civil cases were to apply to child neglect cases, respondents, parents of the children, who were found neglected, had the burden of showing prejudice at the admission of the records; but they could not, given the other extensive direct testimony from medical experts upon which it was presumed the trial court had relied. In re T.M., — N.C. App. —, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

Article 8.

Hearsay.

Rule 801. Definitions and exception for admissions of a party-opponent.

CASE NOTES

Hearsay Defined. —

Testimony of a witness was hearsay under N.C. R. Evid. 801(c) because it consisted of statements, other than ones made by the declarant while testifying at trial offered in evidence to prove the truth of the matter asserted. However, the testimony was admissible under an exception to the hearsay rule. State v. Petrick, — N.C. App. —, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007).

Medical Records. — Although medical records were admitted (in reliance on Rule 10.3, Twelfth Judicial District Juvenile Case Management Plan) into evidence without proper foundation, as required by G.S. 8C-1, N.C. R. Evid. 703, 803(6), in order to fit within the exceptions to the hearsay rule, G.S. 8C-1, N.C. R. Evid. 801(c), 802, because — pursuant to G.S. 7B-804 — the rules of evidence in civil cases were to apply to child neglect cases, respondents, parents of the children, who were found neglected, had the burden of showing prejudice at the admission of the records; but they could not, given the other extensive direct testimony from medical experts upon which it was presumed the trial court had relied. In re T.M., — N.C. App. —, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

Evidence Not Hearsay. —

Defendant's statement to an officer that a passenger told him to stop the car during a police chase was not offered for its truth, and thus was properly admitted in defendant's second-degree murder trial because it was not hearsay evidence under N.C. R. Evid. 801(c), and was introduced to demonstrate malice. State v. Hazelwood, — N.C. App. —, 652 S.E.2d 63, 2007 N.C. App. LEXIS 2311 (2007).

Statements made in reference to testimony given during trial did not constitute hearsay. State v. Parker, — N.C. App. —, 653 S.E.2d 6, 2007 N.C. App. LEXIS 2239 (2007).

Evidence Held Admissible. —

Officer's testimony about juvenile defendant's statements was properly admitted under G.S. 7B-2407 and G.S. 8C-1, N.C. R. Evid. 801(d); the officer interviewed defendant with his mother present, defendant was not in custody, and the juvenile rights warning was read to defendant and his mother, who both signed a statement indicating they understood the rights. In re J.J.D.L., — N.C. App. —, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

Evidence Held Inadmissible. —

Trial court properly sustained the State's hearsay objection to testimony elicited by defense counsel regarding a third-party statement to a police detective because while defendant argued the statement was only being used to establish a historical fact, defendant also argued that the statement would support his alibi defense, in which case, defendant would be offering the statement to prove the truth of the matter asserted. State v. Hairston, — N.C. App. —, 661 S.E.2d 39, 2008 N.C. App. LEXIS 1015 (2008).

Cited in State v. Bass, — N.C. App. —, 660 S.E.2d 123, 2008 N.C. App. LEXIS 864 (2008); State v. Little, — N.C. App. —, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008); In re S.D.J., — N.C. App. —, 665 S.E.2d 818, 2008 N.C. App. LEXIS 1617 (2008).

Rule 802. Hearsay rule.

CASE NOTES

Evidence Held Admissible. —

Hearsay testimony by a witness concerning statements made by the victim was not excluded by the hearsay rule under N.C. R. Evid. 803(1) because the victim's statements were her present sense impression of a choking incident. Furthermore, there was no rigid rule about how long was too long to be immediately thereafter. State v. Petrick, — N.C. App. —, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007).

Although medical records were admitted (in reliance on Rule 10.3, Twelfth Judicial District Juvenile Case Management Plan) into evidence without proper foundation, as required by G.S. 8C-1, N.C. R. Evid. 703, 803(6), in order to fit within the exceptions to the hearsay rule, G.S. 8C-1, N.C. R. Evid. 801(c), 802, because — pursuant to G.S. 7B-804 — the rules of evidence in civil cases were to apply to child neglect cases, respondents, parents of the children, who were found neglected, had the burden of showing prejudice at the admission of the records; but they could not, given the other extensive direct testimony from medical experts upon which it was presumed the trial court had relied. In re T.M., — N.C. App. —, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

Officer's testimony about juvenile defendant's statements was properly admitted under G.S. 7B-2407 and G.S. 8C-1, N.C. R. Evid. 801(d); the officer interviewed defendant with his mother present, defendant was not in custody, and the juvenile rights warning was read to defendant and his mother, who both signed a statement indicating they understood the rights. In re J.J.D.L., — N.C. App. —, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

Cited in State v. Bass, — N.C. App. —, 660 S.E.2d 123, 2008 N.C. App. LEXIS 864 (2008); State v. Little, — N.C. App. —, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008); In re S.D.J., — N.C. App. —, 665 S.E.2d 818, 2008 N.C. App. LEXIS 1617 (2008).

Rule 803. Hearsay exceptions; availability of declarant immaterial.

CASE NOTES

I. General Consideration.
II. Present Sense Impression.
III. Excited Utterances.
VII. Records of Regularly Conducted Activity.

I. GENERAL CONSIDERATION.

The mere admission of incompetent hearsay evidence over proper objection does not require reversal, etc.

Even assuming the State presented no evidence to support admission of hearsay statements under either the present sense impression or excited utterance exceptions, and the admission of the hearsay statements was an abuse of discretion, there was no prejudicial error under G.S. 15A-1442(4)(c) as other evidence established that defendant was armed while on a bus. A witness testified that the witness saw an imprint of a gun in defendant's pocket while on the bus. State v. Bass, — N.C. App. —, 660 S.E.2d 123, 2008 N.C. App. LEXIS 864 (2008).

II. PRESENT SENSE IMPRESSION.

Testimony Made Several Hours After Shooting Incident. — Witness's testimony to the state bureau of investigation special agent was not admissible under the present sense impression exception to the hearsay rule because the witness's statement to the agent was made several hours after the shooting incident. State v. Little, — N.C. App. —, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008).

Testimony Held Admissible. —

Hearsay testimony by a witness concerning statements made by the victim was not excluded by the hearsay rule under N.C. R. Evid. 803(1) because the victim's statements were her present sense impression of a choking incident. Furthermore, there was no rigid rule about how long was too long to be immediately thereafter. State v. Petrick, — N.C. App. —, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007).

III. EXCITED UTTERANCES.

Statement Admissible as Excited Utterance. —

Statements a decedent made to a witness were admissible as an excited utterance under G.S. 8C-1, N.C. R. Evid. 803(2) because they were made sufficiently close to the event and were made while the decedent was upset and had not had time to reflect; the witness consistently described the decedent as being scared, upset, and excited, and in light of the decedent's statement that defendant pulled a gun on him, it was reasonable that the decedent was still upset when he spoke to the witness. State v. Applewhite, — N.C. App. —, 660 S.E.2d 240, 2008 N.C. App. LEXIS 822 (2008).

Statements Held Not Excited Utterances. —

Witness's testimony to the state bureau of investigation special agent was not admissible under the excited utterance exception to the hearsay rule because the statements, made several hours after the shooting, were not the product of a spontaneous reaction. State v. Little, — N.C. App. —, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008).

VII. RECORDS OF REGULARLY CONDUCTED ACTIVITY.

Medical Records. —

Although medical records were admitted (in reliance on Rule 10.3, Twelfth Judicial District Juvenile Case Management Plan) into evidence without proper foundation, as required by G.S. 8C-1, N.C. R. Evid. 703, 803(6), in order to fit within the exceptions to the hearsay rule, G.S. 8C-1, N.C. R. Evid. 801(c), 802, because — pursuant to G.S. 7B-804 — the rules of evidence in civil cases were to apply to child neglect cases, respondents, parents of the children, who were found neglected, had the burden of showing prejudice at the admission of the records; but they could not, given the other extensive direct testimony from medical experts upon which it was presumed the trial court had relied. In re T.M., — N.C. App. —, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

Business Records Held Admissible. —

Results of a drug test performed on the mother and a letter from Alcohol and Drug Services were admissible under the business records exception to the hearsay rule because the social worker for the Department of Social Services was qualified to introduce the results of the drug test and the letter under the business records exception where the social worker, in the course of regularly conducted business activity, collected the mother's sample, ordered the drug test, and filed the results of the drug test with the social worker's office. In re S.D.J.,

— N.C. App. —, 665 S.E.2d 818, 2008 N.C. App. LEXIS 1617 (2008).

Detention Center Incident Reports. — With regard to defendant's convictions on two counts of first-degree murder, the trial court did not violate defendant's right to confrontation with regard to allowing a captain to read from various detention center incident reports because the detention center incident reports were not testimonial in nature nor were the statements contained therein testimonial. The reports were more like business records, which by their nature are not testimonial, pursuant to G.S. 8C-1, N.C. R. Civ. P. 803(6). State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007).

Rule 804. Hearsay exceptions; declarant unavailable.

CASE NOTES

II. Unavailability as a Witness.
IV. Belief of Impending Death.

II. UNAVAILABILITY AS A WITNESS.

Statement Held Admissible. — Trial court did not abuse its discretion in admitting decedent's statements before decedent's death that defendant and another man were the shooters as the statements constituted a dying declaration under G.S. 8C-1, N.C. R. Evid. 804(b)(2). State v. Calhoun, — N.C. App. —, 657 S.E.2d 424, 2008 N.C. App. LEXIS 402 (2008).

IV. BELIEF OF IMPENDING DEATH.

Surrounding Circumstances Supported Dying Declaration. — Trial court did not abuse the court's discretion in admitting a victims's dying declaration evidence where: (1) three and a half minutes after the victim called 911, he told his mother that he was going to die; (2) he had been shot five times and was bleeding; and (3) he was taken to the hospital, received medical treatment in the emergency room, and later died the same day. The circumstances surrounding the victim's statements supported the requirements for admission of a dying declaration under G.S. 8C-1, N.C. R. Evid. 804(b)(2). State v. Bodden, — N.C. App. —, 661 S.E.2d 23, 2008 N.C. App. LEXIS 1022 (2008).

Rule 805. Hearsay within hearsay.

CASE NOTES

Passenger's Statement to Defendant Not Hearsay. — Defendant's statement to an officer that a passenger told him to stop the car during a police chase was not offered for its truth, and thus was properly admitted in defendant's second-degree murder trial because it was not hearsay evidence under N.C. R. Evid. 801(c), and was introduced to demonstrate malice. State v. Hazelwood, — N.C. App. —, 652 S.E.2d 63, 2007 N.C. App. LEXIS 2311 (2007).

Article 9.

Authentication and Identification.

Rule 901. Requirement of authentication or identification.

CASE NOTES

Authentication of Letters. — Letters defendant had written to a codefendant were properly authenticated using, inter alia, defendant's return address on two letters and references to defendant and the codefendant using names only they used to refer to the other. State v. Young, 186 N.C. App. 343, 651 S.E.2d 576, 2007 N.C. App. LEXIS 2197 (2007).

Cited in Morris v. Moore, 186 N.C. App. 431, 651 S.E.2d 594, 2007 N.C. App. LEXIS 2207 (2007).

Rule 902. Self-authentication.

CASE NOTES

Cited in Morris v. Moore, 186 N.C. App. 431, 651 S.E.2d 594, 2007 N.C. App. LEXIS 2207 (2007).

Chapter 9.

Jurors.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-3. Qualifications of prospective jurors.

CASE NOTES

Juror No Longer Resident of County. — Defendant waived any challenge to the fact that a juror was not a resident of Durham County by failing to object at trial as required by G.S. 9-3. State v. Davis, — N.C. App. —, 664 S.E.2d 21, 2008 N.C. App. LEXIS 1508 (Aug. 5, 2008).

Chapter 10B.

Notaries.

Article 1.

Notary Public Act.

Part 9. Validation of Notarial Acts.

Sec.
10B-65. Acts of notaries public in certain instances validated.

Sec.
10B-70. Certain notarial acts for local government agencies validated.

ARTICLE 1.

Notary Public Act.

Part 3. Notarial Acts, Powers, and Limitations.

§ 10B-20. Powers and limitations.

CASE NOTES

Evidence Insufficient as to Signature. — Evidence was insufficient to hold that the signature of a blind property owner's name on a lease was a valid indication of the owner's mutual assent to contract because, although the owner's wife made the owner's signature on the lease, there was no evidence the signature was witnessed by two disinterested persons distinct from a notary who witnessed the signing. Barbee v. Johnson, — N.C. App. —, 660 S.E.2d 135, 2008 N.C. App. LEXIS 887 (2008).

Part 9. Validation of Notarial Acts.

§ 10B-65. Acts of notaries public in certain instances validated.

(a) Any acknowledgment taken and any instrument notarized by a person prior to qualification as a notary public but after commissioning or recommissioning as a notary public, or by a person whose notary commission has expired, is hereby validated. The acknowledgment and instrument shall have the same legal effect as if the person qualified as a notary public at the time the person performed the act.

(b) All documents bearing a notarial seal and which contain any of the following errors are validated and given the same legal effect as if the errors had not occurred:

(1) The date of the expiration of the notary's commission is stated, whether correctly or erroneously.

(2) The notarial seal does not contain a readable impression of the notary's name, contains an incorrect spelling of the notary's name, or does not bear the name of the notary exactly as it appears on the commission, as required under G.S. 10B-37.

(3) The notary's signature does not comport exactly with the name on the notary commission or on the notary seal, as required by G.S. 10B-20.

(4) The notarial seal contains typed, printed, drawn, or handwritten material added to the seal, fails to contain the words "North Carolina"

or the abbreviation "NC", or contains correct information except that instead of the abbreviation for North Carolina contains the abbreviation for another state.

(c) All deeds of trust in which the notary was named in the document as a trustee only are validated.

(d) All notary acknowledgments performed before January 1, 1953, bearing a notarial seal are hereby validated.

(e) This section applies to notarial acts performed on or before May 1, 2008. (1945, c. 665; 1947, c. 313; 1949, c. 1; 1953, c. 702; 1961, cc. 483, 734; 1965, c. 37; 1969, c. 83; c. 716, s. 1; 1971, c. 229, s. 1; 1973, c. 680, s. 1; 1977, c. 734, s. 1; 1979, c. 226, s. 2; c. 643, s. 1; 1981, c. 164, ss. 1, 2; 1983, c. 205, s. 1; 1985, c. 71, s. 1; 1987, c. 277, s. 9; 1989, c. 390, s. 9; 1991, c. 683, s. 2; 1997-19, s. 1; 1997-469, s. 2; 1998-228, s. 10; 1999-21, s. 2; 2001-154, s. 1; 2002-159, s. 27; 2003-38, s. 1; 2004-199, s. 6.; 2005-391, s. 4; 2008-194, s. 5.)

Effect of Amendments. — Session Laws 2008-194, s. 5, effective August 8, 2008, substituted "May 1, 2008" for "February 1, 2004" in subsection (e).

§ 10B-70. Certain notarial acts for local government agencies validated.

(a) Any acknowledgment taken and any instrument notarized for a local government agency by a person prior to qualification as a notary public but after commissioning or recommissioning as a notary public, by a person whose notary commission has expired, or by a person who failed to qualify within 45 days of commissioning as required by G.S. 10B-10, is hereby validated. The acknowledgment and instrument shall have the same legal effect as if the person qualified as a notary public at the time the person performed the act. This section shall apply to notarial acts performed for a local government agency on or after October 31, 2006, and before June 30, 2007.

(b) Any electronic document filed in the Mecklenburg County Register of Deeds office that purports to be notarized in the Commonwealth of Virginia and that contains the typed name of a Virginia notary together with the notary's expiration date shall be given the same legal effect as if the person performed a lawful notarization in Virginia. (2007-484, s. 27; 2008-194, s. 4.)

Effect of Amendments. — Session Laws 2008-194, s. 4, effective August 8, 2008, designated the previously existing provisions as subsection (a); and added subsection (b).

Chapter 12.

Statutory Construction.

§ 12-3.1. Fees and charges by agencies.

Editor's Note. —

Session Laws 2008-107, s. 6.4, provides: "Notwithstanding G.S. 12-3.1, an agency is not required to consult with the Joint Legislative Commission on Governmental Operations prior to establishing or increasing a fee as authorized or anticipated in this act."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008 2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008 2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Chapter 14.

Criminal Law.

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1.

Felonies and Misdemeanors.

Sec.
14-2.3. Forfeiture of gain acquired through criminal activity.
14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, or with deceit and intent to defraud, or with ethnic animosity.

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

Article 4A.

Prohibited Secret Societies and Activities.

14-12.12. Placing burning or flaming cross on property of another or on public street or highway or on any public place.
14-12.13. Placing exhibit with intention of intimidating, etc., another.
14-12.14. Placing exhibit while wearing mask, hood, or other disguise.
14-12.15. Punishment for violation of Article.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

Article 7A.

Rape and Other Sex Offenses.

14-27.2A. Rape of a child; adult offender.
14-27.4A. Sexual offense with a child; adult offender.

Article 8.

Assaults.

14-34.9. Discharging a firearm from within an enclosure.

Article 13A.

North Carolina Street Gang Suppression Act.

14-50.15. Short title.
14-50.16. Pattern of criminal street gang activity.
14-50.17. Soliciting; encouraging participation.
14-50.18. Soliciting; encouraging participation; minor.

Sec.
14-50.19. Threats to deter from gang withdrawal.
14-50.20. Threats of punishment or retaliation.
14-50.21. Separate offense.
14-50.22. Enhanced offense for criminal gang activity.
14-50.23. Contraband, seizure, and forfeiture.
14-50.24. Real property used by criminal street gangs declared a public nuisance; abatement.
14-50.25. Reports of disposition; criminal street gang activity.
14-50.26. Matters proved in criminal trial court.
14-50.27. Local ordinances not preempted by State law.
14-50.28. Applicability to juveniles under the age of 16.
14-50.29. Conditional discharge for first offenders under the age of 18.
14-50.30. Expunction of records.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Article 16.

Larceny.

14-71. Receiving stolen goods; receiving or possessing goods represented as stolen.
14-72.11. Larceny from a merchant.
14-83.1. Fixtures subject to larceny.

Article 16A.

Organized Retail Theft.

14-86.6. Organized retail theft.

SUBCHAPTER VI. CRIMINAL TRESPASS.

Article 22.

Damages and Other Offenses to Land and Fixtures.

14-144. Injuring houses, churches, fences and walls.

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

Article 26.

Offenses Against Public Morality and Decency.

14-190.13. Definitions for certain offenses concerning minors.

Sec.

14-190.16. First degree sexual exploitation of a minor.
14-190.17. Second degree sexual exploitation of a minor.
14-190.17A. Second degree sexual exploitation of a minor.
14-190.18. Promoting prostitution of a minor.
14-202.3. Solicitation of child by computer to commit an unlawful sex act.
14-202.5. Ban use of commercial social networking Web sites by sex offenders.
14-202.5A. (Effective May 1, 2009) Liability of commercial social networking sites.
14-202.6. Ban on name changes by sex offenders.

Article 27A.

Sex Offender and Public Protection Registration Programs.

Part 1. Registration Programs, Purpose and Definitions Generally.

14-208.6. (Effective until May 1, 2009) Definitions.
14-208.6. (Effective May 1, 2009) Definitions.
14-208.6A. Lifetime registration requirements for criminal offenders.

Part 2. Sex Offender and Public Protection Registration Program.

14-208.7. (See Editor's note for applicability) Registration.
14-208.8. Prerelease notification.
14-208.9. (Effective until May 1, 2009) Change of address; change of academic status or educational employment status.
14-208.9. (Effective May 1, 2009) Change of address; change of academic status or educational employment status; change of online identifier.
14-208.9A. Verification of registration information.
14-208.11. Failure to register; falsification of verification notice; failure to return verification form; order for arrest.
14-208.12A. Request for termination of registration requirement.
14-208.14. Statewide registry; Division of Criminal Statistics designated custodian of statewide registry.
14-208.15A. (Effective May 1, 2009) Release of online identifiers to entity; fee.
14-208.18. Sex offender unlawfully on premises.
14-208.19. Community and public notification.

Sec.

Part 4. Registration of Certain Juveniles Adjudicated for Committing Certain Offenses.

14-208.27. Change of address.
14-208.28. Verification of registration information.
14-208.29. Registration information is not public record; access to registration information available only to law enforcement agencies and local boards of education.

Part 5. Sex Offender Monitoring.

14-208.40. Establishment of program; creation of guidelines; duties.
14-208.40A. Determination of satellite-based monitoring requirement by court.
14-208.40B. Determination of satellite-based monitoring requirement in certain circumstances.
14-208.41. Enrollment in satellite-based monitoring programs mandatory; length of enrollment.
14-208.43. Request for termination of satellite-based monitoring requirement.

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

Article 35.

Offenses Against the Public Peace.

14-277.3. [Repealed.]
14-277.3A. Stalking.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Article 37.

Lotteries, Gaming, Bingo and Raffles.

Part 1. Lotteries and Gaming.

14-298. Seizure of illegal gaming items.
14-306.3. Certain game promotions unlawful.
14-309. Violation made criminal.

Article 39.

Protection of Minors.

14-318.2. Child abuse a Class 1 [A1] misdemeanor.
14-318.4. Child abuse a felony.

Article 44.

Regulation of Sales.

14-344. (Effective until June 30, 2009) Sale of admission tickets in excess of printed price.
14-344. (Effective June 30, 2009) Sale of ad-

Sec.
mission tickets in excess of printed price.
14-344.1. (Expires June 30, 2009) Internet sale of admission tickets in excess of printed price.
14-344.2. (Expires June 30, 2009) Prohibition on ticket purchasing software.

Article 52A.

Sale of Weapons in Certain Counties.

14-404. Issuance or refusal of permit; appeal from refusal; grounds for refusal; sheriff's fee.

Article 54B.

Concealed Handgun Permit.

Sec.
14-415.12. Criteria to qualify for the issuance of a permit.

Article 58A.

Audiovisual Recordings.

14-440.1. Unlawful operation of an audiovisual recording device.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-2.3. Forfeiture of gain acquired through criminal activity.

(a) Except as is otherwise provided in Article 3 of Chapter 31A, in the case of any violation of Article 13A of Chapter 14, or a general statute constituting a felony other than a nonwillful homicide, any money or other property or interest in property acquired thereby shall be forfeited to the State of North Carolina, including any profits, gain, remuneration, or compensation directly or indirectly collected by or accruing to any offender.

(b) An action to recover such property shall be brought by either a District Attorney or the Attorney General pursuant to G.S. 1-532. The action must be brought within three years from the date of the conviction for the offense.

(c) Nothing in this section shall be construed to require forfeiture of any money or property recovered by law-enforcement officers pursuant to the investigation of an offense when the money or property is readily identifiable by the owner or guardian of the property or is traceable to him. (1981, c. 840, s. 1; 2008-214, s. 1.)

Effect of Amendments. — Session Laws 2008-214, s. 1, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "criminal activity" for "felonies" in the section heading; in subsection (a), inserted "Article 13A of Chapter 14, or" and substituted "offender" for "felon" at the end; substituted "offense" for "felony" at the end of subsection (b); and substituted "an offense" for "a felony" in subsection (c).

§ 14-2.4. Punishment for conspiracy to commit a felony.

CASE NOTES

Conspiracy to Commit Murder. — Conviction for conspiracy to commit first degree murder was supported by sufficient evidence because, inter alia, defendant admitted to (1) knowing what was going to happen and to having remorse about thinking up such a thing and not stopping it, (2) conceiving of and agreeing to the plan to kill defendant's mother, and (3) assisting the shooter in making it look like a break in and cleaning up the scene. State v. Crowe, — N.C. App. —, 656 S.E.2d 688, 2008 N.C. App. LEXIS 261 (2008).

Cited in State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007).

§ 14-2.5. Punishment for attempt to commit a felony or misdemeanor.

CASE NOTES

Sentence aggravation. — By also making attempted computer solicitation a felony under amended G.S. 14-202.3, the legislature merely increased the severity of the crime; it did not create the new crime of attempt. State v. Ellis, — N.C. App. —, 657 S.E.2d 51, 2008 N.C. App. LEXIS 272 (2008).

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, or with deceit and intent to defraud, or with ethnic animosity.

(a) Except as provided in subsections (b) and (c), every person who shall be convicted of any misdemeanor for which no specific classification and no specific punishment is prescribed by statute shall be punishable as a Class 1 misdemeanor. Any misdemeanor that has a specific punishment, but is not assigned a classification by the General Assembly pursuant to law is classified as follows, based on the maximum punishment allowed by law for the offense as it existed on the effective date of Article 81B of Chapter 15A of the General Statutes:

(1) If that maximum punishment is more than six months imprisonment, it is a Class 1 misdemeanor;
(2) If that maximum punishment is more than 30 days but not more than six months imprisonment, it is a Class 2 misdemeanor; and
(3) If that maximum punishment is 30 days or less imprisonment or only a fine, it is a Class 3 misdemeanor.

Misdemeanors that have punishments for one or more counties or cities pursuant to a local act of the General Assembly that are different from the generally applicable punishment are classified pursuant to this subsection if not otherwise specifically classified.

(b) If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony.

(c) If any Class 2 or Class 3 misdemeanor is committed because of the victim's race, color, religion, nationality, or country of origin, the offender shall be guilty of a Class 1 misdemeanor. If any Class A1 or Class 1 misdemeanor offense is committed because of the victim's race, color, religion, nationality, or country of origin, the offender shall be guilty of a Class H felony. (R.C., c. 34, s. 120; Code, s. 1097; Rev., s. 3293; C.S., s. 4173; 1927, c. 1; 1967, c. 1251, s. 3; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, ss. 2, 47, 48; 1981, c. 63, s. 1; c. 179, s. 14; 1991, c. 702, s. 2; 1993, c. 538, s. 7; 1994, Ex. Sess., c. 14, s. 2; c. 24, s. 14(b); 1995 (Reg. Sess., 1996), c. 742, s. 6; 2008-197, s. 4.1.)

Effect of Amendments. — Session Laws 2008-197, s. 4.1, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class H" for "Class I" in subsection (c).

ARTICLE 2A.

Habitual Felons.

§ 14-7.1. Persons defined as habitual felons.

CASE NOTES

Sufficiency of Indictment. —
State presented substantial evidence that defendant had attained the status of habitual felon as each of the three judgments introduced by the state listed the name of defendant as the same name by which defendant was charged in the latest indictment and defendant introduced no evidence to rebut that prima facie showing by the state. State v. Tyson, — N.C. App. —, 658 S.E.2d 285, 2008 N.C. App. LEXIS 652 (Apr. 1, 2008).

Failure to be Present. — In light of the fact that defendant had waived his right to be at his trial on drug charges due to his unexplained absence from the court, there was no error on the part of the trial court with continuing with the habitual offender portion of defendant's trial since he was informed of the previous convictions the State intended to use and was given a fair opportunity to either admit or deny them or remain silent. State v. Davis, 186 N.C. App. 242, 650 S.E.2d 612, 2007 N.C. App. LEXIS 2109 (2007).

Use of Prior Convictions. —
Defendant was erroneously sentenced as a habitual offender because one of the prior convictions relied upon was a conviction from New Jersey for an offense that was not a felony in New Jersey. State v. Moncree, — N.C. App. —, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008).

Cited in State v. Johnson, — N.C. App. —, 651 S.E.2d 907, 2007 N.C. App. LEXIS 2305 (2007); Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

§ 14-7.3. Charge of habitual felon.

CASE NOTES

Age or Date of Birth Not Required in Indictment. — Habitual offender indictment was not required to allege defendant's age or date or birth. State v. Sinclair, — N.C. App. —, 663 S.E.2d 866, 2008 N.C. App. LEXIS 1473 (Aug. 5, 2008).

Use of Prior Convictions. — Defendant was erroneously sentenced as a habitual offender because one of the prior convictions relied upon was a conviction from New Jersey for an offense that was not a felony in New Jersey. State v. Moncree, — N.C. App. —, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008).

Cited in State v. Coltrane, — N.C. App. —, 656 S.E.2d 322, 2008 N.C. App. LEXIS 194 (2008).

§ 14-7.4. Evidence of prior convictions of felony offenses.

CASE NOTES

Proof of Prior Convictions. —
State presented substantial evidence that defendant had attained the status of habitual felon as each of the three judgments introduced by the state listed the name of defendant as the same name by which defendant was charged in the latest indictment and defendant introduced no evidence to rebut that prima facie showing by the state. State v. Tyson, — N.C. App. —, 658 S.E.2d 285, 2008 N.C. App. LEXIS 652 (Apr. 1, 2008).

§ 14-7.5. Verdict and judgment.

CASE NOTES

Trial court lacked jurisdiction to submit to the jury the charge of attaining the status of habitual felon since the court erred in denying defendant's motion to dismiss a cocaine possession charge. State v. Miller, — N.C. App. —, 661 S.E.2d 770, 2008 N.C. App. LEXIS 1170 (June 17, 2008).

§ 14-7.6. Sentencing of habitual felons.

CASE NOTES

Concurrent Sentence Improper. — State had no right to appeal from a concurrent sentence because the sentence was governed by G.S. 14-7.6, which was outside the scope of appeal of G.S. 15A-1445(a)(3)(c); however, because the concurrent sentence was contrary to G.S. 14-7.6, under N.C. R. App. P. 2 the court would treat the appeal as a mandamus petition, vacate the judgment, and remand for resentencing. State v. Watkins, — N.C. App. —, 659 S.E.2d 58, 2008 N.C. App. LEXIS 687 (2008).

Cited in Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

Article 4A.

Prohibited Secret Societies and Activities.

§ 14-12.12. Placing burning or flaming cross on property of another or on public street or highway or on any public place.

(a) It shall be unlawful for any person or persons to place or cause to be placed on the property of another in this State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

(b) It shall be unlawful for any person or persons to place or cause to be placed on the property of another in this State or on a public street or highway, or on any public place a burning or flaming cross or any manner of exhibit in which a burning or flaming cross real or simulated, is a whole or a part, with the intention of intimidating any person or persons or of preventing them from doing any act which is lawful, or causing them to do any act which is unlawful. (1953, c. 1193, s. 11; 1967, c. 522, ss. 1, 2; 2008-197, s. 1.)

Editor's Note. — Session Laws 2008-197, s. 5, provides: "The Legislative Research Commission shall study the impact of recent cross burnings and noose hangings within the State and determine if any modifications should be made to existing statutes to lawfully deter this type of conduct. The Legislative Research Commission shall report its findings and make recommendations for legislation to the 2009 Session of the General Assembly."

Effect of Amendments. — Session Laws 2008-197, s. 1, effective December 1, 2008, and applicable to offenses committed on or after that date, inserted "or on any public place" in the section heading, and in subsection (b).

§ 14-12.13. Placing exhibit with intention of intimidating, etc., another.

It shall be unlawful for any person or persons to place or cause to be placed anywhere in this State any exhibit of any kind whatsoever, while masked or unmasked, with the intention of intimidating any person or persons, or of preventing them from doing any act which is lawful, or of causing them to do any act which is unlawful. For the purposes of this section, the term "exhibit" includes items such as a noose. (1953, c. 1193, s. 12; 2008-197, s. 2.)

Editor's Note. — Session Laws 2008-197, s. 5, provides: "The Legislative Research Commission shall study the impact of recent cross burnings and noose hangings within the State and determine if any modifications should be made to existing statutes to lawfully deter this type of conduct. The Legislative Research Commission shall report its findings and make recommendations for legislation to the 2009 Session of the General Assembly."

Effect of Amendments. — Session Laws 2008-197, s. 2, effective December 1, 2008, and applicable to offenses committed on or after that date, added the last sentence.

§ 14-12.14. Placing exhibit while wearing mask, hood, or other disguise.

It shall be unlawful for any person or persons, while wearing a mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, to place or cause to be placed at or in any place in the State any exhibit of any kind whatsoever, with the intention of intimidating any person or persons, or of preventing them from doing any act which is lawful, or of causing them to do any act which is unlawful. For the purposes of this section, the term "exhibit" includes items such as a noose. (1953, c. 1193, s. 13; 1967, c. 522, s. 3; 2008-197, s. 3.)

Editor's Note. — Session Laws 2008-197, s. 5, provides: "The Legislative Research Commission shall study the impact of recent cross burnings and noose hangings within the State and determine if any modifications should be made to existing statutes to lawfully deter this type of conduct. The Legislative Research Commission shall report its findings and make recommendations for legislation to the 2009 Session of the General Assembly."

Effect of Amendments. — Session Laws 2008-197, s. 3, effective December 1, 2008, and applicable to offenses committed on or after that date, added the last sentence.

§ 14-12.15. Punishment for violation of Article.

All persons violating any of the provisions of this Article, except for G.S. 14-12.12(b), 14-12.13, and 14-12.14, shall be guilty of a Class 1 misdemeanor. All persons violating the provisions of G.S. 14-12.12(b), 14-12.13, and 14-12.14 shall be punished as a Class H felon. (1953, c. 1193, s. 14; 1967, c. 602; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 12; 1994, Ex. Sess., c. 24, s. 14(c); 2008-197, s. 4.)

Effect of Amendments. — Session Laws 2008-197, s. 4, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class H" for "Class I" at the end.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.

CASE NOTES

I. General Consideration.

II. Murder in the First Degree Generally.
IV. Murder in Perpetration of a Felony.
V. Murder in the Second Degree.
VII. Evidence.
  A. In General.
VIII. Instructions.
  B. Degree of Offense.
X. Pleas of Guilty and Not Guilty.

I. GENERAL CONSIDERATION.

Applied in State v. Rankin, — N.C. App. —, 663 S.E.2d 438, 2008 N.C. App. LEXIS 1320 (2008).

Cited in State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007); State v. Hall, — N.C. App. —, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007); State v. Calhoun, — N.C. App. —, 657 S.E.2d 424, 2008 N.C. App. LEXIS 402 (2008).

II. MURDER IN THE FIRST DEGREE GENERALLY.

Evidence Held Sufficient. —

Evidence supported defendant's conviction for first-degree murder as there was sufficient evidence to support the elements of premeditation and deliberation in the form of defendant's statements and conduct before and after the killing, ill will between the parties, and the nature and number of the victim's wounds. The victim's back was turned when defendant fired defendant's weapon, giving defendant adequate time to weigh the consequences of the act. State v. Bass, — N.C. App. —, 660 S.E.2d 123, 2008 N.C. App. LEXIS 864 (2008).

IV. MURDER IN PERPETRATION OF A FELONY.

Same — Firing at Automobile. —

No double jeopardy existed where defendant was convicted of both discharging a firearm into a vehicle and felony murder, because North Carolina does not recognize the merger doctrine. State v. Jackson, — N.C. App. —, 659 S.E.2d 73, 2008 N.C. App. LEXIS 689 (2008).

V. MURDER IN THE SECOND DEGREE.

Evidence Held Sufficient. —

Evidence that defendant fired several shots in the direction of three individuals, in a small trailer occupied by six persons, and that he admitted shooting one of the individuals, was sufficient to support his conviction of the second degree murder of that individual under G.S. 14-17. State v. Brower, 186 N.C. App. 397, 651 S.E.2d 390, 2007 N.C. App. LEXIS 2209 (2007).

Evidence was sufficient to support defendant's convictions for second degree murder where defendant stole a van, drove it recklessly while being pursued by police, which resulted in the van flipping over, colliding with another vehicle, and the occupants thereof being killed; there was sufficient evidence of defendant's malice. State v. Lloyd, — N.C. App. —, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

VII. EVIDENCE.

A. In General.

Sufficiency of Evidence to Deny Motion to Dismiss. —

As the State presented evidence that defendant retrieved a gun from his vehicle and intentionally fired the gun at defendant, killing him, the State presented sufficient evidence for the jury to infer malice on the part of defendant; thus, the trial court properly denied the motion to dismiss. State v. Ledarius Montreal Banks, — N.C. App. —, 664 S.E.2d 355, 2008 N.C. App. LEXIS 1484 (2008).

VIII. INSTRUCTIONS.

B. Degree of Offense.

Instruction on Lesser-Included Offense Properly Not Given. — Trial court properly refused to submit a lesser-included offense charge of misdemeanor death by vehicle in defendant's criminal trial on charges of second degree murder, as the jury chose to convict defendant of second degree murder rather than involuntary manslaughter, such that providing the additional misdemeanor death option would not have made a difference; any such error was harmless. State v. Lloyd, — N.C. App. —, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

X. PLEAS OF GUILTY AND NOT GUILTY.

Guilty Plea Voluntary. — Although the inmate claimed that his guilty pleas were not voluntary and intelligent, in violation of his Sixth and Fourteenth Amendment rights, as he did not know he was admitting guilt of premeditated and deliberate murder, the inmate voluntarily pled with full knowledge of the charges against him and the consequences of his pleas and since the State possessed overwhelming evidence that the inmate acted with premeditation and deliberation, his pleas made premeditation and deliberation an admitted fact. The inmate also argued he was unaware of the consequences of his plea, as he did not know his admission of guilt would permit the State to submit his underlying felonies as aggravating factors during his sentencing, but this argument was rejected because, even if true, it did not entitle the inmate to relief. Meyer v. Branker, 506 F.3d 358, 2007 U.S. App. LEXIS 26335 (4th Cir. 2007).

ARTICLE 7A.

Rape and Other Sex Offenses.

§ 14-27.1. Definitions.

CASE NOTES

"Committed Upon." — Although the words "committed upon" the victim in G.S. 14-27.1(2) could extend to acts committed by someone other than the person accused of a rape, this phrase connotes an action committed upon the victim and not a voluntary act by the victim. Thus, the protection afforded by statute does not serve to negate the consent of a person who voluntarily and as a result of his or her own actions becomes intoxicated to a level short of unconsciousness or physical helplessness as defined by G.S. 14-27.1(3). State v. Haddock, — N.C. App. —, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

"Sexual Contact." — State was not required to show that the conduct of defendant, a massage therapist, in touching the two female clients of the salon where defendant worked resulted in penetration, as the crime of sexual battery involved sexual contact, as defined by G.S. 14-27.1(5), and through the use of force and against the will of the two clients in violation of G.S. 14-27.5A(a)(1). The State presented sufficient evidence to show that defendant touched, inter alia, the breasts and buttocks of the two female clients and that the female clients were petrified as defendant did so because they did not know what defendant planned to do next. State v. Viera, — N.C. App. —, 658 S.E.2d 529, 2008 N.C. App. LEXIS 608 (Apr. 1, 2008).

Applied in State v. Smith, — N.C. App. —, 660 S.E.2d 82, 2008 N.C. App. LEXIS 906 (2008).

Cited in State v. Tadeja, — N.C. App. —, 664 S.E.2d 402, 2008 N.C. App. LEXIS 1503 (2008).

§ 14-27.2. First-degree rape.

CASE NOTES

I. General Consideration.
III. Other Crimes.
VII. Dangerous or Deadly Weapons.
XI. Penetration.
XIII. Evidence.
XIV. Instructions.

I. GENERAL CONSIDERATION.

Cited in State v. Harris, — N.C. App. —, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008); State v. McAllister, — N.C. App. —, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008); State v. Smith, — N.C. App. —, 660 S.E.2d 82, 2008 N.C. App. LEXIS 906 (2008); State v. Haddock, — N.C. App. —, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

III. OTHER CRIMES.

Arrest of Judgment Proper. —

Since the indictment for first degree rape did not include the purpose element included in the sexual battery statute, it was insufficient to confer subject matter jurisdiction, and the trial court lacked jurisdiction to enter a judgment of defendant's guilt on that offense; thus, the court had to arrest judgment. State v. Kelso, — N.C. App. —, 654 S.E.2d 28, 2007 N.C. App. LEXIS 2523 (2007).

VII. DANGEROUS OR DEADLY WEAPONS.

"Employs" a Weapon. —

Trial court erred by denying defendant's motions to dismiss the charges of first-degree rape and first-degree sexual offense because the State of North Carolina failed to offer any evidence tending to show that defendant employed or displayed a dangerous or deadly weapon or an article which the victim reasonably believed was a dangerous or deadly weapon, as required by G.S. 14-27.2(a)(2)(a) and G.S. 14-27.4(a)(2)(a). However, the case was remanded for resentencing because the jury's convictions necessarily included all the elements of second-degree rape and second-degree sexual offense under G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1). State v. Adams, — N.C. App. —, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007).

Sufficiency of Evidence. — In a case in which the defendant and an accomplice raped a woman while the accomplice threatened the victim with a gun, remand was necessary as to charges of first degree rape and first degree sexual offense by anal intercourse because (1) defendant sufficiently preserved the issue for appellate review, and (2) the evidence was insufficient to permit a reasonable jury to convict defendant of the first degree offenses for which no acting in concert instruction was given since the record contained no evidence showing defendant's personal use or display of a dangerous weapon. State v. Person, — N.C. App. —, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

XI. PENETRATION.

Instruction on Attempted Rape Not Required. — Victim's testimony that defendant tried to make the victim have sex with defendant and the lack of medical evidence of penetration did not create a conflict that would necessitate an instruction on first-degree attempted rape under G.S. 14-27.2(a)(1) since: (1) an expert witness testimony as to a lack of trauma did not indicate lack of penetration; (2) there was evidence that defendant had inserted defendant's penis into the victim's vagina, which was corroborated; (3) a witness testified that defendant told the witness that defendant had had sex with the victim; and (4) the victim's testimony was consistent with penetration. State v. Thomas, — N.C. App. —, 651 S.E.2d 924, 2007 N.C. App. LEXIS 2309 (2007).

XIII. EVIDENCE.

Evidence as to Weapon Admitted. — Victim's testimony regarding the shiny object in defendant's hand, which the victim believed to be a knife, was relevant to the first-degree rape charge. State v. Lawrence, — N.C. App. —, 663 S.E.2d 898, 2008 N.C. App. LEXIS 1509 (2008).

Evidence Held Sufficient. —

Victim's testimony, corroborated by DNA evidence, that (1) defendant entered the victim's vagina with his penis, (2) defendant forced himself upon the victim, (3) the victim fought defendant and made it known that the victim did not want to engage in sexual intercourse with defendant, (4) defendant hit the victim with a bottle, (5) defendant brandished a knife, and (6) defendant choked the victim to unconsciousness with his hands, was sufficient to support defendant's conviction for first-degree rape. State v. Little, — N.C. App. —, 654 S.E.2d 760, 2008 N.C. App. LEXIS 97 (Jan. 15, 2008).

Victim's testimony that defendant possessed a shiny, silver object which the victim thought was a knife, together with defendant's threatening behavior, was sufficient evidence that defendant displayed an article the victim reasonably believed was a dangerous weapon. Defendant's threats were also sufficiently connected in time to the sexual acts. State v. Lawrence, — N.C. App. —, 663 S.E.2d 898, 2008 N.C. App. LEXIS 1509 (2008).

Sufficient evidence supported defendant's conviction of first degree rape, G.S. 14-27.2(a), as there was evidence of a mitochondrial DNA match between defendant's parent and two hairs found in the victim's bedroom. This evidence strongly suggested that the assailant was someone in the same maternal line as defendant's parent, and defendant's two brothers were in custody when the attack on the victim took place. State v. McAllister, — N.C. App. —, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

XIV. INSTRUCTIONS.

Instruction Held Improper. — In a case in which the defendant and an accomplice raped a woman, defendant was entitled to a new trial on the charge of first degree rape by acting in concert with someone else because the jury instruction referred to guilt both as a principle and by acting in concert, which allowed the jury to convict defendant twice for the same crime, in violation of double jeopardy rights. State v. Person, — N.C. App. —, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

§ 14-27.2A. Rape of a child; adult offender.

(a) A person is guilty of rape of a child if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years.

(b) A person convicted of violating this section is guilty of a Class B1 felony and shall be sentenced pursuant to Article 81B of Chapter 15A of the General Statutes, except that in no case shall the person receive an active punishment of less than 300 months, and except as provided in subsection (c) of this section. Following the termination of active punishment, the person shall be enrolled in satellite-based monitoring for life pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes.

(c) Notwithstanding the provisions of Article 81B of Chapter 15A of the General Statutes, the court may sentence the defendant to active punishment for a term of months greater than that authorized pursuant to G.S. 15A-1340.17, up to and including life imprisonment without parole, if the court finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17. If the court sentences the defendant pursuant to this subsection, it shall make findings of fact supporting its decision, to include matters it considered as egregious aggravation. Egregious aggravation can include further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover. Egregious aggravation may also be considered based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.

(d) Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 or Subchapter 1 of Chapter 7B of the General Statutes.

(e) The offense under G.S. 14-27.2(a)(1) is a lesser included offense of the offense in this section. (2008-117, s. 1.)

Editor's Note. — Session Laws 2008-117, s. 22, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-117, s. 21.1 is a severability clause.

§ 14-27.3. Second-degree rape.

CASE NOTES

I. General Consideration.
II. Elements of Offense.
IV. Instructions.

I. GENERAL CONSIDERATION.

Use of Words "And/Or" in Indictment Acceptable. — Use of the words "and/or" did not render a short form indictment for rape facially invalid because a person of common understanding would known that the intent of the indictment was to accuse defendant of having sexual intercourse with a person deemed by law to be incapable of giving consent. In turn, this language was sufficient to notify defendant of the charges against him in order to prepare an adequate defense and to protect him from being punished a second time for the same act. State v. Haddock, — N.C. App. —, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

II. ELEMENTS OF OFFENSE.

An attempt to commit rape, etc.

There was substantial evidence of restraint to support defendant's second-degree attempted rape conviction as defendant straddled the victim and tried to pull up the victim's shirt, and defendant's pants were unzipped, which created an inference of guilt and was evidence of intent; the same evidence demonstrated defendant's overt act in furtherance of the crime. State v. Simpson, — N.C. App. —, 653 S.E.2d 249, 2007 N.C. App. LEXIS 2431 (2007).

Lesser Included Offense. — Trial court erred by denying defendant's motions to dismiss the charges of first-degree rape and first-degree sexual offense because the State of North Carolina failed to offer any evidence tending to show that defendant employed or displayed a dangerous or deadly weapon or an article which the victim reasonably believed was a dangerous or deadly weapon, as required by G.S. 14-27.2(a)(2)(a) and G.S. 14-27.4(a)(2)(a). However, the case was remanded for resentencing because the jury's convictions necessarily included all the elements of second-degree rape and second-degree sexual offense under G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1). State v. Adams, — N.C. App. —, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007).

IV. INSTRUCTIONS.

Instruction on Attempted Second-Degree Rape. —
Jury instruction for second degree rape was not fatally ambiguous simply because the physical helplessness clause and the mental incapacity clause were joined in the disjunctive. State v. Haddock, — N.C. App. —, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

Defendant was entitled to a new trial because the trial court erred when the court did not include the words "due to any act committed upon the victim," as stated in G.S. 14-27.1(2), in the jury instruction at defendant's trial for second degree rape. State v. Haddock, — N.C. App. —, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

§ 14-27.4. First-degree sexual offense.

CASE NOTES

II. Elements of Offense.
III. Practice and Procedure.

II. ELEMENTS OF OFFENSE.

Penetration. —
When considered with the evidence that a victim suffered extensive damage to her outer genital and rectal areas, the State's evidence gave rise to a reasonable inference that the victim's colon injury was the result of the penetration of an object into her rectum, as defined in G.S. 14-27.4(a)(2). Therefore, the State introduced substantial evidence on the charge of first-degree sexual offense, and the trial court did not err in denying defendant's motion to dismiss. State v. Harris, — N.C. App. —, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Dangerous or Deadly Weapon. — Trial court erred by denying defendant's motions to dismiss the charges of first-degree rape and first-degree sexual offense because the State of North Carolina failed to offer any evidence tending to show that defendant employed or displayed a dangerous or deadly weapon or an article which the victim reasonably believed was a dangerous or deadly weapon, as required by G.S. 14-27.2(a)(2)(a) and G.S. 14-27.4(a)(2)(a). However, the case was remanded for resentencing because the jury's convictions necessarily included all the elements of second-degree rape and second-degree sexual offense under G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1). State v. Adams, — N.C. App. —, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007).

Sufficiency of Evidence. — In a case in which the defendant and an accomplice raped a woman while the accomplice threatened the victim with a gun, remand was necessary as to charges of first degree rape and first degree sexual offense by anal intercourse because (1) defendant sufficiently preserved the issue for appellate review, and (2) the evidence was insufficient to permit a reasonable jury to convict defendant of the first degree offenses for which no acting in concert instruction was given since the record contained no evidence showing defendant's personal use or display of a dangerous weapon. State v. Person, — N.C. App. —, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

III. PRACTICE AND PROCEDURE.

Evidence Held Insufficient. —
Because the alleged minor victim did testify at trial but failed to testify as to any sexual act with defendant, because the victim never made any prior statement that any sexual act ever occurred with defendant, and because no other strong corroborating evidence of defendant's extrajudicial statement was offered by the State of North Carolina, defendant's extrajudicial statement alone was not sufficient to support defendant's conviction for a first degree sexual offense. State v. Smith, — N.C. App. —, 660 S.E.2d 82, 2008 N.C. App. LEXIS 906 (2008).

Attempt Instruction Not Warranted. —
In a case in which the defendant and an accomplice raped a woman and defendant was

convicted of, inter alia, first degree sexual offense by anal intercourse, an instruction on attempted first degree sexual offense by anal intercourse was not required since the victim's testimony never specifically excluded penetration and there was DNA evidence that defendant's sperm was found on an anal swab. State v. Person, — N.C. App. —, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

Juvenile Disposition. — Juvenile defendant failed to argue how the absence of a sex offender specific evaluation hindered the trial court's ability to properly sentence him on his adjudication for first degree sex offenses with a child. In re J.J.D.L., — N.C. App. —, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

Denial of juvenile defendant's motion for release pending appeal was not improper, given that defendant did not challenge the trial court's findings of fact supporting its reason for denying defendant's motion, which was that he committed first degree sex offenses with a child. In re J.J.D.L., — N.C. App. —, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

§ 14-27.4A. Sexual offense with a child; adult offender.

(a) A person is guilty of sexual offense with a child if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years.

(b) A person convicted of violating this section is guilty of a Class B1 felony and shall be sentenced pursuant to Article 81B of Chapter 15A of the General Statutes, except that in no case shall the person receive an active punishment of less than 300 months, and except as provided in subsection (c) of this section. Following the termination of active punishment, the person shall be enrolled in satellite-based monitoring for life pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes.

(c) Notwithstanding the provisions of Article 81B of Chapter 15A of the General Statutes, the court may sentence the defendant to active punishment for a term of months greater than that authorized pursuant to G.S. 15A-1340.17, up to and including life imprisonment without parole, if the court finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17. If the court sentences the defendant pursuant to this subsection, it shall make findings of fact supporting its decision, to include matters it considered as egregious aggravation. Egregious aggravation can include further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover. Egregious aggravation may also be considered based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.

(d) The offense under G.S. 14-27.4(a)(1) is a lesser included offense of the offense in this section. (2008-117, s. 2.)

Editor's Note. — Session Laws 2008-117, s. 22, made this section effective effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-117, s. 21.1 is a severability clause.

§ 14-27.5. Second-degree sexual offense.

CASE NOTES

Lesser Included Offense. —

Trial court erred by denying defendant's motions to dismiss the charges of first-degree rape and first-degree sexual offense because the State of North Carolina failed to offer any evidence tending to show that defendant employed or displayed a dangerous or deadly weapon or an article which the victim reasonably believed was a dangerous or deadly weapon, as required by G.S. 14-27.2(a)(2)(a) and G.S. 14-27.4(a)(2)(a). However, the case was remanded for resentencing because the jury's convictions necessarily included all the elements of second-degree rape and second-degree sexual offense under G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1). State v. Adams, — N.C. App. —, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007).

State submitted substantial evidence to show both that defendant, a salon's massage therapist, had sexual contact with two female clients through the use of force and against their will, and, thus, committed two sexual batteries in violation of G.S. 14-27.5(a)(1), and that defendant while working at the salon was practicing massage therapy without a license in violation of G.S. 90-634(a)(1). As a result, dismissal of those charges on defendant's motion was not warranted. State v. Viera, — N.C. App. —, 658 S.E.2d 529, 2008 N.C. App. LEXIS 608 (Apr. 1, 2008).

§ 14-27.5A. Sexual battery.

CASE NOTES

"Sexual Contact." — State was not required to show that the conduct of defendant, a massage therapist, in touching the two female clients of the salon where defendant worked resulted in penetration, as the crime of sexual battery involved sexual contact, as defined by G.S. 14-27.1(5), and through the use of force and against the will of the two clients in violation of G.S. 14-27.5A(a)(1). The State presented sufficient evidence to show that defendant touched, inter alia, the breasts and buttocks of the two female clients and that the female clients were petrified as defendant did so because they did not know what defendant planned to do next. State v. Viera, — N.C. App. —, 658 S.E.2d 529, 2008 N.C. App. LEXIS 608 (Apr. 1, 2008).

Lesser Included Offense. — Since the indictment for first degree rape did not include the purpose element included in the sexual battery statute, it was insufficient to confer subject matter jurisdiction, and the trial court lacked jurisdiction to enter a judgment of defendant's guilt on that offense; thus, the court had to arrest judgment. State v. Kelso, — N.C. App. —, 654 S.E.2d 28, 2007 N.C. App. LEXIS 2523 (2007).

§ 14-27.7. Intercourse and sexual offenses with certain victims; consent no defense.

CASE NOTES

Where Defendant Was Acting as Agent of Sheriff. —

Convictions for sexual activity by a custodian and attempted sexual activity by a custodian were affirmed because defendant, who was a mental health clinician employed by an independent contractor that provided services to prisoners in a county jail, was an agent of the county sheriff so that defendant was criminally liable when defendant committed sexual acts with a prisoner in violation of G.S. 14-27.7(a). State v. Wilson, 362 N.C. 162, 655 S.E.2d 359, 2008 N.C. LEXIS 32 (2008).

Cited in State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

§ 14-27.7A. Statutory rape or sexual offense of person who is 13, 14, or 15 years old.

CASE NOTES

Jury Instruction on Sex Offense Proper. — Trial court did not commit plain error in instructing the jury on a sex offense and accepting a guilty verdict thereon as there was evidence upon which the jury could have found that defendant committed a sexual act upon the victim and the jury instructions as a whole were correct State v. Tadeja, — N.C. App. —, 664 S.E.2d 402, 2008 N.C. App. LEXIS 1503 (2008).

Evidence Was Sufficient to Support Conviction. —

There was substantial evidence to support convictions for incest under G.S. 14-178(a), and two counts of statutory sex offense of a person who was 15 years old in violation of G.S.

14-27.7A(a), because: (1) the victim testified that defendant was her biological father and identified him in open court, and her birth certificate identified defendant as her father, providing direct evidence of defendant's paternity; and (2) there was substantial direct and circumstantial evidence that defendant had vaginal intercourse or engaged in a sexual act with his daughter on multiple occasions while she was 15. State v. Ware, — N.C. App. —, 656 S.E.2d 662, 2008 N.C. App. LEXIS 263 (2008).

ARTICLE 8.

Assaults.

§ 14-31. Maliciously assaulting in a secret manner.

CASE NOTES

Cited in State v. Streeter, — N.C. App. —, 663 S.E.2d 879, 2008 N.C. App. LEXIS 1482 (Aug. 5, 2008).

§ 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

CASE NOTES

I. General Consideration.
V. Deadly Weapon.
VI. Intent to Kill.
VII. Serious Injury.
IX. Instructions to Jury.

I. GENERAL CONSIDERATION.

Applied in State v. Streeter, — N.C. App. —, 663 S.E.2d 879, 2008 N.C. App. LEXIS 1482 (Aug. 5, 2008).

V. DEADLY WEAPON.

Substantial evidence existed to convict defendant of felony assault with a deadly weapon inflicting serious injuries because: (1) defendant weighed 175 pounds and the victim weighed 110 pounds; and (2) the victim had a shoe print on her back, handprint bruises on her arms, thighs, and buttocks, and had handprints on her neck, which were consistent with a choke hold. The jury determined that defendant's hands and feet constituted deadly weapons under G.S. 14-32(b). State v. Harris, — N.C. App. —, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

VI. INTENT TO KILL.

Evidence Held Sufficient. —

There was substantial evidence that defendant unlawfully entered a home with the intent to commit felonious assault under G.S. 14-32(c) for purposes of a burglary charge, even though the same evidence would also support an intent to murder theory as: (1) defendant and three conspirators kicked down the front door of a victim's house, wearing ski masks and carrying loaded guns, (2) they terrorized and assaulted the occupants, (3) co-defendant testified that they entered the home intending to kill at least one person, and (4) they abandoned their plan upon discovering that they had entered the wrong house. State v. Jordan, — N.C. App. —, 651 S.E.2d 917, 2007 N.C. App. LEXIS 2270 (2007).

VII. SERIOUS INJURY.

Evidence of Infliction of Serious Injury. —

Evidence showing that the victim went to the hospital, took pain medication for two weeks, walked with a limp for one to two weeks, and did not fully heal for approximately one month after being shot in the knee was sufficient to show that the victim sustained a serious injury as required to support defendant's conviction for assault with a deadly weapon inflicting serious injury. State v. Tice, — N.C. App. —, 664 S.E.2d 368, 2008 N.C. App. LEXIS 1507 (2008).

IX. INSTRUCTIONS TO JURY.

Failure to Submit Lesser Offense Held Error. —
Under circumstances in which a trial court correctly found that the issue of whether a two-by-four board used to beat the victim was a deadly weapon was for the jury to determine, the trial court should have instructed the jury on the lesser included offense of assault inflicting serious injury, and the failure to do so constituted reversible error. State v. Tillery, 186 N.C. App. 447, 651 S.E.2d 291, 2007 N.C. App. LEXIS 2204 (2007).

Failure to Instruct Jury to Return Not Guilty Verdict if State Failed to Prove Any Elements of the Crime Charged. — Because defendant's plea of not guilty to a charge of assault with a deadly weapon inflicting serious injury with the intent to kill placed the burden upon the State to satisfy the jury beyond a reasonable doubt of every element of the offenses charged in the bill of indictment, defendant was entitled to a specific instruction that if the jury determined that the State failed to prove any of the elements of the charges, it should return a verdict of not guilty. The trial court's failure to include such an instruction necessitated a new trial. State v. McArthur, 186 N.C. App. 373, 651 S.E.2d 256, 2007 N.C. App. LEXIS 2202 (2007).

Defendant's conviction of assault with a deadly weapon inflicting serious injury was improper, as the jury verdict form did not include an option of finding defendant not guilty, nor did it include an option to find defendant guilty of simple assault. The instructions did not cure the omission of a "not guilty" option from the jury verdict form. State v. Jenkins, — N.C. App. —, 658 S.E.2d 309, 2008 N.C. App. LEXIS 605 (Apr. 1, 2008).

§ 14-32.4. Assault inflicting serious bodily injury; strangulation; penalties.

CASE NOTES

Evidence Held Sufficient. — Victim's testimony that defendant attacked the victim and that the victim feared for her life, which was ample evidence of an assault, and the fact that the victim received cuts and bruises on her neck as a result of being strangled, which was confirmed by photographic evidence, provided sufficient evidence of each essential element of assault by strangulation. State v. Little, — N.C. App. —, 654 S.E.2d 760, 2008 N.C. App. LEXIS 97 (Jan. 15, 2008).

Sufficient evidence supported defendant's conviction of assault inflicting serious bodily injury, G.S. 14-32.4, as there was evidence of a mitochondrial DNA match between defendant's parent and two hairs found in the victim's bedroom. This evidence strongly suggested that the assailant was someone in the same maternal line as defendant's parent, and defendant's two brothers were in custody when the attack on the victim took place. State v. McAllister, — N.C. App. —, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

Lesser Included Offense. —
Under G.S. 14-33(c)(2), the essential elements of assault on a female were assault upon a female person by a male person at least 18 years of age; in contrast, the offense of assault by strangulation, G.S. 14-32.4(b), required only that an individual assault another person and inflict physical injury by strangulation. Because each offense included at least one element not present in the other, assault on a female was not a lesser included offense of assault by strangulation and the trial court properly denied a lesser-included-offense instruction. State v. Brunson, — N.C. App. —, 653 S.E.2d 552, 2007 N.C. App. LEXIS 2421 (2007).

Cited in State v. McAllister, — N.C. App. —, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

§ 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

CASE NOTES

I. General Consideration.
IV. Use of Deadly Weapon.
V. Assaults on Females.
VII. Sufficiency of Evidence.
VIII. Punishment.

I. GENERAL CONSIDERATION.

Cited in State v. Adams, — N.C. App. —, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007); State v. Whaley, 362 N.C. 156, 655 S.E.2d 388, 2008 N.C. LEXIS 31 (2008); State v. Harris, — N.C. App. —, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

IV. USE OF DEADLY WEAPON.

May Be Question of Fact For Jury. — Under circumstances in which a trial court correctly found that the issue of whether a two-by-four board used to beat the victim was a deadly weapon was for the jury to determine, the trial court should have instructed the jury on the lesser included offense of assault inflicting serious injury, and the failure to do so constituted reversible error. State v. Tillery, 186 N.C. App. 447, 651 S.E.2d 291, 2007 N.C. App. LEXIS 2204 (2007).

V. ASSAULTS ON FEMALES.

Assault on Female Not a Lesser Included Offense of Assault by Strangulation. — Under G.S. 14-33(c)(2), the essential elements of assault on a female were assault upon a female person by a male person at least 18 years of age; in contrast, the offense of assault by strangulation, G.S. 14-32.4(b), required only that an individual assault another person and inflict physical injury by strangulation. Because each offense included at least one element not present in the other, assault on a female was not a lesser included offense of assault by strangulation and the trial court properly denied a lesser-included-offense instruction. State v. Brunson, — N.C. App. —, 653 S.E.2d 552, 2007 N.C. App. LEXIS 2421 (2007).

VII. SUFFICIENCY OF EVIDENCE.

Evidence Sufficient. — Through the testimony of a middle school teacher that defendant, a juvenile, dragged her and struggled while the teacher was trying to prevent defendant from assaulting another student, the State had presented enough evidence for a charge of assault on a state employee in violation of G.S. 14-33(c)(4) to withstand a motion to dismiss. Thus, defense counsel was not ineffective for failing to renew the motion at the close of all of the evidence. In re A.V., — N.C. App. —, 654 S.E.2d 811, 2008 N.C. App. LEXIS 80 (2008).

There was substantial evidence that defendant assaulted a victim under G.S. 14-33(c)(1) because (1) defendant had attempted to engage the victim in play fighting and was rebuffed, (2) the victim shoved defendant in an attempt to relay to defendant the victim's feelings about "play fighting," (3) defendant was in close proximity when the victim was struck, and (4) defendant was taunting the victim when the victim regained consciousness. In re C.B., — N.C. App. —, 654 S.E.2d 21, 2007 N.C. App. LEXIS 2521 (2007).

VIII. PUNISHMENT.

Sentencing. — State met its burden of proving defendant's prior conviction in Virginia, for inflicting bodily injury on an employee of a juvenile detention center in violation of Va. Code Ann. § 18.2-55, was "substantially similar" to a Class A1 or Class 1 misdemeanor as required by G.S. 15A-1340.14(e), for the purpose of considering prior convictions for sentencing defendant for murder, kidnapping, rape, and burglary convictions in North Carolina. Indeed, the Virginia conviction was substantially similar to bodily injury caused in violation of G.S. 14-33(c), a class A1 misdemeanor, for North Carolina purposes. State v. Sapp, — N.C. App. —, 661 S.E.2d 304, 2008 N.C. App. LEXIS 1098 (2008).

§ 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.

CASE NOTES

Multiple Shots as Multiple Violations. — Because the evidence showed that defendant fired seven shots toward the victim's car and that one bullet hole was found in the victim's car, it did not violate the double jeopardy clauses of the North Carolina and federal constitutions to impose three separate sentences for three counts of attempted discharge of a firearm into occupied property or to sentence defendant both for the three attempt counts and for one completed offense. Each shot fired at the victim's car was a separate offense under G.S. 14-34.1. State v. Hagans, — N.C. App. —, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

And Can Result in Conviction of First-Degree Murder. — No double jeopardy existed where defendant was convicted of both discharging a firearm into a vehicle and felony murder, because North Carolina does not recognize the merger doctrine. State v. Jackson, — N.C. App. —, 659

S.E.2d 73, 2008 N.C. App. LEXIS 689 (2008).

Evidence Held Sufficient. —

Trial court properly denied defendant's motions for dismissal and to set aside the verdict on a charge of discharging a firearm into an occupied property, in violation of G.S. 14-34.1, as there was sufficient evidence to present the charge to the jury and sufficient evidence to uphold the verdict, based on defendant having fired shots into a restaurant in the early morning hours, resulting in damage to the property; the restaurant was closed at the time but the lights were still on although turned down, other nearby establishments were still open, and there were people crowding the streets near the premises, such that it was inferrable that defendant had reasonable grounds to believe that the premises might have been occupied when the shots were fired. State v. Everette, 361 N.C. 646, 652 S.E.2d 241, 2007 N.C. LEXIS 1107 (2007).

Testimony that defendant intended to discharge the gun and that a bullet penetrated an exterior apartment wall was sufficient to support defendant's conviction for felony discharging a firearm into an occupied property under G.S. 14-34.1. State v. Canady, — N.C. App. —, 664 S.E.2d 380, 2008 N.C. App. LEXIS 1498 (2008).

§ 14-34.5. Assault with a firearm on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility.

CASE NOTES

Exclusionary Rule Did Not Bar Evidence of Assault on Law Enforcement Officer. — Trial court properly denied defendant's motion to suppress evidence in the trial of his charge of assault on a law enforcement officer because, even if the police officers' entry into defendant's home was unlawful, the exclusionary rule did not operate to exclude evidence of defendant's assault on the law enforcement officers. State v. Parker, — N.C. App. —, 655 S.E.2d 860, 2008 N.C. App. LEXIS 192 (Feb. 5, 2008).

§ 14-34.9. Discharging a firearm from within an enclosure.

Unless covered under some other provision of law providing greater punishment, any person who willfully or wantonly discharges or attempts to discharge a firearm, as a part of a pattern of criminal street gang activity, from within any building, structure, motor vehicle, or other conveyance, erection, or enclosure toward a person or persons not within that enclosure shall be punished as a Class E felon. (2008-214, s. 2.)

Editor's Note. — Session Laws 2008-214, s. 6, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Article 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.

CASE NOTES

I. General Consideration.
II. Kidnapping, Generally.
IV. Facilitating Commission of Felony or Flight.
VI. First-Degree Kidnapping.
VII. Second-Degree Kidnapping.
  A. In General.
VIII. Charge and Indictment, Generally.
IX. Instructions.

I. GENERAL CONSIDERATION.

Applied in State v. Tollison, — N.C. App. —, 660 S.E.2d 647, 2008 N.C. App. LEXIS 1002 (2008).

Cited in State v. Adams, — N.C. App. —, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007); Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008); State v. McAllister, — N.C. App. —, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

II. KIDNAPPING, GENERALLY.

Restraint Must Be Separate and Apart from That Inherent in Committing Other Felonies. —

State presented substantial evidence of the required kidnapping element that the restraint be a separate complete act independent of and apart from the attempted rape as: (1) defendant straddled the victim on the sofa, hit the victim, tried to pull up the victim's tank top, and had defendant's pants unzipped, at which time defendant had completed the crime of attempted second-degree rape, (2) defendant then pulled the victim from the couch and dragged the victim to the kitchen, and (3) defendant's acts to restrain the victim while they struggled in the kitchen clearly subjected the victim to greater danger and vulnerability than was inherent in the attempted rape that occurred on the couch. State v. Simpson, — N.C. App. —, 653 S.E.2d 249, 2007 N.C. App. LEXIS 2431 (2007).

Evidence held sufficient, etc.

Sufficient evidence supported defendant's conviction of first degree kidnapping, G.S. 14-39, as there was evidence of a mitochondrial DNA match between defendant's parent and two hairs found in the victim's bedroom. This evidence strongly suggested that the assailant was someone in the same maternal line as defendant's parent, and defendant's two brothers were in custody when the attack on the victim took place. State v. McAllister, — N.C. App. —, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

Evidence Held Insufficient. —

Substantial evidence did not support defendant's kidnapping conviction under G.S.14-39(a) as defendant raped a victim wholly in a guest bedroom, and there was no evidence of confinement, restraint, or removal, other than that which was inherent to the offense of rape itself; thus, the case was remanded for resentencing since defendant's rape and sex offense charges were consolidated. State v. Simmons, — N.C. App. —, 662 S.E.2d 559, 2008 N.C. App. LEXIS 1188 (July 1, 2008).

IV. FACILITATING COMMISSION OF FELONY OR FLIGHT.

Where restraint or asportation is not an inherent feature of some other felony, etc.

Kidnapping charges were proper under G.S. 14-39(a) because the restraint of the victims through blindfolding and binding the victims on the floor during an armed robbery was not necessary to effectuate the armed robbery of the victims and the victims were placed in greater danger than that inherent in the offense of robbery with a dangerous weapon. State v. Ly, — N.C. App. —, 658 S.E.2d 300, 2008 N.C. App. LEXIS 650 (Apr. 1, 2008).

Evidence held sufficient, etc.

Where defendant restrained a victim and prevented the victim from leaving her home by holding onto her shirt and pulling her back from the door before defendant subsequently committed a robbery of the same victim with a dangerous weapon, a separate conviction of defendant for kidnapping, in violation of G.S. 14-39(a)(2), was proper and not violative of U.S. Const., Amend. XIV and N.C. Const., Art. I, § 19; the restraint and removal of the victim was a distinct criminal transaction that facilitated the accompanying felony offense. State v. Boyce, 361 N.C. 670, 651 S.E.2d 879, 2007 N.C. LEXIS 1104 (2007).

VI. FIRST-DEGREE KIDNAPPING.

Failure to Release Victims in a Safe Place. — First-degree kidnapping charges under G.S. 14-39(b) were proper because defendants in robbing the victims committed no affirmative or wilful act to release the victims in a safe place, but instead departed the victims' home leaving the victims bound, blindfolded, and without access to a telephone. State v. Ly, — N.C. App. —, 658 S.E.2d 300, 2008 N.C. App. LEXIS 650 (Apr. 1, 2008).

Resentencing Warranted. — Because the trial court erred in sentencing defendant for both first-degree kidnapping and first-degree rape, as the same sexual assault served as the basis for both convictions, the matter was remanded for resentencing. On resentencing, the trial court could either: (1) arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping, or (2) arrest judgment on the first-degree rape conviction and resentence defendant on the first-degree kidnapping conviction. State v. Daniels, — N.C. App. —, 659 S.E.2d 22, 2008 N.C. App. LEXIS 711 (2008).

VII. SECOND-DEGREE KIDNAPPING.

A. In General.

The crime of second-degree kidnapping was complete, etc.

It was plain error to instruct the jury on kidnapping under G.S. 14-39(b) since: (1) if any burglary occurred, it was completed before the restraint, (2) the burglary was complete as soon as defendant kicked down the front door and entered the victim's residence with the intent to murder, (3) the kidnapping was not complete until defendant and co-defendants unlawfully restrained the victims by ordering them at gunpoint to lie on the ground, and (4) the felony that was the only alleged purpose for the kidnapping occurred before, not after, the kidnapping; however, evidence showing that the victims were held at gunpoint in the kitchen was sufficient to find that the victims were both "restrained" and "confined" for purposes of kidnapping. State v. Jordan, — N.C. App. —, 651 S.E.2d 917, 2007 N.C. App. LEXIS 2270 (2007).

Sufficient Evidence of Restraint. — Evidence that defendant restrained three young children under the age of 16 in an apartment bedroom while defendant and an accomplice searched for drugs and money during a robbery sufficiently supported defendant's conviction for second-degree kidnapping in violation of G.S. 14-39. As a result, and because the jury was properly instructed regarding the charge, the trial court did not have grounds to dismiss the charge. State v. Sapp, — N.C. App. —, 661 S.E.2d 304, 2008 N.C. App. LEXIS 1098 (2008).

Evidence Insufficient to Sustain Removal Requirement. — Evidence was not sufficient to sustain defendant's convictions for 10 counts of second degree kidnapping because the State's evidence of kidnapping established only the elements of the crime of robbery with a dangerous weapon with the lone added component of the victims' being required to lie down on the floor and that lone act was a mere technical asportation. State v. Taylor, — N.C. App. —, 664 S.E.2d 375, 2008 N.C. App. LEXIS 1476 (2008).

No double jeopardy implications arose from convictions for second degree kidnapping, first degree burglary, and felonious larceny because the trial court arrested judgment on the common-law robbery charge, which eliminated any possibility of the defendant being punished twice for the restraint involved in the common-law robbery and second degree kidnapping. Moreover, the only force inherent in burglary or in larceny pursuant to a breaking and entering was forcible entry into the property, which was achieved when the intruders forced the door open and not by pushing the victim to the floor of the victim's apartment and holding the victim there. State v. Cousar, — N.C. App. —, 660 S.E.2d 902, 2008 N.C. App. LEXIS 1076 (June 3, 2008).

VIII. CHARGE AND INDICTMENT, GENERALLY.

Indictment Alleging Only Second-Degree Kidnapping. — Defendant was entitled to reversal of convictions for first degree kidnapping and entry of convictions for second degree kidnapping because the indictment only alleged that defendant did something "for the purpose of doing other serious bodily harm" and failed to allege actual serious injury. State v. Rodriguez, — N.C. App. —, 664 S.E.2d 654, 2008 N.C. App. LEXIS 1542 (2008).

IX. INSTRUCTIONS.

Instruction on False Imprisonment as Lesser Offense. — In an action charging defendant with, inter alia, second degree kidnapping, defendant was not entitled to a jury charge on the lesser-included offense of false imprisonment because defendant failed to object to the exclusion of such an instruction and defendant failed to show that the jury probably would have convicted defendant of false imprisonment rather than kidnapping if the judge had given an instruction on false imprisonment. State v. Rodriguez, — N.C. App. —, 664 S.E.2d 654, 2008 N.C. App. LEXIS 1542 (2008).

Instruction Held Proper. — Trial court properly instructed the jury on the charges against defendant of second-degree kidnapping in violation of G.S. 14-39. Contrary to defendant's contention, G.S. 14-39 did not require for a conviction that a person know that a victim was under the age of 16 and, thus, the trial court did not err in not defining the term "unlawfully" when it instructed the jury on that offense regarding defendant transporting to girls under the age of 16 to defendant's house. State v. Bowman, — N.C. App. —, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

§ 14-41. Abduction of children.

CASE NOTES

Cited in Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

§ 14-43.3. Felonious restraint.

CASE NOTES

Cited in Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

ARTICLE 13.

Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material.

§ 14-50.1. Explosive or incendiary device or material defined.

CASE NOTES

Cited in State v. Sherrod, — N.C. App. —, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (Aug. 5, 2008).

ARTICLE 13A.

North Carolina Street Gang Suppression Act.

§ 14-50.15. Short title.

This Article shall be known and may be cited as the "North Carolina Street Gang Suppression Act." (2008-214, s. 3.)

Editor's Note. — Session Laws 2008-214, s. 6, made this Article effective December 1, 2008, and applicable to offenses committed on or after that date.

§ 14-50.16. Pattern of criminal street gang activity.

(a) It is unlawful for any person employed by or associated with a criminal street gang to do either of the following:

(1) To conduct or participate in a pattern of criminal street gang activity.
(2) To acquire or maintain any interest in or control of any real or personal property through a pattern of criminal street gang activity.

A violation of this section is a Class H felony, except that a person who violates subdivision (a)(1) of this section, and is an organizer, supervisor, or acts in any other position of management with regard to the criminal street gang, shall be guilty of a Class F felony.

(b) As used in this Article, "criminal street gang" or "street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, that:

(1) Has as one of its primary activities the commission of one or more felony offenses, or delinquent acts that would be felonies if committed by an adult;
(2) Has three or more members individually or collectively engaged in, or who have engaged in, criminal street gang activity; and
(3) May have a common name, common identifying sign or symbol.

(c) As used in this Article, "criminal street gang activity" means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts, with the specific intent that such act or acts were intended or committed for the purpose, or in furtherance, of the person's involvement in a criminal street gang or street gang. An act or acts are included if accompanied by the necessary mens rea or criminal intent and would be chargeable by indictment under the following laws of this State:

(1) Any offense under Article 5 of Chapter 90 of the General Statutes (Controlled Substances Act).

(2) Any offense under Chapter 14 of the General Statutes except Articles 9, 22A, 40, 46, 47, 59 thereof; and further excepting G.S. 14-78.1, 14-82, 14-86, 14-145, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-247, 14-248, 14-313 thereof.

(d) As used in this Article, "pattern of criminal street gang activity" means engaging in, and having a conviction for, at least two prior incidents of criminal street gang activity, that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by common characteristics and are not isolated and unrelated incidents, provided that at least one of these offenses occurred after December 1, 2008, and the last of the offenses occurred within three years, excluding any periods of imprisonment, of prior criminal street gang activity. Any offenses committed by a defendant prior to indictment for an offense based upon a pattern of street gang activity shall not be used as the basis for any subsequent indictments for offenses involving a pattern of street gang activity. (2008-214, s. 3.)

§ 14-50.17. Soliciting; encouraging participation.

(a) It is unlawful for any person to cause, encourage, solicit, or coerce a person 16 years of age or older to participate in criminal street gang activity.

(b) A violation of this section is a Class H felony. (2008-214, s. 3.)

§ 14-50.18. Soliciting; encouraging participation; minor.

(a) It is unlawful for any person to cause, encourage, solicit, or coerce a person under 16 years of age to participate in criminal street gang activity.

(b) A violation of this section is a Class F felony.

(c) Nothing in this section shall preclude a person who commits a violation of this section from criminal culpability for the underlying offense committed by the minor under any other provision of law. (2008-214, s. 3.)

§ 14-50.19. Threats to deter from gang withdrawal.

(a) It is unlawful for any person to communicate a threat of injury to a person, or to damage the property of another, with the intent to deter a person from assisting another to withdraw from membership in a criminal street gang.

(b) A violation of this section is a Class H felony. (2008-214, s. 3.)

§ 14-50.20. Threats of punishment or retaliation.

(a) It is unlawful for any person to communicate a threat of injury to a person, or to damage the property of another, as punishment or retaliation against a person for having withdrawn from a criminal street gang.

(b) A violation of this section is a Class H felony. (2008-214, s. 3.)

§ 14-50.21. Separate offense.

Any offense committed in violation of G.S. 14-50.16 through G.S. 14-50.20 shall be considered a separate offense. (2008-214, s. 3.)

§ 14-50.22. Enhanced offense for criminal gang activity.

A person age 15 or older who is convicted of a misdemeanor offense that is committed for the benefit of, at the direction of, or in association with, any criminal street gang is guilty of an offense that is one class higher than the offense committed. A Class A1 misdemeanor shall be enhanced to a Class I felony under this section. (2008-214, s. 3.)

§ 14-50.23. Contraband, seizure, and forfeiture.

(a) All property of every kind used or intended for use in the course of, derived from, or realized through criminal street gang activity or a pattern of criminal street gang activity is subject to the seizure and forfeiture provisions of G.S. 14-2.3.

(b) In any action under this section, the court may enter a restraining order in connection with any interest that is subject to forfeiture.

(c) Innocent Activities. — The provisions of this section shall not apply to property used for criminal street gang activity where the owner or person who has legal possession of the property does not have actual knowledge that the property is being used for criminal street gang activity. (2008-214, s. 3.)

§ 14-50.24. Real property used by criminal street gangs declared a public nuisance; abatement.

(a) Public Nuisance. — Any real property that is erected, established, maintained, owned, leased, or used by any criminal street gang for the purpose of conducting criminal street gang activity shall constitute a public nuisance and may be abated as provided by Article 1 of Chapter 19 of the General Statutes.

(b) Innocent Activities. — The provisions of this section shall not apply to real property used for criminal street gang activity where the owner or person who has legal possession of the real property does not have actual knowledge that the real property is being used for criminal street gang activity. (2008-214, s. 3.)

§ 14-50.25. Reports of disposition; criminal street gang activity.

When a defendant is found guilty of a criminal offense, other than an offense under G.S. 14-50.16 through G.S. 14-50.20, the presiding judge shall determine whether the offense involved criminal street gang activity. If the judge so determines, then the judge shall indicate on the form reflecting the judgment that the offense involved criminal street gang activity. The clerk of court shall ensure that the official record of the defendant's conviction includes a notation of the court's determination. (2008-214, s. 3.)

§ 14-50.26. Matters proved in criminal trial court.

A conviction of an offense defined as criminal gang activity shall preclude the defendant from contesting any factual matters determined in the criminal proceeding in any subsequent civil action or proceeding based on the same conduct. (2008-214, s. 3.)

§ 14-50.27. Local ordinances not preempted by State law.

Nothing in this Article shall prevent a local governing body from adopting and enforcing ordinances relating to gangs and gang violence that are consistent with this Article. Where local laws duplicate or supplement the provisions of this Article, this Article shall be construed as providing alternative remedies and not as preempting the field. (2008-214, s. 3.)

§ 14-50.28. Applicability to juveniles under the age of 16.

Except as provided in G.S. 14-50.22, 14-50.29, and 14-50.30, the provisions of this Article shall not apply to juveniles under the age of 16. (2008-214, s. 3.)

§ 14-50.29. Conditional discharge for first offenders under the age of 18.

(a) Whenever any person who has not yet attained the age of 18 years, and has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state, pleads guilty to or is guilty of (i) a Class H felony under this Article or (ii) an enhanced offense under G.S. 14-50.22, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation upon such reasonable terms and conditions as the court may require.

(b) If the court, in its discretion, defers proceedings pursuant to this section, it shall place the defendant on supervised probation for not less than one year, in addition to any other conditions. Prior to taking any action to discharge and dismiss under this section, the court shall make a finding that the defendant has no previous criminal convictions. Upon fulfillment of the terms and conditions of the probation provided for in this section, the court shall discharge the defendant and dismiss the proceedings against the defendant.

(c) Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this section may occur only once with respect to any person. Disposition of a case to determine discharge and dismissal under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal. Upon violation of a term or condition of the probation provided for in this section, the court may enter an adjudication of guilt and proceed as otherwise provided.

(d) Upon discharge and dismissal pursuant to this section, the person may apply for an order to expunge the complete record of the proceedings resulting in the dismissal and discharge, pursuant to the procedures and requirements set forth in G.S. 14-50.30(a). If the court determines, after hearing, that such person was dismissed and the proceedings against the person discharged and that the person had not yet attained 18 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status the person occupied before such arrest or indictment or information.

(e) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons granted a discharge under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted a discharge. (2008-214, s. 3.)

§ 14-50.30. Expunction of records.

(a) Whenever any person who has not yet attained the age of 18 years and has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state, pleads guilty to or is guilty of (i) a Class H felony under this Article or (ii) an enhanced offense under G.S. 14-50.22, the person may file a petition in the court where the person was convicted for expunction of the offense from the person's criminal record. Except as provided in G.S. 14-50.29 upon discharge and dismissal, the petition cannot be filed earlier than (i) two years after the date of the conviction or (ii) the completion of any period of probation, whichever occurs later. The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that the petitioner has been of good behavior (i) during the period of probation since the decision to defer further proceedings on the offense in question pursuant to G.S. 14-50.29 or (ii) during the two-year period since the date of conviction of the offense in question, whichever applies, and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which the petitioner lives, and that the petitioner's character and reputation are good.

(3) If the petition is filed subsequent to conviction of the offense in question, a statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State (i) during the period of probation since the decision to defer further proceedings on the offense in question pursuant to G.S. 14-50.29 or (ii) at any time prior to the conviction for the offense in question or during the two-year period following that conviction, whichever applies.

(5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period or during the two-year period after conviction.

(b) If the court, after hearing, finds that the petitioner has remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for two years from the date of conviction of the offense in question, the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against him, and the petitioner had not attained the age of 18 years at the time of the conviction in question, it shall order that such person be restored, in the contemplation of the law, to the status occupied by the petitioner before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of the person's failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of the person for any purpose. The court shall also order that the said conviction be expunged from the records of the court, and direct all law enforcement agencies bearing record of the same to expunge their records of the conviction as the result of a criminal charge. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief, or head of such other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(c) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina. (2008-214, s. 3.)

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.

CASE NOTES

I. General Consideration.
II. Elements of Offense.
  B. First Degree.
III. Breaking and Entering.
X. Evidence.

I. GENERAL CONSIDERATION.

Applied in State v. McAllister, — N.C. App. —, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

Cited in State v. Adams, — N.C. App. —, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007); State v. McAllister, — N.C. App. —, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

II. ELEMENTS OF OFFENSE.

B. First Degree.

Evidence Held Sufficient. — Given that the State presented sufficient evidence showing that defendant and two other men committed a breaking and entering into the victims' occupied residence, at night, taking a chain necklace, a PlayStation, some games, and a VCR and asking, "where is the money?" every element of a charge of first-degree burglary was shown to support the denial of a motion to dismiss. State v. Farrar, — N.C. App. —, 660 S.E.2d 116, 2008 N.C. App. LEXIS 898 (2008).

Jury Instruction at Variance with Indictment Benefitted Defendant and Was Not Prejudicial Error. — Defendant's first-degree burglary conviction was not improper because, although the jury instructions, which stated that the State had to prove, inter alia, that at the time of the breaking and entering, defendant intended to commit robbery with a firearm or attempted to commit robbery with a firearm, were at variance with the indictment, which alleged that defendant committed the offense by breaking and entering with the intent to commit felony larceny, the jury instructions actually benefitted defendant by adding an additional element for the State to prove, and thus there was no prejudicial error; any error in the jury charge was not prejudicial because larceny was a lesser-included offense of robbery with a dangerous weapon. State v. Farrar, 361 N.C. 675, 651 S.E.2d 865, 2007 N.C. LEXIS 1097 (2007).

III. BREAKING AND ENTERING.

Inferences from Possession of Implements Used in Housebreaking. — Defendant failed to show that, but for the erroneous admission of an officer's opinion statements under G.S. 8C-1, N.C. R. Evid. 701 regarding defendant's possession of implements that were used for housebreaking, the jury would have reached a different verdict on the charge against defendant of possession of implements of housebreaking. State v. Turnage, — N.C. App. —, 660 S.E.2d 129, 2008 N.C. App. LEXIS 886 (2008).

X. EVIDENCE.

Evidence held sufficient, etc.

Defendant's second-degree burglary conviction under G.S. 14-51 was upheld because there was sufficient evidence that he intended to commit armed robbery when he entered the victim's hotel room; defendant held the victim at gunpoint while the victim was forced into his room and robbed. A constructive breaking occurred when the victim was forced into his room. State v. Irons, — N.C. App. —, 657 S.E.2d 733, 2008 N.C. App. LEXIS 408 (2008).

§ 14-54. Breaking or entering buildings generally.

CASE NOTES

I. General Consideration.
III. Breaking or Entering.
IV. Building.
VI. Larceny.
VII. Indictment.
VIII. Lesser Offenses.
IX. Trial.
  B. Evidence.
  C. Instructions.

I. GENERAL CONSIDERATION.

Applied in State v. Adams, — N.C. App. —, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007).

Cited in State v. Marsh, — N.C. App. —, 652 S.E.2d 744, 2007 N.C. App. LEXIS 2357 (2007).

III. BREAKING OR ENTERING.

Entry with Consent of Owner. —

Trial court did not err in denying defendant juvenile's motion to dismiss the charge of felonious breaking and entering and larceny and then finding defendant delinquent on the charges because the State presented substantial evidence of a felonious breaking and entry sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt; the office of a county cooperative extension service director was not held out to the public, and even if defendant had implied consent to enter the office because it was necessary for the general public to have access to it, stealing cash from the director's purse constituted an act sufficient to render implied consent void ab initio. In re S.D.R., — N.C. App. —, 664 S.E.2d 414, 2008 N.C. App. LEXIS 1481 (2008).

IV. BUILDING.

Occupancy is not an element of this section and § 14-72, etc.

Indictment was sufficient under G.S. 15A-924(a)(5) to charge defendant with felonious breaking and entering under G.S. 14-54(a) because the statement that defendant did break and enter a building used as a residence was surplusage as whether a building was a residence or not was not an essential element of the crime; the garage that defendant allegedly broke into was within the curtilage of the residence although it was an independent structure. State v. Jones, — N.C. App. —, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (Feb. 5, 2008).

VI. LARCENY.

Value of Stolen Property Immaterial. —

Evidence was legally sufficient to support defendant's conviction for felonious larceny under G.S. 14-72(a) because although the value of the items taken was less than $1,000, the crime was elevated to a felony when it was committed pursuant to a breaking and entering under G.S. 14-54. State v. Jones, — N.C. App. —, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (Feb. 5, 2008).

VII. INDICTMENT.

Description of Building. — Felonious breaking and entering indictments were sufficient to reasonably identify the building in which the crime was committed, as required by G.S. 14-54, because, although the victim owned several buildings, including six rental houses, the indictment identified the building as the one in which defendant resided. State v. Ly, — N.C. App. —, 658 S.E.2d 300, 2008 N.C. App. LEXIS 650 (Apr. 1, 2008).

VIII. LESSER OFFENSES.

Conviction for Burglary Reversed. — Conviction for first degree burglary was reversed and the matter remanded for imposition of a judgment for misdemeanor breaking or entering because the evidence, which included defendant reaching in and pulling the victim out of the house after the victim opened the door, showed an intent to commit robbery outside, not inside, the victim's house. State v. Goldsmith, — N.C. App. —, 652 S.E.2d 336, 2007 N.C. App. LEXIS 2310 (2007).

IX. TRIAL.

B. Evidence.

Evidence Held Sufficient. — State of North Carolina met its burden of proving each element of breaking and entering under G.S. 14-54(a), including intent, because the evidence presented was sufficient for the jury to conclude that defendants intended to commit robbery with a dangerous weapon at the time defendants entered the home of the victims. State v. Ly, — N.C. App. —, 658 S.E.2d 300, 2008 N.C. App. LEXIS 650 (Apr. 1, 2008).

C. Instructions.

Charge on Lesser Offense Not Required Absent Evidence Thereof. — With regard to defendant's conviction for first-degree burglary wherein the State established by positive and uncontroverted evidence that defendant and another broke and entered the dwelling of the victim during the nighttime with a weapon, and the only element of first-degree burglary that was controverted was defendant's intent when he entered the home, because the State established all the elements of first-degree burglary, except the intent with which defendant entered the home, with positive and uncontroverted evidence, it also established the elements of felonious breaking or entering except for intent and, therefore, it was not error for the trial court to omit an instruction for the lesser included offense of felonious breaking or entering. Instead, because the evidence as to defendant's intent was circumstantial and controverted, the trial court was required to instruct on the lesser included offense of misdemeanor non-felonious breaking or entering, which it did. State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007).

§ 14-55. Preparation to commit burglary or other housebreakings.

CASE NOTES

I. General Consideration.
II. Possession of Housebreaking Implements.
  A. In General.

I. GENERAL CONSIDERATION.

Applied in State v. Turnage, — N.C. App. —, 660 S.E.2d 129, 2008 N.C. App. LEXIS 886 (2008).

II. POSSESSION OF HOUSEBREAKING IMPLEMENTS.

A. In General.

Elements of Offense. — Police officer had probable cause to arrest defendant for possession of burglary tools under G.S. 14-55 because her suspicion that defendant possessed implements of housebreaking was supported by: (1) defendant's possession of a flashlight; (2) defendant's possession of a backpack containing unknown items; and (3) all of the factors supporting the finding of reasonable suspicion for the initial stop of defendant, including the time of day, defendant's proximity to the location of the crime, and the absence of other persons in the area. State v. Campbell, — N.C. App. —, 656 S.E.2d 721, 2008 N.C. App. LEXIS 280 (2008).

§ 14-56. Breaking or entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft.

CASE NOTES

Evidence Sufficient to Show Each Element. —
There was sufficient evidence to support a conviction for breaking or entering a motor vehicle with an intent to commit larceny where defendant shared a common purpose with his co-defendant to open a truck, to wrongfully remove a satchel with an intent to deprive the victim of the satchel and its contents, and to appropriate them to defendant's use. Although the co-defendant broke into the vehicle and grabbed a satchel, defendant hastily drove away from the scene with his co-defendant in the passenger seat, holding the satchel. State v. Baskin, — N.C. App. —, 660 S.E.2d 566, 2008 N.C. App. LEXIS 895 (2008).

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Article 16.

Larceny.

§ 14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.

CASE NOTES

II. Elements of the Offense.
III. Practice and Procedure.

II. ELEMENTS OF THE OFFENSE.

Larceny a Lesser-Included Offense of Robbery With a Dangerous Weapon. — Defendant's first-degree burglary conviction was not improper because, although the jury instructions, which stated that the State had to prove, inter alia, that at the time of the breaking and entering, defendant intended to commit robbery with a firearm or attempted to commit robbery with a firearm, were at variance with the indictment, which alleged that defendant committed the offense by breaking and entering with the intent to commit felony larceny, the jury instructions actually benefitted defendant by adding an additional element for the State to prove, and thus there was no prejudicial error; any error in the jury charge was not prejudicial because larceny was a lesser-included offense of robbery with a dangerous weapon. State v. Farrar, 361 N.C. 675, 651 S.E.2d 865, 2007 N.C. LEXIS 1097 (2007).

III. PRACTICE AND PROCEDURE.

Conviction for Larceny, Receiving and Possession of Same Property. —
Convictions for felonious possession of stolen property were arrested, as defendant could not be convicted of larceny and possession of the same stolen property. State v. Spencer, — N.C. App. —, 654 S.E.2d 69, 2007 N.C. App. LEXIS 2555 (2007).

§ 14-71. Receiving stolen goods; receiving or possessing goods represented as stolen.

(a) If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a Class H felony, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny.

(b) If a person knowingly receives or possesses property in the custody of a law enforcement agency that was explicitly represented to the person by an agent of the law enforcement agency or a person authorized to act on behalf of a law enforcement agency as stolen, the person is guilty of a Class H felony and may be indicted, tried, and punished in any county in which the person received or possessed the property. (1797, c. 485, s. 2; R.C., c. 34, s. 56; Code, s. 1074; Rev., s. 3507; C.S., s. 4250; 1949, c. 145, s. 1; 1975, c. 163, s. 1; 1993, c. 539, s. 1164; 1994, Ex. Sess., c. 24, s. 14(c); 2007-373, s. 1; 2008-187, s. 34(a).)

Effect of Amendments. —

Session Laws 2008-187, s. 34(a), effective August 7, 2008, inserted "or a person authorized to act on behalf of a law enforcement agency" in subsection (b).

§ 14-71.1. Possessing stolen goods.

CASE NOTES

But Legislature Did Not Intend to Punish Both Larceny and Possession. — Convictions for felonious possession of stolen property were arrested, as defendant could not be convicted of larceny and possession of the same stolen property. State v. Spencer, — N.C. App. —, 654 S.E.2d 69, 2007 N.C. App. LEXIS 2555 (2007).

Conviction for Uncharged Offense Was Error. — Trial court erred in entering judgment on the possession of stolen property related to the truck defendant was driving, as that was not an offense with which defendant was charged. State v. Marsh, — N.C. App. —, 652 S.E.2d 744, 2007 N.C. App. LEXIS 2357 (2007).

Evidence Held Sufficient. —

Evidence was sufficient to support conviction for possession of stolen goods as to the tools inside a truck, as the tools were visible to casual passers-by and were reported stolen only a few hours before the officer stopped defendant in the truck; thus, the trial court properly denied defendant's motion to dismiss that charge. State v. Marsh, — N.C. App. —, 652 S.E.2d 744, 2007 N.C. App. LEXIS 2357 (2007).

Evidence was sufficient to support defendant's possession of stolen property conviction because (1) the testimony showed that he had possession of the truck where the stolen tools were found for at least three days prior to being stopped by the police, (2) defendant testified that he did not trust the person who gave him the tools nor was he surprised that the tolls were stolen, and (3) that evidence was sufficient to allow the question of whether defendant knew or had reasonable grounds to believe that the tools were stolen to go to the jury. State v. Southards, — N.C. App. —, 657 S.E.2d 419, 2008 N.C. App. LEXIS 403 (2008).

§ 14-72. Larceny of property; receiving stolen goods or possessing stolen goods.

CASE NOTES

I. General Consideration.
IV. Possession of Stolen Property.
VI. Offenses Which Are Felonies Regardless of Value of Property.

I. GENERAL CONSIDERATION.

Cited in State v. Cobb, — N.C. App. —, 652 S.E.2d 699, 2007 N.C. App. LEXIS 2367 (2007); In re Mecklenburg County., — N.C. App. —, 662 S.E.2d 570, 2008 N.C. App. LEXIS 1189 (July 1, 2008); State v. Garris, — N.C. App. —, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008); State v. Sherrod, — N.C. App. —, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (Aug. 5, 2008).

IV. POSSESSION OF STOLEN PROPERTY.

Evidence Supported Conviction for Misemeanor, Not Felony. — Jury's verdict only supported a conviction for misdemeanor possession of stolen property because the jury found defendant not guilty of breaking and entering and the jury was not charged on whether the value of the truck was over $1,000. State v. Marsh, — N.C. App. —, 652 S.E.2d 744, 2007 N.C. App. LEXIS 2357 (2007).

VI. OFFENSES WHICH ARE FELONIES REGARDLESS OF VALUE OF PROPERTY.

Same — Larceny by Breaking and Entering. —

Evidence was legally sufficient to support defendant's conviction for felonious larceny under G.S. 14-72(a) because although the value of the items taken was less than $1,000, the crime was elevated to a felony when it was committed pursuant to a breaking and entering under G.S. 14-54. State v. Jones, — N.C. App. —, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (Feb. 5, 2008).

§ 14-72.11. Larceny from a merchant.

A person is guilty of a Class H felony if the person commits larceny against a merchant under any of the following circumstances:

(1) If the property taken has a value of more than two hundred dollars ($200.00), by using an exit door erected and maintained to comply with the requirements of 29 C.F.R. § 1910.36 and 29 C.F.R. § 1910.37 upon which door has been placed a notice, sign, or poster providing information about the felony offense and punishment provided under this subsection, to exit the premises of a store.

(2) By removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device.

(3) By affixing a product code created for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price.

(4) When the property is infant formula valued in excess of one hundred dollars ($100.00). As used in this subsection, the term "infant formula," has the same meaning as found in 21 U.S.C. § 321(z). (2007-373, s. 2; 2008-187, s. 34(b).)

Effect of Amendments. — Session Laws 2008-187, s. 34(b), effective August 7, 2008, substituted "29 C.F.R. § 1910.36 and 29 C.F.R. § 1910.37" for "29 C.F.R. § 1910 Subpart E" in subdivision (1).

§ 14-83.1. Fixtures subject to larceny.

All common law distinctions providing that personal property that has become affixed to real property is not subject to a charge of larceny are abolished. Any person who shall remove or take and carry away, or shall aid another in removing, taking or carrying away, any property that is affixed to real property, with the intent to steal the property, shall be guilty of larceny and shall be punished as provided by statute. (2008-128, s. 2.)

Editor's Note. — Session Laws 2008-128, s. 3, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-128, s. 2, enacted this section as G.S. 14-83A; it was recodified as G.S. 14-83.1 at the direction of the Revisor of Statutes.

ARTICLE 16A.

Organized Retail Theft.

§ 14-86.6. Organized retail theft.

(a) A person is guilty of a Class H felony if the person:

(1) Conspires with another person to commit theft of retail property from retail establishments, with a value exceeding one thousand five hundred dollars ($1,500) aggregated over a 90-day period, with the intent to sell that retail property for monetary or other gain, and who takes or causes that retail property to be placed in the control of a retail property fence or other person in exchange for consideration.

(2) Receives or possesses any retail property that has been taken or stolen in violation of subdivision (1) of this subsection while knowing or having reasonable grounds to believe the property is stolen.

(b) Any interest a person has acquired or maintained in violation of this section shall be subject to forfeiture pursuant to the procedures for forfeiture set out in G.S. 18B-504. (2007-373, s. 3; 2008-187, s. 34(c).)

Effect of Amendments. — Session Laws 2008-187, s. 34(c), effective August 7, 2008, substituted "from retail establishments" for "from a retail establishment" in subdivision (a)(1).

ARTICLE 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

CASE NOTES

I. General Consideration.
III. Armed Robbery.
V. Use or Threatened Use of Dangerous Weapon.
  A. In General.
VII. Lesser Offenses.
VIII. Indictment.
IX. Evidence.

I. GENERAL CONSIDERATION.

Applied in State v. Adams, — N.C. App. —, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007); State v. Taylor, — N.C. App. —, 664 S.E.2d 375, 2008 N.C. App. LEXIS 1476 (2008).

Cited in State v. Colson, 186 N.C. App. 281, 650 S.E.2d 656, 2007 N.C. App. LEXIS 2084 (2007); State v. Harris, — N.C. App. —, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

III. ARMED ROBBERY.

Conviction upheld. —
Defendant was not entitled to a jury instruction on second-degree murder or manslaughter since the state proceeded on a theory of felony murder only, relying on robbery with a dangerous weapon as the underlying felony, and the evidence of the G.S. 14-87(a) elements was not in conflict; defendant had permission to access the victim's marijuana in a temporary manner, but then used a dangerous weapon to remove the drug from the victim's possession. State v. Gwynn, 362 N.C. 334, 661 S.E.2d 706, 2008 N.C. LEXIS 486 (2008).

V. USE OR THREATENED USE OF DANGEROUS WEAPON.

A. In General.

Statement in an indictment that defendant kept his hand in his coat while de-

manding money was insufficient to support a charge of armed robbery in violation of G.S. 14-87, because it failed either to state expressly that the weapon was dangerous or to allege facts that showed the dangerous nature of the alleged weapon. State v. Marshall, — N.C. App. —, 656 S.E.2d 709, 2008 N.C. App. LEXIS 277 (2008).

VII. LESSER OFFENSES.

Same — Larceny. —

Defendant's first-degree burglary conviction was not improper because, although the jury instructions, which stated that the State had to prove, inter alia, that at the time of the breaking and entering, defendant intended to commit robbery with a firearm or attempted to commit robbery with a firearm, were at variance with the indictment, which alleged that defendant committed the offense by breaking and entering with the intent to commit felony larceny, the jury instructions actually benefitted defendant by adding an additional element for the State to prove, and thus there was no prejudicial error; any error in the jury charge was not prejudicial because larceny was a lesser-included offense of robbery with a dangerous weapon. State v. Farrar, 361 N.C. 675, 651 S.E.2d 865, 2007 N.C. LEXIS 1097 (2007).

VIII. INDICTMENT.

Amended Indictment Upheld. —

Amendment of an indictment alleging robbery with a dangerous weapon to remove allegations concerning the amount of money taken during the robberies was permissible because the amendment did not constitute substantial alterations in that the value of the property taken was not an element of the offense but merely surplusage. State v. McCallum, — N.C. App. —, 653 S.E.2d 915, 2007 N.C. App. LEXIS 2561 (2007).

IX. EVIDENCE.

Evidence held sufficient to be submitted to the jury, etc.

Evidence that defendant and the victim knew each other and were in close communication; that defendant told defendant's cousin that defendant and defendant's son were leaving to commit a robbery; that defendant told defendant's cousin defendant could obtain firearms; and that, after the murder, defendant was in possession of certain firearms stolen from the victim's house was sufficient to support a conviction for robbery with a dangerous weapon and, thus, to send the charge to the jury. State v. Rankin, — N.C. App. —, 663 S.E.2d 438, 2008 N.C. App. LEXIS 1320 (2008).

Article 18.

Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.

CASE NOTES

I. General Consideration.
V. Evidence.
VI. Instructions.

I. GENERAL CONSIDERATION.

Great Monetary Loss as Aggravating Factor. — Since the ratio of the amounts embezzled to the threshold amount of the offense charged was a factor to be considered in determining whether the imposition of an aggravated sentence was proper, defendant's embezzlement of $404,436 and $296,901 supported the imposition of an aggravated sentence, as they were sums of "great monetary value" when compared with threshold amount required for embezzlement of amounts over $100,000.00. State v. Cobb, — N.C. App. —, 652 S.E.2d 699, 2007 N.C. App. LEXIS 2367 (2007).

Cited in State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007).

V. EVIDENCE.

Evidence Sufficient to Survive Motion to Dismiss. — Trial court did not err when it denied defendant's motion to dismiss the embezzlement charges against defendant because the State of North Carolina presented substantial evidence of defendant's agency or fiduciary relationship with the vendors who contracted with defendant sufficient to survive a motion to dismiss on that element. Additionally, the State also presented evidence sufficient to survive the motion to dismiss on the issue of intent as the State presented evidence that defendant received money on behalf of the vendors, did not pay them when it was due, and was experiencing personal financial problems. State v. Newell, — N.C. App. —, 657 S.E.2d 400, 2008 N.C. App. LEXIS 427 (2008).

VI. INSTRUCTIONS.

Faulty Instructions Held Reversible Error. — Trial court committed reversible error by essentially instructing the jury that the receipts of vendors who contracted with defendant could not be commingled with other corporate funds as a matter of law. State v. Newell, — N.C. App. —, 657 S.E.2d 400, 2008 N.C. App. LEXIS 427 (2008).

Article 19.

False Pretenses and Cheats.

§ 14-100. Obtaining property by false pretenses.

CASE NOTES

I. General Consideration.
III. Indictment.
IV. Illustrative Cases.

I. GENERAL CONSIDERATION.

Collateral Estoppel Did Not Bar Trial. — Collateral estoppel under G.S. 15A-954(a)(7) did not bar trial on a second set of 10 checks that were the subject of obtaining money by false pretenses indictments since even if the victim gave permission as to the first four checks litigated in a first trial, a jury could still find that the victim did not give permission to defendant to cash the 10 checks; because of the lack of joinder and the fact that the transactions in the second case occurred at a different time, the only issues decided in the first trial were whether defendant obtained money by false pretenses when negotiating each of the first four checks. State v. Spargo, — N.C. App. —, 652 S.E.2d 50, 2007 N.C. App. LEXIS 2312 (2007).

Cited in State v. Hinkle, — N.C. App. —, 659 S.E.2d 34, 2008 N.C. App. LEXIS 705 (2008).

III. INDICTMENT.

Aiding and Abetting Allegations Were Surplusage. — Because allegations of whether a defendant was acting in concert or aiding and abetting were "irrelevant and surplusage," defendant failed to show that instructing the jury on the basis of one of these theories substantially altered the charged offense, and defendant's argument that defendant was unable to prepare a defense lacked merit. Defendant had timely notice of the charges to adequately prepare a defense and was not convicted of a crime other than that alleged in the indictment. State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007).

Sufficiency of Indictment. — Indictment, which charged that defendant committed two counts of obtaining property by false pretenses, was not fatally defective because there was no confusion as to what offenses the State of North Carolina accused defendant of committing as the use of the term "solicit" in the indictment did not necessarily imply the allegation of a separate criminal act for solicitation, and the indictment did not have to specify the alleged victim as the State of North Carolina was not required to prove an intent to defraud any particular person. State v. McBride, — N.C. App. —, 653 S.E.2d 218, 2007 N.C. App. LEXIS 2418 (2007).

IV. ILLUSTRATIVE CASES.

Evidence Held Sufficient. — Denial of defendant's motion to dismiss the charge of obtaining property by false pretenses was proper because the State presented sufficient evidence from which the jury could have inferred that defendant knowingly and willingly laundered money through defendant's personal and business banking accounts in aiding and abetting three others in obtaining property by false pretenses from school system. State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007).

Trial court did not err in denying defendant's motion to dismiss based on insufficiency of the evidence because the evidence was sufficient to justify sending the case to the jury in that the evidence clearly indicated that defendant made a false representation to his two victims regarding the legitimacy of the deposit of counterfeit checks by them into their banking accounts, that it was his intent to do so, and that his deception was effective as defendant obtained money in the transactions. State v. McBride, — N.C. App. —, 653 S.E.2d 218, 2007 N.C. App. LEXIS 2418 (2007).

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

Damages and Other Offenses to Land and Fixtures.

§ 14-127. Willful and wanton injury to real property.

CASE NOTES

Cited in In re R.D.L., — N.C. App. —, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (Aug. 5, 2008).

§ 14-144. Injuring houses, churches, fences and walls.

If any person shall, by any other means than burning or attempting to burn, unlawfully and willfully demolish, destroy, deface, injure or damage any of the houses or other buildings mentioned in this Chapter in the Article entitled Arson and Other Burnings; or shall by any other means than burning or attempting to burn unlawfully and willfully demolish, pull down, destroy, deface, damage or injure any church, uninhabitated [uninhabited] house, outhouse or other house or building not mentioned in such article; or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure [enclosure], or any part thereof, surrounding or about any yard, garden, cultivated field or pasture, or about any church or graveyard, or about any factory or other house in which machinery is used, every person so offending shall be punished as follows:

(1) If the damage is five thousand dollars ($5,000) or less, the person is guilty of a Class 2 misdemeanor.

(2) If the damage is more than five thousand dollars ($5,000), the person is guilty of a Class I felony. (R.C., c. 34, s. 103; Code, s. 1062; Rev., s. 3673; C.S., s. 4317; 1957, c. 250, s. 2; 1969, c. 1224, s. 1; 1993, c. 539, s. 83; 1994, Ex. Sess., c. 24, s. 14(c); 2008-15, s. 1.)

Editor's Note. —
This section was amended by Session Laws 2008-15, s. 1, in the coded bill drafting format provided by G.S. 120-20.1. In the first sentence, the bracketed words "[uninhabited]" and "[enclosure]" were inserted at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2008-15, s. 1, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "punished as follows:" for "guilty of a Class 2 misdemeanor." at the end of the introductory paragraph and added subdivisions (1) and (2).

ARTICLE 22B.

First and Second Degree Trespass.

§ 14-159.13. Second degree trespass.

CASE NOTES

Cited in State v. Hinkle, — N.C. App. —, 659 S.E.2d 34, 2008 N.C. App. LEXIS 705 (2008).

Article 23.

Trespasses to Personal Property.

§ 14-160. Willful and wanton injury to personal property; punishments.

CASE NOTES

Cited in In re R.D.L., — N.C. App. —, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (Aug. 5, 2008).

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

Article 26.

Offenses Against Public Morality and Decency.

§ 14-177. Crime against nature.

CASE NOTES

Cited in State v. Wilson, 362 N.C. 162, 655 S.E.2d 359, 2008 N.C. LEXIS 32 (2008); State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

§ 14-178. Incest.

CASE NOTES

Sufficiency of Evidence. —

There was substantial evidence to support convictions for incest under G.S. 14-178(a), and two counts of statutory sex offense of a person who was 15 years old in violation of G.S. 14-27.7A(a), because: (1) the victim testified that defendant was her biological father and identified him in open court, and her birth certificate identified defendant as her father, providing direct evidence of defendant's paternity; and (2) there was substantial direct and circumstantial evidence that defendant had vaginal intercourse or engaged in a sexual act with his daughter on multiple occasions while she was 15. State v. Ware, — N.C. App. —, 656 S.E.2d 662, 2008 N.C. App. LEXIS 263 (2008).

§ 14-190.1. Obscene literature and exhibitions.

CASE NOTES

Cited in State v. Riffe, — N.C. App. —, 661 S.E.2d 899, 2008 N.C. App. LEXIS 1166 (June 17, 2008).

§ 14-190.13. Definitions for certain offenses concerning minors.

The following definitions apply to G.S. 14-190.14, displaying material harmful to minors; G.S. 14-190.15, disseminating or exhibiting to minors harmful material or performances; G.S. 14-190.16, first degree sexual exploitation of a minor; G.S. 14-190.17, second degree sexual exploitation of a minor; G.S. 14-190.17A, third degree sexual exploitation of a minor; G.S. 14-190.18, promoting prostitution of a minor; G.S. 14-190.19, participating in prostitution of a minor.

(1) Harmful to Minors. — That quality of any material or performance that depicts sexually explicit nudity or sexual activity and that, taken as a whole, has the following characteristics:
  a. The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest of minors in sex; and
  b. The average adult person applying contemporary community standards would find that the depiction of sexually explicit nudity or sexual activity in the material or performance is patently offensive to prevailing standards in the adult community concerning what is suitable for minors; and
  c. The material or performance lacks serious literary, artistic, political, or scientific value for minors.

(2) Material. — Pictures, drawings, video recordings, films or other visual depictions or representations but not material consisting entirely of written words.

(3) Minor. — An individual who is less than 18 years old and is not married or judicially emancipated.

(4) Prostitution. — Engaging or offering to engage in sexual activity with or for another in exchange for anything of value.

(5) Sexual Activity. — Any of the following acts:
  a. Masturbation, whether done alone or with another human or an animal.
  b. Vaginal, anal, or oral intercourse, whether done with another human or with an animal.
  c. Touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female.
  d. An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a person clad in undergarments or in revealing or bizarre costume.
  e. Excretory functions; provided, however, that this sub-subdivision shall not apply to G.S. 14-190.17A.
  f. The insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.
  g. The lascivious exhibition of the genitals or pubic area of any person.

(6) Sexually Explicit Nudity. — The showing of:
  a. Uncovered, or less than opaquely covered, human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast, except as provided in G.S. 14-190.9(b); or
  b. Covered human male genitals in a discernibly turgid state. (1985, c. 703, s. 9; 1989 (Reg. Sess., 1990), c. 1022, s. 2; 1993, c. 301, s. 2; 2008-218, s. 1.)

Editor's Note. — Session Laws 2008-218, s. 10, is a severability clause.

Effect of Amendments. — Session Laws 2008-218, s. 1, effective December 1, 2008, and applicable to offenses committed on or after that date, made a minor grammatical change in the introductory paragraph; and added subdivision (5)g.

CASE NOTES

Cited in State v. Riffe, — N.C. App. —, 661 S.E.2d 899, 2008 N.C. App. LEXIS 1166 (June 17, 2008).

§ 14-190.16. First degree sexual exploitation of a minor.

(a) Offense. — A person commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he:

(1) Uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or

(2) Permits a minor under his custody or control to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or

(3) Transports or finances the transportation of a minor through or across this State with the intent that the minor engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or

(4) Records, photographs, films, develops, or duplicates for sale or pecuniary gain material that contains a visual representation depicting a minor engaged in sexual activity.

(b) Inference. — In a prosecution under this section, the trier of fact may infer that a participant in sexual activity whom material through its title, text, visual representations, or otherwise represents or depicts as a minor is a minor.

(c) Mistake of Age. — Mistake of age is not a defense to a prosecution under this section.

(d) Punishment and Sentencing. — Violation of this section is a Class C felony. (1985, c. 703, s. 9; 1993, c. 539, s. 1196; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 507, s. 19.5(o); 2008-117, s. 3; 2008-218, s. 2.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-218, s. 10, is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 3, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class C felony" for "Class D felony" in subsection (d).

Session Laws 2008-218, s. 2, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class C felony" for "Class D felony" in subsection (d).

§ 14-190.17. Second degree sexual exploitation of a minor.

(a) Offense. — A person commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he:

(1) Records, photographs, films, develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or

(2) Distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.

(b) Inference. — In a prosecution under this section, the trier of fact may infer that a participant in sexual activity whom material through its title, text, visual representations or otherwise represents or depicts as a minor is a minor.

(c) Mistake of Age. — Mistake of age is not a defense to a prosecution under this section.

(d) Punishment and Sentencing. — Violation of this section is a Class E felony. (1985, c. 703, s. 9; 1993, c. 539, s. 1197; 1994, Ex. Sess., c. 24, s. 14(c); 2008-117, s. 4; 2008-218, s. 3.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-218, s. 10, is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 4, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class E felony" for "Class F felony" in subsection (d).

Session Laws 2008-218, s. 3, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class E felony" for "Class F felony" in subsection (d).

§ 14-190.17A. Second degree sexual exploitation of a minor.

(a) Offense. — A person commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity.

(b) Inference. — In a prosecution under this section, the trier of fact may infer that a participant in sexual activity whom material through its title, text, visual representations or otherwise represents or depicts as a minor is a minor.

(c) Mistake of Age. — Mistake of age is not a defense to a prosecution under this section.

(d) Punishment and Sentencing. — Violation of this section is a Class H felony. (1989 (Reg. Sess., 1990), c. 1022, s. 1; 1993, c. 539, s. 1198; 1994, Ex. Sess., c. 24, s. 14(c); 2008-117, s. 5; 2008-218, s. 4.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-218, s. 10 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 5, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class H felony" for "Class I felony" in subsection (d).

Session Laws 2008-218, s. 4, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class H felony" for "Class I felony" in subsection (d).

CASE NOTES

Evidence Sufficient to Withstand Motion to Dismiss. — Denial of defendant's motion to dismiss was not erroneous because the State presented sufficient evidence to submit the charge of third degree sexual exploitation of a minor to the jury even if G.S. 14-190.17A required knowledge of both the character and content of the material as the jury was allowed to review all twelve computer files to determine if the names reflected the materials' content, and there was sufficient evidence to support a finding that defendant possessed the material in question, including the fact that the computer and a receipt for its purchase by defendant were found at defendant's place of business. State v. Riffe, — N.C. App. —, 661 S.E.2d 899, 2008 N.C. App. LEXIS 1166 (June 17, 2008).

Cited in State v. Dexter, — N.C. App. —, 651 S.E.2d 900, 2007 N.C. App. LEXIS 2313 (2007).

§ 14-190.18. Promoting prostitution of a minor.

(a) Offense. — A person commits the offense of promoting prostitution of a minor if he knowingly:

(1) Entices, forces, encourages, or otherwise facilitates a minor to participate in prostitution; or

(2) Supervises, supports, advises, or protects the prostitution of or by a minor.

(b) Mistake of Age. — Mistake of age is not a defense to a prosecution under this section.

(c) Punishment and Sentencing. — Violation of this section is a Class C felony. (1985, c. 703, s. 9; 1993, c. 539, s. 1199; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 507, s. 19.5(p); 2008-117, s. 6.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 6, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class C felony" for "Class D felony" in subsection (c).

§ 14-202.1. Taking indecent liberties with children.

CASE NOTES

I. General Consideration.
II. Elements and Proof of Offense.
III. Evidence.
IV. Instructions.

I. GENERAL CONSIDERATION.

Cited in State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

II. ELEMENTS AND PROOF OF OFFENSE.

Attempt. — Evidence proffered was sufficient to show that defendant committed the inchoate crime of attempted indecent liberties with children and attempted solicitation of a minor, even though the minor was an adult police officer posing as a child, because the warrant application recounted numerous sexually explicit instant message conversations between defendant and individuals who defendant believed were children, in which he asked to meet the "children" to engage in sexual conduct, and the warrant application also stated that defendant transmitted a video of himself masturbating. State v. Ellis, — N.C. App. —, 657 S.E.2d 51, 2008 N.C. App. LEXIS 272 (2008).

III. EVIDENCE.

The uncorroborated testimony of a victim, etc.

Child victim's uncorroborated testimony was sufficient to convict a juvenile defendant for committing indecent liberties between children under G.S. 14-202.1, since the State's evidence established that, at the time of the incident, the victim was seven and defendant was 15, and that defendant masturbated in front of the victim. Because the State established each element of the offense, the victim's testimony was sufficient to support the conviction. In re B.E., — N.C. App. —, 652 S.E.2d 344, 2007 N.C. App. LEXIS 2255 (2007).

Evidence Supported Finding of Abuse. —

Evidence that the father became drunk, walked up to his minor daughter, grabbed the daughter from behind and fondled her breasts and that despite her protests the father continued to grope the child, and that on another occasion the father inappropriately touched the daughter in the vaginal area was sufficient to show that he sexually abused the daughter. In re M.G., — N.C. App. —, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007).

IV. INSTRUCTIONS.

Jury Instruction Inadequate. — Defendant was entitled to a new trial because, while the evidence was sufficient to support defendant's conviction for indecent liberties with a child, and the jury certainly found that something bad involving defendant and the victim occurred, the jury instructions as given simply did not delineate the issues clearly enough that the appellate court could find an absence of plain error. State v. Smith, — N.C. App. —, 660 S.E.2d 82, 2008 N.C. App. LEXIS 906 (2008).

§ 14-202.2. Indecent liberties between children.

CASE NOTES

Evidence Held Sufficient. — Uncorroborated testimony of a child victim was sufficient to convict a juvenile defendant for committing indecent liberties between children under G.S. 14-202.2(a)(1), since the State's evidence established that, at the time of the incident, the victim was seven and defendant was 15, and that defendant masturbated in front of the victim. Because the State established each element of the offense, the evidence was sufficient to support the conviction. In re B.E., — N.C. App. —, 652 S.E.2d 344, 2007 N.C. App. LEXIS 2255 (2007).

Cited in In re C.B., — N.C. App. —, 654 S.E.2d 21, 2007 N.C. App. LEXIS 2521 (2007).

§ 14-202.3. Solicitation of child by computer to commit an unlawful sex act.

(a) Offense. — A person is guilty of solicitation of a child by a computer if the person is 16 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer, a child who is less than 16 years of age and at least 3 years younger than the defendant, or a person the defendant believes to be a child who is less than 16 years of age and who the defendant believes to be at least 3 years younger than the defendant, to meet with the defendant or any other person for the purpose of committing an unlawful sex act. Consent is not a defense to a charge under this section.

(b) Jurisdiction. — The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

(c) Punishment. — A violation of this section is punishable as follows:

(1) A violation is a Class H felony except as provided by subdivision (2) of this subsection.

(2) If either the defendant, or any other person for whom the defendant was arranging the meeting in violation of this section, actually appears at the meeting location, then the violation is a Class G felony. (1995 (Reg. Sess., 1996), c. 632, s. 1; 2005-121, s. 1; 2008-218, s. 5.)

Editor's Note. — Session Laws 2008-218, s. 10, is a severability clause.

Effect of Amendments. — Session Laws 2008-218, s. 5, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "punishable as follows" for "a Class H felony" in subsection (c); and added subdivisions (c)(1) and (c)(2).

CASE NOTES

Attempted Computer Solicitation. — By also making attempted computer solicitation a felony under amended G.S. 14-202.3, the legislature merely increased the severity of the crime; it did not create the new crime of attempt. State v. Ellis, — N.C. App. —, 657 S.E.2d 51, 2008 N.C. App. LEXIS 272 (2008).

Evidence proffered was sufficient to show that defendant committed the inchoate crime of attempted indecent liberties with children and attempted solicitation of a minor, even though the minor was an adult police officer posing as a child, because the warrant application recounted numerous sexually explicit instant message conversations between defendant and individuals who defendant believed were children, in which he asked to meet the "children" to engage in sexual conduct, and the warrant application also stated that defendant transmitted a video of himself masturbating. State v. Ellis, — N.C. App. —, 657 S.E.2d 51, 2008 N.C. App. LEXIS 272 (2008).

§ 14-202.5. Ban use of commercial social networking Web sites by sex offenders.

(a) Offense. — It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.

(b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:

(1) Is operated by a person who derives revenue membership fees, advertising, or other sources related to the operation of the Web site.

(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

(d) Jurisdiction. — The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

(e) Punishment. — A violation of this section is a Class I felony. (2008-218, s. 6.)

Editor's Note. — Session Laws 2008-218, s. 11, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-218, s. 10, is a severability clause.

§ 14-202.5A. (Effective May 1, 2009) Liability of commercial social networking sites.

(a) Notwithstanding the provisions of G.S. 14-208.15A(f), a commercial social networking site, as defined in G.S. 14-202.5, may be held civilly liable for damages for failing to make reasonable efforts to prevent a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access its Web site.

(b) For the purposes of this section, "access" is defined as allowing the sex offender to do any of the activities or actions described in G.S. 14-202.5(b)(2) through G.S. 14-202.5(b)(4) by utilizing the Web site. (2008-218, s. 7.)

Editor's Note. — Session Laws 2008-218, s. 11, makes this section effective May 1, 2009, and applicable to acts occurring on or after that date.

Session Laws 2008-218, s. 10, is a severability clause.

§ 14-202.6. Ban on name changes by sex offenders.

It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to obtain a change of name under Chapter 101 of the General Statutes. (2008-218, s. 8.)

Editor's Note. — Session Laws 2008-218, s. 11, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-218, s. 10, is a severability clause.

ARTICLE 27A.

Sex Offender and Public Protection Registration Programs.

Part 1. Registration Programs, Purpose and Definitions Generally.

§ 14-208.5. Purpose.

Editor's Note. — Session Laws 2006-247, s. 18, provides: "The Department of Correction shall study and develop a plan for offering mental health treatment for incarcerated sex offenders designed to reduce the likelihood of recidivism. The Department shall study appropriate and effective mental health treatment techniques and alternatives. Services must be best practices, as determined by the Department. The Department will consult various stakeholders from organizations dedicated to the prevention of sexual assault, victims' advocacy organizations, and experts in the field of treatment of sexual offenders. The Department shall consider the fiscal impact, if any, of implementing the plan developed pursuant to this study.

"The Department shall make a preliminary report to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services no later than January 15, 2007, and a final report to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services and the General Assembly on or before October 1, 2007."

Session Laws 2008-117, s. 21.2, provides: "The Department of Justice shall study the guidelines issued by the United States Attorney for the federal Sex Offender Registration and Notification Act (SORNA) to determine whether North Carolina is in compliance with those guidelines. The Department of Justice shall identify any areas in which the State fails to comply with SORNA and the action required for compliance. The Attorney General, or his designee, shall report to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee by December 1, 2008, regarding the status of the State's compliance with SORNA and recommend any actions or State legislation that may be required to satisfy the SORNA guidelines."

Session Laws 2008-181, ss. 39.1 through 39.3, provide: "39.1 There is created the Joint Legislative Study Committee on Civil Commitment of Sexual Predators Who Are Determined to be Incapable of Proceeding to Trial. The Committee shall consist of 10 members to be appointed as follows: the Speaker of the House of Representatives shall appoint five members of the House of Representatives and the President Pro Tempore of the Senate shall appoint five members the Senate.

"The Speaker of the House of Representatives shall appoint a cochair, and the President Pro Tempore of the Senate shall appoint a cochair for the Committee. The Committee may meet at any time upon the joint call of the cochairs. Vacancies on the Committee shall be filled by the same appointing authority as made the initial appointment.

"The Committee, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Committee may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02.

"Subject to the approval of the Legislative Services Commission, the Committee may meet in the Legislative Building or the Legislative Office Building. The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Committee in its work. The House of Representatives' and the Senate's Directors of Legislative Assistants shall assign clerical support staff to the Committee, and the expenses relating to the clerical employees shall be borne by the Committee. Members of the Committee shall receive subsistence and travel expenses at the rates set forth in G.S. 120-3.1, 138-5, or 138-6, as appropriate.

"39.2 The Committee shall study the State's current laws regarding defendants who are determined to be incapable of proceeding to trial and the State's current laws regarding involuntary commitment. The Committee shall further consider whether these laws adequately and appropriately address the public safety issues raised by certain defendants who are: (i) charged with committing a sex offense against a child, (ii) found incapable of proceeding to trial, and (iii) do not meet the criteria for involuntary commitment. In its study, the Committee shall review legislation adopted by other states addressing these issues. The Committee may also consider any other issues it deems relevant to this study.

"39.3 The Committee shall make a final report of its findings and recommendations to the 2009 General Assembly."

CASE NOTES

Town Ordinance Barring Sex Offenders from Parks. — Woodfin, N.C., Ordinance § 130.03 was constitutional under the Fourteenth Amendment of the United States Constitution and N.C. Const., Art. I, §§ 19 and 35 as: (1) a sex offender's alleged liberty interest to enter a park owned by a town to have barbecues and enjoy nature was not protected by the right to intrastate travel; (2) an asserted liberty interest to freely roam in parks was not a fundamental right; (3) a town had been delegated the authority to prohibit acts detrimental to its citizens' health, safety, or welfare by G.S. 160A-174; (4) G.S. 14-208.5 recognized that sex offenders posed a high risk of engaging in sex offenses; and (5) Woodfin, N.C., Ordinance § 130.03 was rationally related to a legitimate government interest in protecting children and other visitors to parks owned and operated by the town from sexual attacks. Standley v. Town of Woodfin, 362 N.C. 328, 661 S.E.2d 728, 2008 N.C. LEXIS 496 (2008).

§ 14-208.6. (Effective until May 1, 2009) Definitions.

The following definitions apply in this Article:

(1a) "Aggravated offense" means any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

(1b) "County registry" means the information compiled by the sheriff of a county in compliance with this Article.

(1c) "Division" means the Division of Criminal Statistics of the Department of Justice.

(1d) "Employed" includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit.

(1e) "Institution of higher education" means any postsecondary public or private educational institution, including any trade or professional institution, college, or university.

(1f) "Mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of others.

G.S. 14-208.6 is set out twice. See notes.

(1g) "Nonresident student" means a person who is not a resident of North Carolina but who is enrolled in any type of school in the State on a part-time or full-time basis.

(1h) "Nonresident worker" means a person who is not a resident of North Carolina but who has employment or carries on a vocation in the State, on a part-time or full-time basis, with or without compensation or government or educational benefit, for more than 14 days, or for an aggregate period exceeding 30 days in a calendar year.

(1i) "Offense against a minor" means any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor's parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint). The term also includes the following if the person convicted of the following is not the minor's parent: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

(2) "Penal institution" means:
  a. A detention facility operated under the jurisdiction of the Division of Prisons of the Department of Correction;
  b. A detention facility operated under the jurisdiction of another state or the federal government; or
  c. A detention facility operated by a local government in this State or another state.

(2a) "Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.

(2b) "Recidivist" means a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4).

(3) "Release" means discharged or paroled.

(4) "Reportable conviction" means:
  a. A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentencing the individual finds that the registration of that individual under this Article furthers the purposes of this Article as stated in G.S. 14-208.5.
  b. A final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.
  c. A final conviction in a federal jurisdiction (including a court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section.
  d. A final conviction for a violation of G.S. 14-202(d), (e), (f), (g), or (h), or a second or subsequent conviction for a violation of G.S. 14-202(a), (a1), or (c), only if the court sentencing the individual issues an order pursuant to G.S. 14-202(l) requiring the individual to register.

G.S. 14-208.6 is set out twice. See notes.

(5) "Sexually violent offense" means a violation of G.S. 14-27.2 (first degree rape), G.S. 14-27.2A (rape of a child; adult offender), G.S. 14-27.3 (second degree rape), G.S. 14-27.4 (first degree sexual offense), G.S. 14-27.4A (sex offense with a child; adult offender), G.S. 14-27.5 (second degree sexual offense), G.S. 14-27.5A (sexual battery), G.S. 14-27.6 (attempted rape or sexual offense), G.S. 14-27.7 (intercourse and sexual offense with certain victims), G.S. 14-27.7A(a) (statutory rape or sexual offense of person who is 13-, 14-, or 15-years-old where the defendant is at least six years older), G.S. 14-43.13 (subjecting or maintaining a person for sexual servitude), G.S. 14-178 (incest between near relatives), G.S. 14-190.6 (employing or permitting minor to assist in offenses against public morality and decency), G.S. 14-190.9(a1) (felonious indecent exposure), G.S. 14-190.16 (first degree sexual exploitation of a minor), G.S. 14-190.17 (second degree sexual exploitation of a minor), G.S. 14-190.17A (third degree sexual exploitation of a minor), G.S. 14-190.18 (promoting prostitution of a minor), G.S. 14-190.19 (participating in the prostitution of a minor), G.S. 14-202.1 (taking indecent liberties with children), or G.S. 14-202.3 (Solicitation of child by computer to commit an unlawful sex act), G.S. 14-318.4(a1) (parent or caretaker commit or permit act of prostitution with or by a juvenile), or G.S. 14-318.4(a2) (commission or allowing of sexual act upon a juvenile by parent or guardian). The term also includes the following: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

(6) "Sexually violent predator" means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.

(7) "Sheriff" means the sheriff of a county in this State.

(8) "Statewide registry" means the central registry compiled by the Division in accordance with G.S. 14-208.14.

(9) "Student" means a person who is enrolled on a full-time or part-time basis, in any postsecondary public or private educational institution, including any trade or professional institution, or other institution of higher education. (1995, c. 545, s. 1; 1997-15, ss. 1, 2; 1997-516, s. 1; 1999-363, s. 1; 2001-373, s. 1; 2002-147, s. 16; 2003-303, s. 2; 2004-109, s. 8; 2005-121, s. 2; 2005-130, s. 1; 2005-226, s. 2; 2006-247, ss. 1(b), 19(a), 20(d); 2008-117, s. 6.1; 2008-220, s. 1.)

Section Set Out Twice. — The section above is effective until May 1, 2009. For the section as amended May 1, 2009, see the following section, also numbered G.S. 14-208.6.

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-220, s. 11(a)-(e), provides: "(a) Funds are authorized to be allocated to the Governor's Crime Commission for award as grants to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws. The grants shall be awarded specifically to enhance and support law efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes. Eligible sheriffs' offices are required to provide non-State matching funds equal to fifty percent (50%) of the grant amount awarded under this section, one-half of which may be in in-kind contributions.

"(b) The Commission shall establish the criteria regarding the eligibility and amount of the awards for the grants described in this section. The grant criteria shall include consideration of all of the following:

"(1) The number of convicted sex offenders in the county of the applicant.

"(2) The level of community support for the grant award.

"(3) Whether the application identifies a problem that is consistent with the purposes of this initiative.

"(4) The applicant's development and maintenance of a process to regularly exchange information and intelligence with other public safety agencies.

"(5) Whether the application articulates clearly the jurisdiction's goals, outcomes, and objectives and describes the accountability system and performance measures to determine progress towards achieving them.

"(c) Any grants allocated shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant funds described by this section shall supplement, and not supplant, existing funds and services provided for the tracking of registered sex offenders. The grants shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award as grants of up to twenty-five thousand dollars ($25,000) each to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides in part: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Effect of Amendments. —

Session Laws 2008-117, s. 6.1, effective December 1, 2008, and applicable to offenses committed on or after that date, in subdivision (5), inserted "G.S. 14-27.2A (rape of a child; adult offender)" and inserted "G.S. 14-27.4A (sex offense with a child; adult offender)".

Session Laws 2008-220, s. 1, effective December 1, 2008, and applicable to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date, inserted "G.S. 14-318.4(a1) (parent or caretaker commit or permit act of prostitution with or by a juvenile), or G.S. 14-318.4(a2) (commission or allowing of sexual act upon a juvenile by parent or guardian)" in subdivision (5).

CASE NOTES

Cited in Standley v. Town of Woodfin, 186 N.C. App. 134, 650 S.E.2d 618, 2007 N.C. App. LEXIS 2121 (2007).

§ 14-208.6. (Effective May 1, 2009) Definitions.

The following definitions apply in this Article:

(1a) "Aggravated offense" means any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

(1b) "County registry" means the information compiled by the sheriff of a county in compliance with this Article.

G.S. 14-208.6 is set out twice. See notes.

(1c) "Division" means the Division of Criminal Information of the Department of Justice.

(1d) "Electronic mail" means the transmission of information or communication by the use of the Internet, a computer, a facsimile machine, a pager, a cellular telephone, a video recorder, or other electronic means sent to a person identified by a unique address or address number and received by that person.

(1e) "Employed" includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit.

(1f) "Entity" means a business or organization that provides Internet service, electronic communications service, remote computing service, online service, electronic mail service, or electronic instant message or chat services whether the business or organization is within or outside the State.

(1g) "Instant Message" means a form of real-time text communication between two or more people. The communication is conveyed via computers connected over a network such as the Internet.

(1h) "Institution of higher education" means any postsecondary public or private educational institution, including any trade or professional institution, college, or university.

(1i) "Internet" means the global information system that is logically linked together by a globally unique address space based on the Internet Protocol or its subsequent extensions; that is able to support communications using the Transmission Control Protocol/Internet Protocol suite, its subsequent extensions, or other Internet Protocol compatible protocols; and that provides, uses, or makes accessible, either publicly or privately, high-level services layered on the communications and related infrastructure described in this subdivision.

(1j) "Mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of others.

(1k) "Nonresident student" means a person who is not a resident of North Carolina but who is enrolled in any type of school in the State on a part-time or full-time basis.

(1*l*) "Nonresident worker" means a person who is not a resident of North Carolina but who has employment or carries on a vocation in the State, on a part-time or full-time basis, with or without compensation or government or educational benefit, for more than 14 days, or for an aggregate period exceeding 30 days in a calendar year.

(1m) "Offense against a minor" means any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor's parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint). The term also includes the following if the person convicted of the following is not the minor's parent: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

(1n) "Online identifier" means electronic mail address, instant message screen name, user ID, chat or other Internet communication name, but it does not mean social security number, date of birth, or pin number.

(2) "Penal institution" means:

a. A detention facility operated under the jurisdiction of the Division of Prisons of the Department of Correction;

b. A detention facility operated under the jurisdiction of another state or the federal government; or

c. A detention facility operated by a local government in this State or another state.

(2a) "Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.

(2b) "Recidivist" means a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4).

(3) "Release" means discharged or paroled.

(4) "Reportable conviction" means:

a. A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentencing the individual finds that the registration of that individual under this Article furthers the purposes of this Article as stated in G.S. 14-208.5.

b. A final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.

c. A final conviction in a federal jurisdiction (including a court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section.

d. A final conviction for a violation of G.S. 14-202(d), (e), (f), (g), or (h), or a second or subsequent conviction for a violation of G.S. 14-202(a), (a1), or (c), only if the court sentencing the individual issues an order pursuant to G.S. 14-202(l) requiring the individual to register.

(5) "Sexually violent offense" means a violation of G.S. 14-27.2 (first degree rape), G.S. 14-27.2A (rape of a child; adult offender), G.S. 14-27.3 (second degree rape), G.S. 14-27.4 (first degree sexual offense), G.S. 14-27.4A (sex offense with a child; adult offender), G.S. 14-27.5 (second degree sexual offense), G.S. 14-27.5A (sexual battery), G.S. 14-27.6 (attempted rape or sexual offense), G.S. 14-27.7 (intercourse and sexual offense with certain victims), G.S. 14-27.7A(a) (statutory rape or sexual offense of person who is 13-, 14-, or 15-years-old where the defendant is at least six years older), G.S. 14-43.13 (subjecting or maintaining a person for sexual servitude), G.S. 14-178 (incest between near relatives), G.S. 14-190.6 (employing or permitting minor to assist in offenses against public morality and decency), G.S. 14-190.9(a1) (felonious indecent exposure), G.S. 14-190.16 (first degree sexual exploitation of a minor), G.S. 14-190.17 (second degree

sexual exploitation of a minor), G.S. 14-190.17A (third degree sexual exploitation of a minor), G.S. 14-190.18 (promoting prostitution of a minor), G.S. 14-190.19 (participating in the prostitution of a minor), G.S. 14-202.1 (taking indecent liberties with children), or G.S. 14-202.3 (Solicitation of child by computer to commit an unlawful sex act), G.S. 14-318.4(a1) (parent or caretaker commit or permit act of prostitution with or by a juvenile), or G.S. 14-318.4(a2) (commission or allowing of sexual act upon a juvenile by parent or guardian). The term also includes the following: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

(6) "Sexually violent predator" means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.

(7) "Sheriff" means the sheriff of a county in this State.

(8) "Statewide registry" means the central registry compiled by the Division in accordance with G.S. 14-208.14.

(9) "Student" means a person who is enrolled on a full-time or part-time basis, in any postsecondary public or private educational institution, including any trade or professional institution, or other institution of higher education. (1995, c. 545, s. 1; 1997-15, ss. 1, 2; 1997-516, s. 1; 1999-363, s. 1; 2001-373, s. 1; 2002-147, s. 16; 2003-303, s. 2; 2004-109, s. 8; 2005-121, s. 2; 2005-130, s. 1; 2005-226, s. 2; 2006-247, ss. 1(b), 19(a), 20(d); 2008-117, s. 6.1; 2008-220, s. 1.)

Section Set Out Twice. — The section above is effective May 1, 2009. For the section as in effect until May 1, 2009, see the preceding section, also numbered G.S. 14-208.6.

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-220, s. 11(a)-(e), provides: "(a) Funds are authorized to be allocated to the Governor's Crime Commission for award as grants to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws. The grants shall be awarded specifically to enhance and support law efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes. Eligible sheriffs' offices are required to provide non-State matching funds equal to fifty percent (50%) of the grant amount awarded under this section, one-half of which may be in in-kind contributions.

"(b) The Commission shall establish the criteria regarding the eligibility and amount of the awards for the grants described in this section. The grant criteria shall include consideration of all of the following:

"(1) The number of convicted sex offenders in the county of the applicant.

"(2) The level of community support for the grant award.

"(3) Whether the application identifies a problem that is consistent with the purposes of this initiative.

"(4) The applicant's development and maintenance of a process to regularly exchange information and intelligence with other public safety agencies.

"(5) Whether the application articulates clearly the jurisdiction's goals, outcomes, and objectives and describes the accountability system and performance measures to determine progress towards achieving them.

"(c) Any grants allocated shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant funds described by this section shall supplement, and not supplant, existing funds and services provided for the tracking of registered sex offenders. The grants shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award as grants of up to twenty-five thousand dollars ($25,000) each to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws."

"Session Laws 2008-220, s. 12, provides in part: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Effect of Amendments. — Session Laws 2008-117, s. 6.1, effective December 1, 2008, and applicable to offenses committed on or after that date, in subdivision (5), inserted "G.S. 14-27.2A (rape of a child; adult offender)" and inserted "G.S. 14-27.4A (sex offense with a child; adult offender)".

Session Laws 2008-220, s. 1, effective May 1, 2009, added present subdivision (1d) and redesignated former subdivision (1d) as subdivision (1e); added subdivisions (1f) and (1g) and redesignated former subdivision (1e) as subdivision (1h); added subdivision (1i) and redesignated former subdivisions (1f) through (1i) as subdivisions (1j) through (1m); added subdivision (1n). For applicability, see Editor's note.

§ 14-208.6A. Lifetime registration requirements for criminal offenders.

It is the objective of the General Assembly to establish a 30-year registration requirement for persons convicted of certain offenses against minors or sexually violent offenses with an opportunity for those persons to petition in superior court to shorten their registration time period after 10 years of registration. It is the further objective of the General Assembly to establish a more stringent set of registration requirements for recidivists, persons who commit aggravated offenses, and for a subclass of highly dangerous sex offenders who are determined by a sentencing court with the assistance of a board of experts to be sexually violent predators.

To accomplish this objective, there are established two registration programs: the Sex Offender and Public Protection Registration Program and the Sexually Violent Predator Registration Program. Any person convicted of an offense against a minor or of a sexually violent offense as defined by this Article shall register in person as an offender in accordance with Part 2 of this Article. Any person who is a recidivist, who commits an aggravated offense, or who is determined to be a sexually violent predator shall register in person as such in accordance with Part 3 of this Article.

The information obtained under these programs shall be immediately shared with the appropriate local, State, federal, and out-of-state law enforcement officials and penal institutions. In addition, the information designated under G.S. 14-208.10(a) as public record shall be readily available to and accessible by the public. However, the identity of the victim is not public record and shall not be released as a public record. (1997-516, s. 1; 2001-373, s. 2; 2006-247, s. 2(a); 2008-117, s. 7.)

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. —

Session Laws 2008-117, s. 7, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "30-year" for "10-year," and inserted "with an opportunity for those persons to petition in superior court to shorten their registration time period after 10 years of registration" in the first paragraph.

Part 2. Sex Offender and Public Protection Registration Program.

§ 14-208.7. (See Editor's note for applicability) Registration.

(a) A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. If the person moves to North Carolina from outside this State, the person shall register within three business days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first. If the person is a current resident of North Carolina, the person shall register:

(1) Within three business days of release from a penal institution or arrival in a county to live outside a penal institution; or

(2) Immediately upon conviction for a reportable offense where an active term of imprisonment was not imposed.

Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14-208.12A.

(a1) A person who is a nonresident student or a nonresident worker and who has a reportable conviction, or is required to register in the person's state of residency, is required to maintain registration with the sheriff of the county where the person works or attends school. In addition to the information required under subsection (b) of this section, the person shall also provide information regarding the person's school or place of employment as appropriate and the person's address in his or her state of residence.

(b) **(Effective until May 1, 2009)** The Division shall provide each sheriff with forms for registering persons as required by this Article. The registration form shall require:

(1) The person's full name, each alias, date of birth, sex, race, height, weight, eye color, hair color, drivers license number, and home address;

(2) The type of offense for which the person was convicted, the date of conviction, and the sentence imposed;

(3) A current photograph;

(4) The person's fingerprints;

(5) A statement indicating whether the person is a student or expects to enroll as a student within a year of registering. If the person is a student or expects to enroll as a student within a year of registration, then the registration form shall also require the name and address of the educational institution at which the person is a student or expects to enroll as a student; and

(6) A statement indicating whether the person is employed or expects to be employed at an institution of higher education within a year of registering. If the person is employed or expects to be employed at an institution of higher education within a year of registration, then the registration form shall also require the name and address of the educational institution at which the person is or expects to be employed.

G.S. 14-208.7(b) is set out twice. See note.

The sheriff shall photograph the individual at the time of registration and take fingerprints from the individual at the time of registration both of which will be kept as part of the registration form. The registrant will not be required to pay any fees for the photograph or fingerprints taken at the time of registration.

(b) **(Effective May 1, 2009)** The Division shall provide each sheriff with forms for registering persons as required by this Article. The registration form shall require all of the following:

(1) The person's full name, each alias, date of birth, sex, race, height, weight, eye color, hair color, drivers license number, and home address.

(2) The type of offense for which the person was convicted, the date of conviction, and the sentence imposed.

(3) A current photograph taken by the sheriff, without charge, at the time of registration.

(4) The person's fingerprints taken by the sheriff, without charge, at the time of registration.

(5) A statement indicating whether the person is a student or expects to enroll as a student within a year of registering. If the person is a student or expects to enroll as a student within a year of registration, then the registration form shall also require the name and address of the educational institution at which the person is a student or expects to enroll as a student.

(6) A statement indicating whether the person is employed or expects to be employed at an institution of higher education within a year of registering. If the person is employed or expects to be employed at an institution of higher education within a year of registration, then the registration form shall also require the name and address of the educational institution at which the person is or expects to be employed.

(7) Any online identifier that the person uses or intends to use.

(c) When a person registers, the sheriff with whom the person registered shall immediately send the registration information to the Division in a manner determined by the Division. The sheriff shall retain the original registration form and other information collected and shall compile the information that is a public record under this Part into a county registry.

(d) Any person required to register under this section shall report in person at the appropriate sheriff's office to comply with the registration requirements set out in this section. The sheriff shall provide the registrant with written proof of registration at the time of registration. (1995, c. 545, s. 1; 1997-516, s. 1; 2001-373, s. 4; 2002-147, s. 17; 2006-247, s. 5(a); 2008-117, s. 8; 2008-220, s. 2.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until May 1, 2009. The second version of subsection (b) set out above is effective May 1, 2009.

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-117, s. 8, amended this section to replace what was originally a 10-year minimum registration requirement with a 30-year registration requirement that can be reduced to 10 years. Session Laws 2008-117, s. 22, made the 30-year requirement applicable to registrations made on or after December 1, 2008."

Session Laws 2008-220, s. 10, provides: "By December 1, 2008, the Administrative Office of the Courts, in consultation with the North Carolina Department of Justice, the North Carolina Department of Correction, and the North Carolina Sheriffs' Association shall develop a procedure to ensure timely notification to the Division of Criminal Information, Department of Justice, and to sheriffs regarding any person subject to registration under Article

27A of Chapter 14 of the General Statutes who does not receive an active term of imprisonment, as specified in G.S. 14-208.7(a)."

Session Laws 2008-220, s. 11(a)-(e), provides: "(a) Funds are authorized to be allocated to the Governor's Crime Commission for award as grants to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws. The grants shall be awarded specifically to enhance and support law efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes. Eligible sheriffs' offices are required to provide non-State matching funds equal to fifty percent (50%) of the grant amount awarded under this section, one-half of which may be in in-kind contributions.

"(b) The Commission shall establish the criteria regarding the eligibility and amount of the awards for the grants described in this section. The grant criteria shall include consideration of all of the following:

"(1) The number of convicted sex offenders in the county of the applicant.

"(2) The level of community support for the grant award.

"(3) Whether the application identifies a problem that is consistent with the purposes of this initiative.

"(4) The applicant's development and maintenance of a process to regularly exchange information and intelligence with other public safety agencies.

"(5) Whether the application articulates clearly the jurisdiction's goals, outcomes, and objectives and describes the accountability system and performance measures to determine progress towards achieving them.

"(c) Any grants allocated shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant funds described by this section shall supplement, and not supplant, existing funds and services provided for the tracking of registered sex offenders. The grants shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award as grants of up to twenty-five thousand dollars ($25,000) each to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Effect of Amendments. —

Session Laws 2008-117, s. 8, substituted "three business days" for "10 days" in the introductory paragraph of subsection (a) and in subdivision (a)(1); in the concluding paragraph of subsection (a), substituted "30 years" for "10 years" and added "unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14-208.12A" at the end. For applicability provision, see Editor's note.

Session Laws 2008-220, s. 2, effective May 1, 2009, and applicable to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date, rewrote subsection (b).

CASE NOTES

Applied in State v. Williams, — N.C. App. —, 660 S.E.2d 200, 2008 N.C. App. LEXIS 870 (2008).

Cited in Standley v. Town of Woodfin, 186 N.C. App. 134, 650 S.E.2d 618, 2007 N.C. App. LEXIS 2121 (2007); State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

§ 14-208.8. Prerelease notification.

(a) **(Effective until May 1, 2009)** At least 10 days, but not earlier than 30 days, before a person who will be subject to registration under this Article is due to be released from a penal institution, an official of the penal institution shall:

(1) Inform the person of the person's duty to register under this Article and require the person to sign a written statement that the person was so informed or, if the person refuses to sign the statement, certify that the person was so informed;

(2) Obtain the registration information required under G.S. 14-208.7(b)(1), (2), (5), and (6), as well as the address where the person expects to reside upon the person's release; and

(3) Send the Division and the sheriff of the county in which the person expects to reside the information collected in accordance with subdivision (2) of this subsection.

(a) **(Effective May 1, 2009)** At least 10 days, but not earlier than 30 days, before a person who will be subject to registration under this Article is due to be released from a penal institution, an official of the penal institution shall do all of the following:

(1) Inform the person of the person's duty to register under this Article and require the person to sign a written statement that the person was so informed or, if the person refuses to sign the statement, certify that the person was so informed.

(2) Obtain the registration information required under G.S. 14-208.7(b)(1), (2), (5), (6), and (7), as well as the address where the person expects to reside upon the person's release.

(3) Send the Division and the sheriff of the county in which the person expects to reside the information collected in accordance with subdivision (2) of this subsection.

(b) If a person who is subject to registration under this Article does not receive an active term of imprisonment, the court pronouncing sentence shall conduct, at the time of sentencing, the notification procedures specified in subsection (a) of this section. (1995, c. 545, s. 1; 1997-516, s. 1; 2002-147, s. 18; 2008-220, s. 3.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until May 1, 2009. The second version of subsection (a) set out above is effective May 1, 2009.

Editor's Note. — Session Laws 2008-220, s. 11(a)-(e), provides: "(a) Funds are authorized to be allocated to the Governor's Crime Commission for award as grants to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws. The grants shall be awarded specifically to enhance and support law efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes. Eligible sheriffs' offices are required to provide non-State matching funds equal to fifty percent (50%) of the grant amount awarded under this section, one-half of which may be in in-kind contributions.

"(b) The Commission shall establish the criteria regarding the eligibility and amount of the awards for the grants described in this section. The grant criteria shall include consideration of all of the following:

"(1) The number of convicted sex offenders in the county of the applicant.

"(2) The level of community support for the grant award.

"(3) Whether the application identifies a problem that is consistent with the purposes of this initiative.

"(4) The applicant's development and maintenance of a process to regularly exchange information and intelligence with other public safety agencies.

"(5) Whether the application articulates clearly the jurisdiction's goals, outcomes, and objectives and describes the accountability system and performance measures to determine progress towards achieving them.

"(c) Any grants allocated shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant funds described by this section shall supplement, and not supplant, existing funds and services provided for the tracking of registered sex offenders. The grants shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award as grants of up to twenty-five thousand dollars ($25,000) each to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Effect of Amendments. — Session Laws 2008-220, s. 3, effective May 1, 2009, inserted "do all of the following" in the introductory paragraph in subsection (a); inserted "and (7)" in subdivision (a)(2); made minor grammatical changes. For applicability, see Editor's note.

§ 14-208.9. (Effective until May 1, 2009) Change of address; change of academic status or educational employment status.

(a) If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. If the person moves to another county, the person shall also report in person to the sheriff of the new county and provide written notice of the person's address not later than the tenth day after the change of address. Upon receipt of the notice, the sheriff shall immediately forward this information to the Division. When the Division receives notice from a sheriff that a person required to register is moving to another county in the State, the Division shall inform the sheriff of the new county of the person's new residence.

(b) If a person required to register intends to move to another state, the person shall report in person to the sheriff of the county of current residence at least three business days before the date the person intends to leave this State to establish residence in another state or jurisdiction. The person shall provide to the sheriff a written notification that includes all of the following information: the address, municipality, county, and state of intended residence.

(1) If it appears to the sheriff that the record photograph of the sex offender no longer provides a true and accurate likeness of the sex offender, then the sheriff shall take a photograph of the offender to update the registration.

(2) The sheriff shall inform the person that the person must comply with the registration requirements in the new state of residence. The sheriff shall also immediately forward the information included in the notification to the Division, and the Division shall inform the appropriate state official in the state to which the registrant moves of the person's notification and new address.

G.S. 14-208.9 is set out twice. See notes.

(b1) A person who indicates his or her intent to reside in another state or jurisdiction and later decides to remain in this State shall, within three business days after the date upon which the person indicated he or she would leave this State, report in person to the sheriff's office to which the person reported the intended change of residence, of his or her intent to remain in this State. If the sheriff is notified by the sexual offender that he or she intends to remain in this State, the sheriff shall promptly report this information to the Division.

(c) If a person required to register changes his or her academic status either by enrolling as a student or by terminating enrollment as a student, then the person shall, within three business days, report in person to the sheriff of the county with whom the person registered and provide written notice of the person's new status. The written notice shall include the name and address of the institution of higher education at which the student is or was enrolled. The sheriff shall immediately forward this information to the Division.

(d) If a person required to register changes his or her employment status either by obtaining employment at an institution of higher education or by terminating employment at an institution of higher education, then the person shall, within three business days, report in person to the sheriff of the county with whom the person registered and provide written notice of the person's new status not later than the tenth day after the change to the sheriff of the county with whom the person registered. The written notice shall include the name and address of the institution of higher education at which the person is or was employed. The sheriff shall immediately forward this information to the Division. (1995, c. 545, s. 1; 1997-516, s. 1; 2001-373, s. 5; 2002-147, s. 19; 2006-247, s. 6(a); 2007-213, s. 9A; 2007-484, s. 42(b); 2008-117, s. 9.)

Section Set Out Twice. — The section above is effective until May 1, 2009. For the section as amended May 1, 2009, see the following section, also numbered G.S. 14-208.9.

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. —

Session Laws 2008-117, s. 9, effective December 1, 2008 and applicable to offenses committed on or after that date, substituted "the third business day" for "the tenth day" in subsection (a); and substituted "three business days" for "10 days" throughout the section.

CASE NOTES

Double Jeopardy Not Shown. — Defendant could have his post-release supervision revoked because defendant left his residence without notifying his post-release officer and be prosecuted for the offense of failing to notify the sheriff of defendant's change of address as a sex offender under G.S. 14-208.9 and in violation of G.S. 14-208.11 without defendant's double jeopardy rights being violated. Revocation of post-release supervision was not a criminal proceeding and the revocation related to defendant's conviction for sex offenses rather than the State's prosecution of defendant for failing to notify the sheriff of defendant's change of address. State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

§ 14-208.9. (Effective May 1, 2009) Change of address; change of academic status or educational employment status; change of online identifier.

(a) If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. If the person moves to another county, the person shall also report in person to the sheriff of the new county and provide written notice of the person's address not later than the tenth day after the change of address. Upon receipt of the notice, the sheriff shall immediately forward this information to the Division. When the Division receives notice from a sheriff that a person required to register is moving to another county in the State, the Division shall inform the sheriff of the new county of the person's new residence.

(b) If a person required to register intends to move to another state, the person shall report in person to the sheriff of the county of current residence at least three business days before the date the person intends to leave this State to establish residence in another state or jurisdiction. The person shall provide to the sheriff a written notification that includes all of the following information: the address, municipality, county, and state of intended residence.

(1) If it appears to the sheriff that the record photograph of the sex offender no longer provides a true and accurate likeness of the sex offender, then the sheriff shall take a photograph of the offender to update the registration.

(2) The sheriff shall inform the person that the person must comply with the registration requirements in the new state of residence. The sheriff shall also immediately forward the information included in the notification to the Division, and the Division shall inform the appropriate state official in the state to which the registrant moves of the person's notification and new address.

(b1) A person who indicates his or her intent to reside in another state or jurisdiction and later decides to remain in this State shall, within three business days after the date upon which the person indicated he or she would leave this State, report in person to the sheriff's office to which the person reported the intended change of residence, of his or her intent to remain in this State. If the sheriff is notified by the sexual offender that he or she intends to remain in this State, the sheriff shall promptly report this information to the Division.

(c) If a person required to register changes his or her academic status either by enrolling as a student or by terminating enrollment as a student, then the person shall, within three business days, report in person to the sheriff of the county with whom the person registered and provide written notice of the person's new status. The written notice shall include the name and address of the institution of higher education at which the student is or was enrolled. The sheriff shall immediately forward this information to the Division.

(d) If a person required to register changes his or her employment status either by obtaining employment at an institution of higher education or by terminating employment at an institution of higher education, then the person shall, within three business days, report in person to the sheriff of the county with whom the person registered and provide written notice of the person's new status not later than the tenth day after the change to the sheriff of the county with whom the person registered. The written notice shall include the name and address of the institution of higher education at which the person is or was employed. The sheriff shall immediately forward this information to the Division.

(e) If a person required to register changes an online identifier, or obtains a new online identifier, then the person shall, within 10 days, report in person to the sheriff of the county with whom the person registered to provide the new or changed online identifier information to the sheriff. The sheriff shall immediately forward this information to the Division. (1995, c. 545, s. 1; 1997-516, s. 1; 2001-373, s. 5; 2002-147, s. 19; 2006-247, s. 6(a); 2007-213, s. 9A; 2007-484, s. 42(b); 2008-117, s. 9; 2008-220, s. 5; 2008-220, ss. 4, 5.)

Section Set Out Twice. — The section above is effective May 1, 2009. For the section as in effect until May 1, 2009, see the preceding section, also numbered G.S. 14-208.9.

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-220, s. 11(a)-(e), provides: "(a) Funds are authorized to be allocated to the Governor's Crime Commission for award as grants to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws. The grants shall be awarded specifically to enhance and support law efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes. Eligible sheriffs' offices are required to provide non-State matching funds equal to fifty percent (50%) of the grant amount awarded under this section, one-half of which may be in in-kind contributions.

"(b) The Commission shall establish the criteria regarding the eligibility and amount of the awards for the grants described in this section. The grant criteria shall include consideration of all of the following:

"(1) The number of convicted sex offenders in the county of the applicant.

"(2) The level of community support for the grant award.

"(3) Whether the application identifies a problem that is consistent with the purposes of this initiative.

"(4) The applicant's development and maintenance of a process to regularly exchange information and intelligence with other public safety agencies.

"(5) Whether the application articulates clearly the jurisdiction's goals, outcomes, and objectives and describes the accountability system and performance measures to determine progress towards achieving them.

"(c) Any grants allocated shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant funds described by this section shall supplement, and not supplant, existing funds and services provided for the tracking of registered sex offenders. The grants shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award as grants of up to twenty-five thousand dollars ($25,000) each to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Effect of Amendments. — Session Laws 2008-117, s. 9, effective December 1, 2008 and applicable to offenses committed on or after that date, substituted "the third business day" for "the tenth day" in subsection (a); and substituted "three business days" for "10 days" throughout the section.

Session Laws 2008-220, ss. 4 and 5, effective May 1, 2009, inserted "change of online identifier" in the section heading; and added subsection (e). For applicability, see Editor's note.

§ 14-208.9A. Verification of registration information.

(a) The information in the county registry shall be verified semiannually for each registrant as follows:

(1) Every year on the anniversary of a person's initial registration date, and again six months after that date, the Division shall mail a nonforwardable verification form to the last reported address of the person.

G.S. 14-208.9A(a)(3) is set out twice. See note.

(2) The person shall return the verification form in person to the sheriff within three business days after the receipt of the form.

(3) **(Effective until May 1, 2009)** The verification form shall be signed by the person and shall indicate whether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address.

(3) **(Effective May 1, 2009)** The verification form shall be signed by the person and shall indicate the following:

a. Whether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address.

b. Whether the person still uses or intends to use any online identifiers last reported to the sheriff. If the person has any new or different online identifiers, then the person shall provide those online identifiers to the sheriff.

(3a) If it appears to the sheriff that the record photograph of the sex offender no longer provides a true and accurate likeness of the sex offender, then the sheriff shall take a photograph of the offender to include with the verification form.

(4) If the person fails to return the verification form in person to the sheriff within three business days after receipt of the form, the person is subject to the penalties provided in G.S. 14-208.11. If the person fails to report in person and provide the written verification as provided by this section, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address. If the person cannot be found at the registered address and has failed to report a change of address, the person is subject to the penalties provided in G.S. 14-208.11, unless the person reports in person to the sheriff and proves that the person has not changed his or her residential address.

(b) Additional Verification May Be Required. — During the period that an offender is required to be registered under this Article, the sheriff is authorized to attempt to verify that the offender continues to reside at the address last registered by the offender.

(c) Additional Photograph May Be Required. — If it appears to the sheriff that the current photograph of the sex offender no longer provides a true and accurate likeness of the sex offender, upon in-person notice from the sheriff, the sex offender shall allow the sheriff to take another photograph of the sex offender at the time of the sheriff's request. If requested by the sheriff, the sex offender shall appear in person at the sheriff's office during normal business hours within three business days of being requested to do so and shall allow the sheriff to take another photograph of the sex offender. A person who willfully fails to comply with this subsection is guilty of a Class 1 misdemeanor. (1997-516, s. 1; 2006-247, s. 7(a); 2008-117, s. 10; 2008-220, s. 6.)

Subdivision (a)(3) Set Out Twice. — The first version of subdivision (a)(3) set out above is effective until May 1, 2009. The second version of subdivision (a)(3) set out above is effective May 1, 2009.

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-220, s. 11(a)-(e), provides: "(a) Funds are authorized to be allocated to the Governor's Crime Commission for award as grants to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws. The grants shall be awarded specifically to enhance and support law efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes. Eligible sheriffs' offices are required to provide non-State matching funds equal to fifty percent (50%) of the grant amount awarded under this section, one-half of which may be in in-kind contributions.

"(b) The Commission shall establish the criteria regarding the eligibility and amount of the awards for the grants described in this section. The grant criteria shall include consideration of all of the following:

"(1) The number of convicted sex offenders in the county of the applicant.

"(2) The level of community support for the grant award.

"(3) Whether the application identifies a problem that is consistent with the purposes of this initiative.

"(4) The applicant's development and maintenance of a process to regularly exchange information and intelligence with other public safety agencies.

"(5) Whether the application articulates clearly the jurisdiction's goals, outcomes, and objectives and describes the accountability system and performance measures to determine progress towards achieving them.

"(c) Any grants allocated shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant funds described by this section shall supplement, and not supplant, existing funds and services provided for the tracking of registered sex offenders. The grants shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award as grants of up to twenty-five thousand dollars ($25,000) each to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Effect of Amendments. —

Session Laws 2008-117, s. 10, effective December 1, 2008 and applicable to offenses committed on or after that date, substituted "three business days" for "10 days" in subdivisions (a)(2) and (a)(4); and substituted "three business days" for "72 hours" in subsection (c).

Session Laws 2008-220, s. 6, effective May 1, 2009, redesignated former subdivision (a)(3) as present subdivisions (a)(3) and (a)(3)a, and added "the following" in the introductory language of subdivision (a)(3); and added subdivision (a)(3)b. For applicability, see Editor's note.

§ 14-208.11. Failure to register; falsification of verification notice; failure to return verification form; order for arrest.

(a) A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:

(1) Fails to register as required by this Article.

(2) Fails to notify the last registering sheriff of a change of address as required by this Article.

(3) Fails to return a verification notice as required under G.S. 14-208.9A.

(4) Forges or submits under false pretenses the information or verification notices required under this Article.

(5) Fails to inform the registering sheriff of enrollment or termination of enrollment as a student.

(6) Fails to inform the registering sheriff of employment at an institution of higher education or termination of employment at an institution of higher education.

(7) Fails to report in person to the sheriff's office as required by G.S. 14-208.7, 14-208.9, and 14-208.9A.

(8) Reports his or her intent to reside in another state or jurisdiction but remains in this State without reporting to the sheriff in the manner required by G.S. 14-208.9.

(9) Fails to notify the registering sheriff of out-of-county employment if temporary residence is established as required under G.S. 14-208.8A.

(10) **(Effective May 1, 2009)** Fails to inform the registering sheriff of any new or changes to existing online identifiers that the person uses or intends to use.

(a1) If a person commits a violation of subsection (a) of this section, the probation officer, parole officer, or any other law enforcement officer who is aware of the violation shall immediately arrest the person in accordance with G.S. 15A-401, or seek an order for the person's arrest in accordance with G.S. 15A-305.

(b) Before a person convicted of a violation of this Article is due to be released from a penal institution, an official of the penal institution shall conduct the prerelease notification procedures specified under G.S. 14-208.8(a)(2) and (3). If upon a conviction for a violation of this Article, no active term of imprisonment is imposed, the court pronouncing sentence shall, at the time of sentencing, conduct the notification procedures specified under G.S. 14-208.8(a)(2) and (3).

(c) A person who is unable to meet the registration or verification requirements of this Article shall be deemed to have complied with its requirements if:

(1) The person is incarcerated in, or is in the custody of, a local, State, private, or federal correctional facility,

(2) The person notifies the official in charge of the facility of their status as a person with a legal obligation or requirement under this Article and

(3) The person meets the registration or verification requirements of this Article no later than 10 days after release from confinement or custody. (1995, c. 545, s. 1; 1997-516, s. 1; 2002-147, s. 20; 2006-247, ss. 8(a), 8(b); 2008-220, s. 7.)

Editor's Note. —

Session Laws 2008-220, s. 11(a)-(e), provides: "(a) Funds are authorized to be allocated to the Governor's Crime Commission for award as grants to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws. The grants shall be awarded specifically to enhance and support law efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes. Eligible sheriffs' offices are required to provide non-State matching funds equal to fifty percent (50%) of the grant amount awarded under this section, one-half of which may be in in-kind contributions.

"(b) The Commission shall establish the criteria regarding the eligibility and amount of the awards for the grants described in this section. The grant criteria shall include consideration of all of the following:

"(1) The number of convicted sex offenders in the county of the applicant.

"(2) The level of community support for the grant award.

"(3) Whether the application identifies a problem that is consistent with the purposes of this initiative.

"(4) The applicant's development and maintenance of a process to regularly exchange information and intelligence with other public safety agencies.

"(5) Whether the application articulates clearly the jurisdiction's goals, outcomes, and objectives and describes the accountability system and performance measures to determine progress towards achieving them.

"(c) Any grants allocated shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant funds described by this section shall supplement, and not supplant, existing funds and services provided for the tracking of registered sex offenders. The grants shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award as grants of up to twenty-five thousand dollars ($25,000) each to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Effect of Amendments. —

Session Laws 2008-220, s. 7, effective May 1, 2009, added subdivision (a)(10). For applicability, see Editor's note.

CASE NOTES

No Double Jeopary Violation. —

Defendant could have his post-release supervision revoked because he left his residence without notifying his post-release officer and be prosecuted for the offense of failing to notify the sheriff of his change of address as a sex offender under G.S. 14-208.9 and in violation of G.S. 14-208.11 without defendant's double jeopardy rights being violated. Revocation of post-release supervision was not a criminal proceeding and the revocation related to defendant's conviction for sex offenses rather than the State's prosecution of defendant for failing to notify the sheriff of defendant's change of address. State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

§ 14-208.12A. Request for termination of registration requirement.

(a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court in the district where the person resides to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article.

(a1) The court may grant the relief if:

(1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,

(2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and

(3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

(a2) The district attorney in the district in which the petition is filed shall be given notice of the petition at least three weeks before the hearing on the matter. The petitioner may present evidence in support of the petition and the district attorney may present evidence in opposition to the requested relief or may otherwise demonstrate the reasons why the petition should be denied.

(a3) If the court denies the petition, the person may again petition the court for relief in accordance with this section one year from the date of the denial of the original petition to terminate the registration requirement. If the court grants the petition to terminate the registration requirement, the clerk of court shall forward a certified copy of the order to the Division to have the person's name removed from the registry.

(b) If there is a subsequent offense, the county registration records shall be retained until the registration requirement for the subsequent offense is terminated by the court under subsection (a1) of this section. (1997-516, s. 1; 2006-247, s. 10(a); 2008-117, s. 11.)

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. —

Session Laws 2008-117, s. 11, effective December 1, 2008, and applicable to offenses committed on or after that date, in subsection (a), inserted "Ten years from the date of initial county registration" at the beginning, inserted "30-year" preceding "registration requirement" and deleted "10 years from the date of initial county registration" thereafter. For note on applicability of 30-year registration period, see Editor's note under G.S. 14-208.7.

§ 14-208.14. Statewide registry; Division of Criminal Statistics designated custodian of statewide registry.

(a) The Division of Criminal Statistics shall compile and keep current a central statewide sex offender registry. The Division is the State agency designated as the custodian of the statewide registry. As custodian the Division has the following responsibilities:

(1) To receive from the sheriff or any other law enforcement agency or penal institution all sex offender registrations, changes of address, changes of academic or educational employment status, and prerelease notifications required under this Article or under federal law. The Division shall also receive notices of any violation of this Article, including a failure to register or a failure to report a change of address.

(2) To provide all need-to-know law enforcement agencies (local, State, campus, federal, and those located in other states) immediately upon receipt by the Division of any of the following: registration information, a prerelease notification, a change of address, a change of academic or educational employment status, or notice of a violation of this Article.

(2a) To notify the appropriate law enforcement unit at an institution of higher education as soon as possible upon receipt by the Division of relevant information based on registration information or notice of a change of academic or educational employment status. If an institution of higher education does not have a law enforcement unit, then the Division shall provide the information to the local law enforcement agency that has jurisdiction for the campus.

(3) To coordinate efforts among law enforcement agencies and penal institutions to ensure that the registration information, changes of address, prerelease notifications, and notices of failure to register or to report a change of address are conveyed in an appropriate and timely manner.

(4) To provide public access to the statewide registry in accordance with this Article.

(5) **(Effective May 1, 2009)** To maintain a system allowing an entity to access a list of online identifiers of persons in the central sex offender registry.

(b) The statewide registry shall include the following:

(1) Registration information obtained by a sheriff or penal institution under this Article or from any other local or State law enforcement agency.

(2) Registration information received from a state or local law enforcement agency or penal institution in another state.

(3) Registration information received from a federal law enforcement agency or penal institution. (1997-516, s. 1; 2002-147, s. 21; 2008-220, s. 8.)

Editor's Note. — Session Laws 2008-220, s. 11 (a)-(e), provides: "(a) Funds are authorized to be allocated to the Governor's Crime Commission for award as grants to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws. The grants shall be awarded specifically to enhance and support law efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes. Eligible sheriffs' offices are required to provide non-State matching funds equal to fifty percent (50%) of the grant amount awarded under this section, one-half of which may be in in-kind contributions.

"(b) The Commission shall establish the criteria regarding the eligibility and amount of the awards for the grants described in this section. The grant criteria shall include consideration of all of the following:

"(1) The number of convicted sex offenders in the county of the applicant.

"(2) The level of community support for the grant award.

"(3) Whether the application identifies a problem that is consistent with the purposes of this initiative.

"(4) The applicant's development and maintenance of a process to regularly exchange information and intelligence with other public safety agencies.

"(5) Whether the application articulates clearly the jurisdiction's goals, outcomes, and objectives and describes the accountability system and performance measures to determine progress towards achieving them.

"(c) Any grants allocated shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant funds described by this section shall supplement, and not supplant, existing funds and services provided for the tracking of registered sex offenders. The grants shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award as grants of up to twenty-five thousand dollars ($25,000) each to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Effect of Amendments. — Session Laws 2008-220, s. 8, effective May 1, 2009, added subdivision (a)(5). For applicability, see Editor's note.

§ 14-208.15A. (Effective May 1, 2009) Release of online identifiers to entity; fee.

(a) The Division may release registry information regarding a registered offender's online identifier to an entity for the purpose of allowing the entity to prescreen users or to compare the online identifier information with information held by the entity as provided by this section.

(b) An entity desiring to prescreen its users or compare its database of registered users to the list of online identifiers of persons in the statewide registry may apply to the Division to access the information. An entity that complies with the criteria developed by the Division regarding the release and use of the online identifier information and pays the fee may screen new users or compare its database of registered users to the list of online identifiers of persons in the statewide registry as frequently as the Division may allow for the purpose of identifying a registered user associated with an online identifier contained in the statewide registry.

(c) The Division may charge an entity that submits a request for the online identifiers of persons in the statewide registry an annual fee of one hundred dollars ($100.00). Fees collected under this section shall be credited to the Department of Justice and applied to the cost of providing this service.

(d) The Division shall develop criteria and adopt rules regarding the release and use of online identifier information. The criteria shall include a requirement that the information obtained from the statewide registry shall not be disclosed for any purpose other than for prescreening its users or comparing the database of registered users of the entity against the list of online identifiers of persons in the statewide registry.

(e) An entity that receives:

(1) A complaint from a user of the entity's services that a person uses its service to solicit a minor by computer to commit an unlawful sex act as defined in G.S. 14-202.3, or

(2) A report that a user may be violating G.S. 14-190.17 or G.S. 14-190.17A by posting or transmitting material that contains a visual representation of a minor engaged in sexual activity,

shall report that information and the online identifier information of the person allegedly committing the offense, including whether that online identifier is included in the statewide registry, to the Cyber Tip Line at the National Center for Missing and Exploited Children, which shall forward that report to an appropriate law enforcement official in this State. The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

(f) An entity that complies with this section in good faith is immune from civil or criminal liability resulting from either of the following:

(1) The entity's refusal to provide system service to a person on the basis that the entity reasonably believed that the person was subject to registration under State sex offender registry laws.

(2) A person's criminal or tortious acts against a minor with whom the person had communicated on the entity's system. (2008-220, s. 9.)

Editor's Note. — Session Laws 2008-220, s. 12, makes this section effective May 1, 2009, and applicable to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date.

Session Laws 2008-220, s. 12, further provides: "The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Session Laws 2008-220, s. 11(a)-(e), provides: "(a) Funds are authorized to be allocated to the Governor's Crime Commission for award as grants to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws. The grants shall be awarded specifically to enhance and support law efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes. Eligible sheriffs' offices are required to provide non-State matching funds equal to fifty percent (50%) of the grant amount awarded under this section, one-half of which may be in in-kind contributions.

"(b) The Commission shall establish the criteria regarding the eligibility and amount of the awards for the grants described in this section. The grant criteria shall include consideration of all of the following:

"(1) The number of convicted sex offenders in the county of the applicant.

"(2) The level of community support for the grant award.

"(3) Whether the application identifies a problem that is consistent with the purposes of this initiative.

"(4) The applicant's development and maintenance of a process to regularly exchange information and intelligence with other public safety agencies.

"(5) Whether the application articulates clearly the jurisdiction's goals, outcomes, and objectives and describes the accountability system and performance measures to determine progress towards achieving them.

"(c) Any grants allocated shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant funds described by this section shall supplement, and not supplant, existing funds and services provided for the tracking of registered sex offenders. The grants shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award as grants of up to twenty-five thousand dollars ($25,000) each to eligible sheriffs' offices to assist with the enforcement of the State's sex offender laws."

§ 14-208.18. Sex offender unlawfully on premises.

(a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (b) [subsection (c)] of this section, to knowingly be at any of the following locations:

(1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.

(2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

(3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

(b) Notwithstanding any provision of this section, a person subject to subsection (a) of this section who is the parent or guardian of a minor may take the minor to any location that can provide emergency medical care treatment if the minor is in need of emergency medical care.

(c) Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:

(1) Any offense in Article 7A of this Chapter.

(2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

(d) A person subject to subsection (a) of this section who is a parent or guardian of a student enrolled in a school may be present on school property if all of the following conditions are met:

(1) The parent or guardian is on school property for the purpose for one of the following:
   a. To attend a conference at the school with school personnel to discuss the academic or social progress of the parents' or guardians' child; or
   b. The presence of the parent or guardian has been requested by the principal or his or her designee for any other reason relating to the welfare or transportation of the child.

(2) The parent or guardian complies with all of the following:
   a. Notice: The parent or guardian shall notify the principal of the school of the parents' or guardians' registration under this Article and of his or her presence at the school unless the parent or guardian has permission to be present from the superintendent or the local board of education, or the principal has granted ongoing permission for regular visits of a routine nature. If permission is granted by the superintendent or the local board of education, the superintendent or chairman of the local board of education shall inform the principal of the school where the parents' or guardians' will be present. Notification includes the nature of the parents' or guardians' visit and the hours when the parent or guardian will be present at the school. The parent or guardian is responsible for notifying the principal's office upon arrival and upon departure. Any permission granted under this sub-subdivision shall be in writing.
   b. Supervision: At all times that a parent or guardian is on school property, the parent or guardian shall remain under the direct supervision of school personnel. A parent or guardian shall not be on school property even if the parent or guardian has ongoing permission for regular visits of a routine nature if no school personnel are reasonably available to supervise the parent or guardian on that occasion.

(e) A person subject to subsection (a) of this section who is eligible to vote may be present at a location described in subsection (a) used as a voting place as defined by G.S. 163-165 only for the purposes of voting and shall not be outside the voting enclosure other than for the purpose of entering and exiting the voting place. If the voting place is a school, then the person subject to subsection (a) shall notify the principal of the school that he or she is registered under this Article.

(f) A person subject to subsection (a) of this section who is eligible under G.S. 115C-378 to attend public school may be present on school property if permitted by the local board of education pursuant to G.S. 115C-391(d)(2).

(g) A juvenile subject to subsection (a) of this section may be present at a location described in that subsection if the juvenile is at the location to receive medical treatment or mental health services and remains under the direct supervision of an employee of the treating institution at all times.

(h) A violation of this section is a Class H felony. (2008-117, s. 12.)

Editor's Note. — Session Laws 2008-117, s. 22, makes this section effective December 1, 2008, and applicable to offenses committed on or after that date.

The reference in the introductory language of subsection (a) to "subsection (b)" appears to be incorrect. The correct reference should probably be to subsection (c), which provides a description of the relevant offenses.

Session Laws 2008-117, s. 21.1 is a severability clause.

§ 14-208.19. Community and public notification.

The licensee for each licensed day care center and the principal of each elementary school, middle school, and high school shall register with the North Carolina Sex Offender and Public Protection Registry to receive e-mail notification when a registered sex offender moves within a one-mile radius of the licensed day care center or school. (2008-117, s. 13.)

Editor's Note. — Session Laws 2008-117, s. 13, enacted this section as G.S. 14-208.25A. It has been recodified as 14-208.19 at the direction of the Revisor of Statutes.

Session Laws 2008-117, s. 22, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-117, s. 21.1 is a severability clause.

Part 4. Registration of Certain Juveniles Adjudicated for Committing Certain Offenses.

§ 14-208.27. Change of address.

If a juvenile who is adjudicated delinquent and required to register changes address, the juvenile court counselor for the juvenile shall provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the juvenile had last registered. Upon receipt of the notice, the sheriff shall immediately forward this information to the Division. If the juvenile moves to another county in this State, the Division shall inform the sheriff of the new county of the juvenile's new residence. (1997-516, s. 1; 2001-490, s. 2.36; 2008-117, s. 14.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 14, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "the third business day" for "the tenth day."

§ 14-208.28. Verification of registration information.

The information provided to the sheriff shall be verified semiannually for each juvenile registrant as follows:

(1) Every year on the anniversary of a juvenile's initial registration date and six months after that date, the sheriff shall mail a verification form to the juvenile court counselor assigned to the juvenile.

(2) The juvenile court counselor for the juvenile shall return the verification form to the sheriff within three business days after the receipt of the form.

(3) The verification form shall be signed by the juvenile court counselor and the juvenile and shall indicate whether the juvenile still resides at the address last reported to the sheriff. If the juvenile has a different address, then that fact and the new address shall be indicated on the form. (1997-516, s. 1; 2001-490, s. 2.37; 2006-247, s. 13; 2008-117, s. 15.)

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. —

Session Laws 2008-117, s. 15, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "three business days" for "10 days" in subdivision (2).

§ 14-208.29. Registration information is not public record; access to registration information available only to law enforcement agencies and local boards of education.

(a) Notwithstanding any other provision of law, the information regarding a juvenile required to register under this Part is not public record and is not available for public inspection.

(b) The registration information of a juvenile adjudicated delinquent and required to register under this Part shall be maintained separately by the sheriff and released only to law enforcement agencies and local boards of education. Registry information for any juvenile enrolled in the local school administrative unit shall be forwarded to the local board of education. Under no circumstances shall the registration of a juvenile adjudicated delinquent be included in the county or statewide registries, or be made available to the public via internet. (1997-516, s. 1; 2008-117, s. 12.2.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 12.2, effective December 1, 2008, and applicable to offenses committed on or after that date, added "and local boards of education" in the section heading; and inserted "and local boards of education. Registry information for any juvenile enrolled in the local school administrative unit shall be forwarded to the local board of education" in subsection (b).

Part 5. Sex Offender Monitoring.

§ 14-208.40. Establishment of program; creation of guidelines; duties.

(a) The Department of Correction shall establish a sex offender monitoring program that uses a continuous satellite-based monitoring system and shall create guidelines to govern the program. The program shall be designed to monitor three categories of offenders as follows:

(1) Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense as those terms are defined in G.S. 14-208.6.

(2) Any offender who satisfies all of the following criteria: (i) is convicted of a reportable conviction as defined by G.S. 14-208.6(4), (ii) is required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes, (iii) has committed an offense involving the physical, mental, or sexual abuse of a minor, and (iv) based on the Department's risk assessment program requires the highest possible level of supervision and monitoring.

(3) Any offender who is convicted of G.S. 14-27.2A or G.S. 14-27.4A, who shall be enrolled in the satellite-based monitoring program for the offender's natural life upon termination of the offender's active punishment.

(b) In developing the guidelines for the program, the Department shall require that any offender who is enrolled in the satellite-based program submit to an active continuous satellite-based monitoring program, unless an active program will not work as provided by this section. If the Department determines that an active program will not work as provided by this section, then the Department shall require that the defendant submit to a passive continuous satellite-based program that works within the technological or geographical limitations.

(c) The satellite-based monitoring program shall use a system that provides all of the following:

(1) Time-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology.

(2) Reporting of subject's violations of prescriptive and proscriptive schedule or location requirements. Frequency of reporting may range from once a day (passive) to near real-time (active).

(d) The Department may contract with a single vendor for the hardware services needed to monitor subject offenders and correlate their movements to reported crime incidents. The contract may provide for services necessary to implement or facilitate any of the provisions of this Part. (2006-247, s. 15(a); 2007-213, s. 1; 2007-484, s. 42(b); 2008-117, s. 16.)

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. —

Session Laws 2008-117, s. 16, effective December 1, 2008, and applicable to offenses committed on or after that date, in subsection (a), substituted "three categories" for "two categories"; and added subdivision (a)(3).

§ 14-208.40A. Determination of satellite-based monitoring requirement by court.

(a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), during the sentencing phase, the district attorney shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor. The district attorney shall have no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.

The offender shall be allowed to present to the court any evidence that the district attorney's evidence is not correct.

(b) After receipt of the evidence from the parties, the court shall determine whether the offender's conviction places the offender in one of the categories described in G.S. 14-208.40(a), and if so, shall make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

(c) If the court finds that the offender has been classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in a satellite-based monitoring program for life.

(d) If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A and the offender is not a recidivist, the court shall order that the Department do a risk assessment of the offender. The Department shall have a minimum of 30 days, but not more than 60 days, to complete the risk assessment of the offender and report the results to the court.

(e) Upon receipt of a risk assessment from the Department pursuant to subsection (d) of this section, the court shall determine whether, based on the Department's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court. (2007-213, s. 2; 2008-117, s. 16.1.)

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 16.1, effective December 1, 2008, and applicable to offenses committed on or after that date, in subsections (a) and (b), inserted clause (iv) and renumbered former clause (iv) as clause (v); in subsection (c), inserted "or was convicted of G.S. 14-27.2A or G.S. 14-27.4A"; in subsection (d), inserted "or a violation of G.S. 14-27.2A or G.S. 14-27.4A"; and made minor stylistic changes.

§ 14-208.40B. Determination of satellite-based monitoring requirement in certain circumstances.

(a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), and there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring, the Department shall make an initial determination on whether the offender falls into one of the categories described in G.S. 14-208.40(a).

(b) If the Department determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the Department shall schedule a hearing in the court of the county in which the offender resides. The Department shall notify the offender of the Department's determination and the date of the scheduled hearing by certified mail sent to the address provided by the offender pursuant to G.S. 14-208.7. The hearing shall be scheduled no sooner than 15 days from the date the notification is mailed. Receipt of notification shall be presumed to be the date indicated by the certified mail receipt.

(c) At the hearing, the court shall determine if the offender falls into one of the categories described in G.S. 14-208.40(a). The court shall hold the hearing and make findings of fact pursuant to G.S. 14-208.40A.

If the court finds that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, or (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in satellite-based monitoring for life.

If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A, and the offender is not a recidivist, the court shall order that the Department do a risk assessment of the offender. The Department shall have a minimum of 30 days, but not more than 60 days, to complete the risk assessment of the offender and report the results to the court. The Department may use a risk assessment of the offender done within six months of the date of the hearing.

Upon receipt of a risk assessment from the Department, the court shall determine whether, based on the Department's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court. (2007-213, s. 3; 2007-484, s. 42(b); 2008-117, s. 16.2.)

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 16.2, effective December 1, 2008, and applicable to offenses committed on or after that date, in subsection (c), inserted clause (iv) in the second paragraph and made a related change, and substituted "the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A" for "offense is not an aggravated offense" in the third paragraph.

§ 14-208.41. Enrollment in satellite-based monitoring programs mandatory; length of enrollment.

(a) Any person described by G.S. 14-208.40(a)(1) shall enroll in a satellite-based monitoring program with the Division of Community Corrections office in the county where the person resides. The person shall remain enrolled in the satellite-based monitoring program for the registration period imposed under G.S. 14-208.23 which is the person's life, unless the requirement to enroll in the satellite-based monitoring program is terminated pursuant to G.S. 14-208.43.

(b) Any person described by G.S. 14-208.40(a)(2) who is ordered by the court pursuant to G.S. 14-208.40A or G.S. 14-208.40B to enroll in a satellite-based monitoring program shall do so with the Division of Community Corrections office in the county where the person resides. The person shall remain enrolled in the satellite-based monitoring program for the period of time ordered by the court.

(c) Any person described by G.S. 14-208.40(a)(3), upon completion of active punishment, shall enroll in a satellite-based monitoring program with the Division of Community Corrections office in the county where the person resides. The person shall enroll in the satellite-based monitoring program for the entire period of post-release supervision and shall remain enrolled in the satellite-based monitoring program for the person's life, unless the requirement to enroll in the satellite-based monitoring program is terminated pursuant to G.S. 14-208.43. (2006-247, s. 15(a); 2007-213, s. 13; 2007-484, s. 42(b); 2008-117, s. 17; 2008-187, s. 5.)

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. —

Session Laws 2008-117, s. 17, effective December 1, 2008, and applicable to offenses committed on or after that date, added subsection (c).

Session Laws 2008-187, s. 5, effective August 7, 2008, in subsection (b), deleted "required by the Department pursuant to" preceding "G.S. 14 208.40B" and deleted "or the period of time specified by the Department" at the end.

§ 14-208.43. Request for termination of satellite-based monitoring requirement.

(a) An offender described by G.S. 14-208.40(a)(1) or G.S. 14-208.40(a)(3) who is required to submit to satellite-based monitoring for the offender's life may file a request for termination of monitoring requirement with the Post-Release Supervision and Parole Commission. The request to terminate the satellite-based monitoring requirement and to terminate the accompanying requirement of unsupervised probation may not be submitted until at least one year after the offender: (i) has served his or her sentence for the offense for which the satellite-based monitoring requirement was imposed, and (ii) has also completed any period of probation, parole, or post-release supervision imposed as part of the sentence.

(b) Upon receipt of the request for termination, the Commission shall review documentation contained in the offender's file and the statewide registry to determine whether the person has complied with the provisions of this Article. In addition, the Commission shall conduct fingerprint-based state and federal criminal history record checks to determine whether the person has been convicted of any additional reportable convictions.

(c) If it is determined that the person has not received any additional reportable convictions during the period of satellite-based monitoring and the person has substantially complied with the provisions of this Article, the Commission may terminate the monitoring requirement if the Commission finds that the person is not likely to pose a threat to the safety of others.

(d) If it is determined that the person has received any additional reportable convictions during the period of satellite-based monitoring or has not substantially complied with the provisions of this Article, the Commission shall not order the termination of the monitoring requirement.

(d1) Notwithstanding the provisions of this section, if the Commission is notified by the Department of Correction that the offender has been released, pursuant to G.S. 14-208.12A, from the requirement to register under Part 2 of Article 27A of this Chapter, upon request of the offender, the Commission shall order the termination of the monitoring requirement.

(e) The Commission shall not consider any request to terminate a monitoring requirement except as provided by this section. The Commission has no authority to consider or terminate a monitoring requirement for an offender described in G.S. 14-208.40(a)(2). (2006-247, s. 15(a); 2007-213, s. 11; 2007-484, s. 42(b); 2008-117, s. 18.)

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. —

Session Laws 2008-117, s. 18, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "14-208.40(a)(1) or G.S. 14-208.40(a)(3)" for "14-308.40(a)(1)" in subsection (a).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Article 28.

Perjury.

§ 14-209. Punishment for perjury.

CASE NOTES

Evidence Sufficient. —

Substantial evidence supported a conviction for perjury under G.S. 14-209, as the evidence permitted a finding that defendant made a false statement that he had no real estate assets in a sworn indigency affidavit and that he made such statement knowingly to avoid reporting assets that could affect his child support obligations and to increase his likelihood of receiving court-appointed counsel in child support proceedings. State v. Denny, 361 N.C. 662, 652 S.E.2d 212, 2007 N.C. LEXIS 1095 (2007).

ARTICLE 30.

Obstructing Justice.

§ 14-223. Resisting officers.

CASE NOTES

I. General Consideration.
II. Nature and Evidence of Offense.

I. GENERAL CONSIDERATION.

Trial court did not violate the Double Jeopardy Clause, etc.

Superior court erred in dismissing a charge against defendant of resisting, delaying or obstructing a public officer (RDO) pursuant to G.S. 14-223 because defendant was not placed in double jeopardy where the evidence required to convict defendant on the RDO charge was not the same as for the assault on a government official charge. State v. Newman, 186 N.C. App. 382, 651 S.E.2d 584, 2007 N.C. App. LEXIS 2201 (2007).

II. NATURE AND EVIDENCE OF OFFENSE.

Defendant was entitled to dismissal of the charge of resisting a public officer because a reasonable person would have felt free to ignore the detective's presence to go about their business since the detective made no show of force or otherwise communicated that cooperation was required; defendant's flight from the consensual encounter could not be used as evidence that defendant was resisting, delaying, or obstructing the detective. State v. Sinclair, — N.C. App. —, 663 S.E.2d 866, 2008 N.C. App. LEXIS 1473 (Aug. 5, 2008).

Resistance Not Warranted. —

Trial court did not err in finding defendant delinquent for resisting, delaying, and obstructing an officer because the State provided substantial evidence to support the adjudication; defendant consented to the officer's search of his person, he refused to comply when the officer asked him to open his mouth, he attempted to swallow what he had in his mouth, and he willfully engaged in a physical confrontation with the officer and attempted to flee. In re S.D.R., — N.C. App. —, 664 S.E.2d 414, 2008 N.C. App. LEXIS 1481 (2008).

§ 14-225. False reports to law enforcement agencies or officers.

CASE NOTES

Insufficient Evidence. — While the State's evidence showed that defendant willfully made a false report to the police, absent any evidence that she did so with any malicious purpose, or intent to interfere with a law enforcement agency or hindering or obstructing the officer in the performance of his duties, her conviction under G.S. 14-225 was reversed. State v. Dietze, — N.C. App. —, 660 S.E.2d 197, 2008 N.C. App. LEXIS 834 (2008).

§ 14-226. Intimidating or interfering with witnesses.

CASE NOTES

Evidence Insufficient. — Letter defendant wrote to a witness set to testify against a friend defendant made in jail was insufficient to support a conviction for attempting to intimidate a witness, because the letter was neither threatening, coercive, or menacing, and the letter did not hint at bodily harm or violence against the witness, contained no cursing, vulgarity, or threatening language, and maintained a courteous tone throughout. State v. Williams, 186 N.C. App. 233, 650 S.E.2d 607, 2007 N.C. App. LEXIS 2122 (2007).

ARTICLE 31.

Misconduct in Public Office.

§ 14-234. Public officers or employees benefiting from public contracts; exceptions.

CASE NOTES

Public Official Immunity Does Not Apply to Bar Claims. — Because G.S. 14-234 (deriving a personal benefit from a contract made or administered on behalf of a public agency) did not contemplate recovery of compensation by an individual citizen from a public official as an individual, to the extent that plaintiffs sought relief other than monetary compensation under G.S. 14-234(a)(1), public official immunity was not applicable to bar the claim. Free Spirit Aviation, Inc. v. Rutherford Airport Auth., — N.C. App. —, 664 S.E.2d 8, 2008 N.C. App. LEXIS 1494 (Aug. 5, 2008).

Public Official Immunity Did Not Bar Claim for Duress. — Airport authority member's threatening demand for a discount, viewed in the light most favorable to the plaintiffs and drawing all reasonable inferences in plaintiffs' favor, was intentional and wrongful, and therefore a malicious act. Because public official immunity (POI) did not apply to claims based on malicious acts, POI did not bar plaintiffs' G.S. 14-234 claim against the member for duress. Free Spirit Aviation, Inc. v. Rutherford Airport Auth., — N.C. App. —, 664 S.E.2d 8, 2008 N.C. App. LEXIS 1494 (Aug. 5, 2008).

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

ARTICLE 35.

Offenses Against the Public Peace.

§ 14-269. Carrying concealed weapons.

CASE NOTES

I. General Consideration.
II. Elements of the Offense.
V. Practice and Procedure.

I. GENERAL CONSIDERATION.

Cited in State v. Sherrod, — N.C. App. —, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (Aug. 5, 2008).

II. ELEMENTS OF THE OFFENSE.

"About His Person". —
Evidence was insufficient to support defendant's conviction for carrying a concealed weapon in violation of G.S. 14-269(a) as the State failed to present evidence that the backpack in which the weapon was concealed was within arms reach of the driver's seat, where defendant was located, and thus did not prove that the weapon was "about his person." State v. Soles, — N.C. App. —, 662 S.E.2d 564, 2008 N.C. App. LEXIS 1194 (July 1, 2008).

V. PRACTICE AND PROCEDURE.

Indictment Facially Valid. — Trial court did not commit jurisdictional error by entering judgment against defendant for the offense of carrying a concealed weapon after the jury was instructed that it could find defendant guilty only upon a finding that he intentionally carried and concealed about his person one or more knives, while the indictment alleged only that defendant unlawfully carried a concealed weapon, a metallic set of knuckles, because the mention of knives was inadvertent and did not affect the State's burden of proof or constitute a substantial change or variance from the indictment; the indictment charging carrying a concealed weapon pursuant to G.S. 14-269(a) was valid on its face, and the additional language regarding metallic knuckles was mere surplusage and not an essential element of the crime. State v. Bollinger, — N.C. App. —, 665 S.E.2d 136, 2008 N.C. App. LEXIS 1518 (2008).

§ 14-269.2. Weapons on campus or other educational property.

CASE NOTES

Cited in State v. Sherrod, — N.C. App. —, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (Aug. 5, 2008).

§ 14-277.1. Communicating threats.

CASE NOTES

Cited in State v. Adams, — N.C. App. —, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007).

§ 14-277.3: Repealed by Session Laws 2008-167, s. 1, effective December 1, 2008.

Cross References. — For current provisions as to stalking, see G.S. 14-277.3A.

Editor's Note. — Session Laws 2008-167, s. 3, provides: "This act becomes effective December 1, 2008, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 14-277.3A. Stalking.

(a) Legislative Intent. — The General Assembly finds that stalking is a serious problem in this State and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that causes a long-lasting impact on the victim's quality of life and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time.

The General Assembly recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the General Assembly enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences. The General Assembly intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct. The General Assembly recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

(b) Definitions. — The following definitions apply in this section:

(1) Course of conduct. — Two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, is in the presence of, or follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

(2) Harasses or harassment. — Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

(3) Reasonable person. — A reasonable person in the victim's circumstances.

(4) Substantial emotional distress. — Significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(c) Offense. — A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:

(1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.

(2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

(d) Classification. — A violation of this section is a Class A1 misdemeanor. A defendant convicted of a Class A1 misdemeanor under this section, who is sentenced to a community punishment, shall be placed on supervised probation in addition to any other punishment imposed by the court. A defendant who commits the offense of stalking after having been previously convicted of a stalking offense is guilty of a Class F felony. A defendant who commits the offense of stalking when there is a court order in effect prohibiting the conduct described under this section by the defendant against the victim is guilty of a Class H felony.

(e) Jurisdiction. — Pursuant to G.S. 15A-134, if any part of the offense occurred within North Carolina, including the defendant's course of conduct or the effect on the victim, then the defendant may be prosecuted in this State. (2008-167, s. 2.)

Editor's Note. — Session Laws 2008-167, s. 3, provides: "This act becomes effective December 1, 2008, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

Amendment of Indictment. — In a case in which the defendant was prosecuted for stalking and for having previously been convicted of stalking, the State was properly allowed to amend the indictment to place the allegation of the prior offense in a count separate from that of the current offense because the amendment was not a substantial alteration of the charge, prohibited by G.S. 15A-923(e); the amendment merely placed the last two sentences of the single count in the original indictment into a separate count, to comply with G.S. 15A-928, and defendant had prior notice that the State alleged defendant's prior conviction and intended to prove that conviction, so defendant had the opportunity to prepare a defense. State v. Stephens, — N.C. App. —, 655 S.E.2d 435, 2008 N.C. App. LEXIS 74 (2008).

Harassment Could Not Support Civil No-Contact Order. — Finding that a blogger had harassed the victims under G.S. 50C-1(6) and (7) by knowingly publishing electronic or computerized transmissions directed at the victims that tormented, terrorized, or terrified the victims and served no legitimate purpose could not support a civil no-contact order, even though the correct definition of harassment under G.S. 14-277.3(c) was used. Ramsey v.

Harman, — N.C. App. —, 661 S.E.2d 924, 2008 N.C. App. LEXIS 1146 (June 17, 2008).

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36A.

Riots and Civil Disorders.

§ 14-288.4. Disorderly conduct.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Evidence Insufficient for Disorderly Conduct Conviction. — Trial court erred in denying a juvenile's motion to dismiss the charge of disorderly conduct in a school in violation of G.S. 14-288.4(a)(6) because although the juvenile's behavior was an annoyance to the dean of students of a high school, it did not rise to the level of criminal activity; there was no evidence that the school or classroom instruction was substantially disrupted, that the juvenile was aggressive or violent, or that the juvenile used disturbing or vulgar language. In re S.M., — N.C. App. —, 660 S.E.2d 653, 2008 N.C. App. LEXIS 992 (2008).

§ 14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.

CASE NOTES

Cited in State v. Garris, — N.C. App. —, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008).

§ 14-288.20. Certain weapons at civil disorders.

CASE NOTES

Cited in State v. Sherrod, — N.C. App. —, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (Aug. 5, 2008).

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries, Gaming, Bingo and Raffles.

Part 1. Lotteries and Gaming.

§ 14-298. Seizure of illegal gaming items.

Upon a determination that probable cause exists to believe that any gaming table prohibited to be used by G.S. 14-289 through G.S. 14-300, any illegal punchboard or illegal slot machine, or any video game machine prohibited to be used by G.S. 14-306 or G.S. 14-306.1A, or any game terminal described in G.S. 14-306.3(b) is in the illegal possession or use of any person within the limits of their jurisdiction, all sheriffs and law enforcement officers are authorized to seize the items in accordance with applicable State law. Any law enforcement agency in possession of that item shall retain the item pending a disposition order from a district or superior court judge. Upon application by the law enforcement agency, district attorney, or owner, and after notice and opportunity to be heard by all parties, if the court determines that the item is unlawful to possess, it shall enter an order releasing the item to the law enforcement agency for destruction or for training purposes. If the court determines that the item is not unlawful to possess and will not be used in violation of the law, the item shall be ordered released to its owner upon satisfactory proof of ownership. The foregoing procedures for release shall not apply, however, with respect to an item seized for use as evidence in any criminal action or proceeding until after entry of final judgment. (1791, c. 336, P.R.; 1798, c. 502, s. 2, P.R.; R.C., c. 34, s. 74; Code, s. 1049; Rev., s. 3720; C.S., s. 4435; 1931, c. 14, s. 4; 1973, c. 108, s. 11; 2000-151, s. 5; 2004-199, ss. 47(a), 47(b); 2004-203, s. 20(a); 2007-484, s. 3(a); 2008-122, s. 2.)

Effect of Amendments. —

Session Laws 2008-122, s. 2, effective December 1, 2008, and applicable to offenses committed on or after that date, inserted "or any game terminal described in G.S. 14-306.3(b)" near the beginning of the paragraph.

§ 14-306.3. Certain game promotions unlawful.

(a) It is unlawful to promote, operate, or conduct a server-based electronic game promotion.

(b) It is unlawful for any person to possess any game terminal with a display that simulates a game ordinarily played on a slot machine regulated under G.S. 14-306 or a video gaming machine regulated under G.S. 14-306.1A for the purpose of promoting, operating, or conducting a server-based electronic game promotion.

(c) As used in this section, "server-based electronic game promotion" means a system that meets all of the following criteria:

(1) A database contains a pool of entries with each entry associated with a prize value.

(2) Participants purchase, or otherwise obtain by any means, a prepaid card.

(3) With each prepaid card purchased or obtained, the participant also obtains one or more entries.

(4) Entries may be revealed in any of the following ways:
   a. At a point-of-sale terminal at the time of purchase or later.
   b. At a game terminal with a display that simulates a game ordinarily played on a slot machine regulated under G.S. 14-306 or a video gaming machine regulated under G.S. 14-306.1A.

(d) Upon conviction or plea of guilty, all of the following held by the person shall be automatically revoked:

(1) A permit issued under Chapter 18B of the General Statutes.

(2) A contract to sell tickets or shares under Article 5 of Chapter 18C of the General Statutes.

(e) Nothing in this section shall apply to the form of Class III gaming legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8. (2008-122, s. 1.)

Editor's Note. — Session Laws 2008-122, s. 4, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

§ 14-309. Violation made criminal.

(a) Any person who violates any provision of G.S. 14-304 through 14-309 is guilty of a Class 1 misdemeanor for the first offense, and is guilty of a Class H felony for a second offense and a Class G felony for a third or subsequent offense.

(b) Notwithstanding the provisions of subsection (a) of this section, any person violating the provisions of G.S. 14-306.1A involving the operation of five or more machines prohibited by that section is guilty of a Class G felony.

(c) Notwithstanding the provisions of subsection (a) of this section, any person violating the provisions of G.S. 14-306.3(b) involving the possession of five or more machines prohibited by that subsection is guilty of a Class G felony. (1937, c. 196, s. 6; 1993, c. 366, s. 3, c. 539, s. 211; 1994, Ex. Sess., c. 14, s. 9(a), (b); 2000-151, s. 3; 2006-6, s. 11; 2008-122, s. 3.)

Effect of Amendments. — Session Laws 2008-122, s. 3, effective December 1, 2008, and applicable to offenses committed on or after that date, added subsection (c).

ARTICLE 39.

Protection of Minors.

§ 14-315. Selling or giving weapons to minors.

CASE NOTES

Cited in State v. Sherrod, — N.C. App. —, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (Aug. 5, 2008).

§ 14-318.2. Child abuse a Class 1 [A1] misdemeanor.

(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

(b) The Class A1 misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.

(c) A parent who abandons an infant less than seven days of age pursuant to G.S. 14-322.3 shall not be prosecuted under this section for any acts or omissions related to the care of that infant. (1965, c. 472, s. 1; 1971, c. 710, s. 6; 1993, c. 539, s. 223; 1994, Ex. Sess., c. 14, s. 13; c. 24, s. 14(c); 2001-291, s. 4; 2008-191, s. 1.)

Editor's Note. —

Session Laws 2008-191, s. 3, provides: "This act becomes effective December 1, 2008, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Sesson Laws 2008-191, s. 1, effective December 1, 2008, substituted "Class A1" for "Class 1" in subsections (a) and (b). See Editor's note for effective date and applicability.

§ 14-318.4. Child abuse a felony.

(a) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class E felony, except as otherwise provided in subsection (a3) of this section.

(a1) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child, who commits, permits, or encourages any act of prostitution with or by the child is guilty of child abuse and shall be punished as a Class E felon.

(a2) Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class E felony.

(a3) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class C felony.

(a4) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class E felony if the act or omission results in serious bodily injury to the child.

(a5) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class H felony if the act or omission results in serious physical injury to the child.

(b) The felony of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.

(c) Abandonment of an infant less than seven days of age pursuant to G.S. 14-322.3 may be treated as a mitigating factor in sentencing for a conviction under this section involving that infant.

(d) The following definitions apply in this section:

(1) Serious bodily injury. — Bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

(2) Serious physical injury. — Physical injury that causes great pain and suffering. The term includes serious mental injury. (1979, c. 897, s. 1; 1979, 2nd Sess., c. 1316, s. 18; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 653, s. 1; c. 916, § 1; 1985, c. 509, s. 5; c. 668; 1993, c. 539, s. 1233; 1994, Ex. Sess., c. 24, s. 14(c); 1999-451, s. 1; 2001-291, s. 5; 2008-191, s. 2.)

Editor's Note. —

Session Laws 2008-191, s. 3, provides: "This act becomes effective December 1, 2008, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Sesson Laws 2008-191, s. 2, substituted "child" for "juvenile" in subsection (a1); substituted "the child" for "a juvenile" in subsection (a2); deleted the second sentence in subsection (a3), which defined "serious bodily injury"; added subsections (a4), (a5), and (d). See Editor's note for effective date and applicability.

CASE NOTES

Jury Instructions Proper. — Jury instruction allowing the jury to find defendant guilty of felonious child abuse if the jury found that defendant intentionally inflicted serious bodily injury to the child or intentionally assaulted the child proximately resulting in serious bodily injury was proper, as was a jury instruction providing that the jury could find the requisite intent through culpable or criminal negligence. State v. Oakman, — N.C. App. —, 663 S.E.2d 453, 2008 N.C. App. LEXIS 1493 (Aug. 5, 2008).

ARTICLE 44.

Regulation of Sales.

§ 14-344. (Effective until June 30, 2009) Sale of admission tickets in excess of printed price.

Any person, firm, or corporation shall be allowed to add a reasonable service fee to the face value of the tickets sold, and the person, firm, or corporation which sells or resells such tickets shall not be permitted to recoup funds greater than the combined face value of the ticket, tax, and the authorized service fee. This service fee may not exceed three dollars ($3.00) for each ticket except that a promoter or operator of the property where the event is to be held and a ticket sales agency may agree in writing on a reasonable service fee greater than three dollars ($3.00) for the first sale of tickets by the ticket sales agent. This service fee may be a pre-established amount per ticket or a percentage of each ticket. The existence of the service fee shall be made known to the public by printing or writing the amount of the fee on the tickets which are printed for the event. Any person, firm or corporation which sells or offers to sell a ticket for a price greater than the price permitted by this section or as permitted by G.S. 14-344.1 shall be guilty of a Class 2 misdemeanor. (1941, c. 180; 1969, c. 1224, s. 8; 1977, c. 9; 1979, c. 909; 1981, c. 36; 1985, c. 434; 1991, c. 165, s. 1; 1993, c. 539, s. 232; 1994, Ex. Sess., c. 24, s. 14(c); 2008-158, s. 3.)

Section Set Out Twice. — The section above is effective until June 30, 2009. For the section as amended June 30, 2009, see the following section, also numbered G.S. 14-344.

Editor's Note. — Session Laws 2008-158, s. 4, provides: "This act becomes effective August 1, 2008, and expires June 30, 2009. The expiration of this act does not relieve a person's liability to file the report required under G.S. 14-344.1(e) for gross receipts received in June 2009. Liability for acts or omissions before the expiration date of this act are not abated or affected by the expiration. Section 3 of this act applies to offenses committed on or after that date."

Effect of Amendments. — Session Laws 2008-158, s. 3, inserted "or as permitted by G.S. 14-344.1" near the end of the paragraph. See Editor's note for effective date, expiration date, and applicability.

§ 14-344. (Effective June 30, 2009) Sale of admission tickets in excess of printed price.

Any person, firm, or corporation shall be allowed to add a reasonable service fee to the face value of the tickets sold, and the person, firm, or corporation which sells or resells such tickets shall not be permitted to recoup funds greater than the combined face value of the ticket, tax, and the authorized service fee. This service fee may not exceed three dollars ($3.00) for each ticket except that a promoter or operator of the property where the event is to be held and a ticket sales agency may agree in writing on a reasonable service fee greater than three dollars ($3.00) for the first sale of tickets by the ticket sales agent. This service fee may be a pre-established amount per ticket or a percentage of each ticket. The existence of the service fee shall be made known to the public by printing or writing the amount of the fee on the tickets which are printed for the event. Any person, firm or corporation which sells or offers to sell a ticket for a price greater than the price permitted by this section shall be guilty of a Class 2 misdemeanor. (1941, c. 180; 1969, c. 1224, s. 8; 1977, c. 9; 1979, c. 909; 1981, c. 36; 1985, c. 434; 1991, c. 165, s. 1; 1993, c. 539, s. 232; 1994, Ex. Sess., c. 24, s. 14(c); 2008-158, ss. 3, 4.)

Section Set Out Twice. — The section above is above is effective June 30, 2009. For the section as in effect until June 30, 2009, see the preceding section, also numbered G.S. 14-344.

§ 14-344.1. (Expires June 30, 2009) Internet sale of admission tickets in excess of printed price.

(a) Internet Resale. — A person may resell an admission ticket under this section on the Internet at a price greater than the price on the face of the ticket unless the venue where the event will occur prohibits the Internet ticket resale as provided under subsection (b) of this section. To resell an admission ticket under this section, the person reselling the ticket must offer the ticket for resale on a Web site with a ticket guarantee that meets the requirements of subsection (c) of this section. A prospective purchaser must be directed to the guarantee before completion of the resale transaction. A person who resells an admission ticket under this section acknowledges liability for the informational report required under subsection (e) of this section.

(b) Resale Prohibited. — The venue where an event will occur may prohibit the resale of admission tickets for the event at a price greater than the price on the face of the ticket. To prohibit the resale of tickets under this section, the venue must file a notice of prohibition of the resale of admission tickets for a specified event with the Secretary of State and must post the notice of prohibition conspicuously on its Web site. The primary ticket seller for the event must also post the notice conspicuously on its Web site. A prohibition under this subsection may not become valid until 30 days after the notice is posted on the venue's Web site. The prohibition expires on December 31 of each year unless the prohibition is renewed. To renew a prohibition, a venue must renew its notice of prohibition filed with the Secretary of State and must post the notice as required under this subsection. A venue who files a notice of prohibition must pay a fee in the amount set in G.S. 55-1-22 for filing articles of incorporation. A venue that renews a notice of prohibition must pay a fee in the amount set in G.S. 55-1-22 for filing a paper annual report.

(c) Ticket Guarantee. — A person who resells or offers to resell admission tickets under this section must guarantee to the purchaser a full refund of the amount paid for the ticket under each of the following conditions:

(1) The ticketed event is cancelled. Reasonable handling and delivery fees may be withheld from the refund price of a cancelled ticketed event if the ticket guarantee on the Web site specifically informs the purchaser that handling and delivery fees will be withheld from the refunded amount.

(2) The purchaser is denied admission to the ticketed event. This subdivision does not apply if admission to the ticketed event is denied to the purchaser because of an action or omission of the purchaser.

(3) The ticket is not delivered to the purchaser in the manner described on the Web site or pursuant to the delivery guarantee made by the reseller, and the failure results in the purchaser's inability to attend the ticketed event.

(d) Student Tickets. — This section does not apply to student tickets issued by institutions of higher education in North Carolina for sporting events.

(e) Report on Receipts. — A person who resells or offers to resell admission tickets under this section must report each month to the Department of Revenue, under oath, on a form provided by the Department. The report is due by the 10th day after the end of each month and covers the gross receipts received during the previous month from reselling admission tickets to an event or venue in this State. The report must include all of the following:

(1) The total amount of gross receipts derived from reselling an admission ticket on the Internet to an event or venue in this State. For purposes of this subsection, gross receipts exclude the price printed on the face of the ticket.
(2) The event for which admission tickets are sold and the venue where the event will occur.
(3) The person or venue from whom the reseller purchased admission tickets.
(4) The acquisition price of the admission tickets.
(5) The price received by the reseller for the admission tickets.
(6) The name and address of the person to whom the admission ticket is resold, if the purchaser is a reseller.
(7) Any other information required by the Secretary of Revenue. (2008-158, s. 1.)

Editor's Note. — Session Laws 2008-158, s. 4, provides: "This act becomes effective August 1, 2008, and expires June 30, 2009. The expiration of this act does not relieve a person's liability to file the report required under G.S. 14-344.1(e) for gross receipts received in June 2009. Liability for acts or omissions before the expiration date of this act are not abated or affected by the expiration. Section 3 of this act applies to offenses committed on or after that date."

§ 14-344.2. (Expires June 30, 2009) Prohibition on ticket purchasing software.

(a) Definition. — The term "ticket seller" means a person who has executed a written agreement with the management of any venue in North Carolina for a sporting event, theater, musical performance, or public entertainment of any kind to sell tickets to the event over the Internet.

(b) Unfair Trade Practice. — A person who knowingly sells, gives, transfers, uses, distributes, or possesses software that is primarily designed or produced for the purpose of interfering with the operation of a ticket seller who sells, over the Internet, tickets of admission to a sporting event, theater, musical performance, or public entertainment of any kind by circumventing any security measures on the ticket seller's Web site, circumventing any access control systems of the ticket seller's Web site, circumventing any access control solutions of the ticket seller's Web site, or circumventing any controls or measures that are instituted by the ticket seller on its Web site to ensure an equitable ticket buying process shall be in violation of G.S. 75-1.1. The ticket seller and venue hosting the ticketed event have standing to bring a private right of action under G.S. 75-1.1 for violation of this section.

(c) Original Ticket Seller. — A person or firm is not liable under this section with respect to tickets for which the person or firm is the original ticket seller. (2008-158, s. 2.)

Editor's Note. — Session Laws 2008-158, s. 4, provides: "This act becomes effective August 1, 2008, and expires June 30, 2009. The expiration of this act does not relieve a person's liability to file the report required under G.S. 14-344.1(e) for gross receipts received in June 2009. Liability for acts or omissions before the expiration date of this act are not abated or affected by the expiration. Section 3 of this act applies to offenses committed on or after that date."

Article 47.

Cruelty to Animals.

§ 14-360. Cruelty to animals; construction of section.

CASE NOTES

Cited in State v. Hinkle, — N.C. App. —, 659 S.E.2d 34, 2008 N.C. App. LEXIS 705 (2008).

Article 52.

Miscellaneous Police Regulations.

§ 14-399. Littering.

CASE NOTES

Private dumpster is a "litter receptacle" within the meaning of G.S. 14-399(a). State v. Hinkle, — N.C. App. —, 659 S.E.2d 34, 2008 N.C. App. LEXIS 705 (2008).

Trial court erred by denying defendants' motion to dismiss littering charges under G.S. 14-399(a) because the State failed to present substantial evidence that a dumpster behind a grocery store, into which defendants deposited plastic bags containing dead animals, was not a litter receptacle. The word "receptacle" in the statute included a broad range of containment vessels. State v. Hinkle, — N.C. App. —, 659 S.E.2d 34, 2008 N.C. App. LEXIS 705 (2008).

Article 52A.

Sale of Weapons in Certain Counties.

§ 14-403. Permit issued by sheriff; form of permit; expiration of permit.

CASE NOTES

Cited in Waldron v. Batten, — N.C. App. —, 662 S.E.2d 568, 2008 N.C. App. LEXIS 1193 (July 1, 2008).

§ 14-404. Issuance or refusal of permit; appeal from refusal; grounds for refusal; sheriff's fee.

(a) Upon application, the sheriff shall issue the license or permit to a resident of that county, unless the purpose of the permit is for collecting, in which case a sheriff can issue a permit to a nonresident, when the sheriff has done all of the following:

(1) Verified, before the issuance of a permit, by a criminal history background investigation that it is not a violation of State or federal

law for the applicant to purchase, transfer, receive, or possess a handgun. The sheriff shall determine the criminal and background history of any applicant by accessing computerized criminal history records as maintained by the State Bureau of Investigation and the Federal Bureau of Investigation, by conducting a national criminal history records check, by conducting a check through the National Instant Criminal Background Check System (NICS), and by conducting a criminal history check through the Administrative Office of the Courts.

(2) Fully satisfied himself or herself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant.

(3) Fully satisfied himself or herself that the applicant desires the possession of the weapon mentioned for (i) the protection of the home, business, person, family or property, (ii) target shooting, (iii) collecting, or (iv) hunting.

(b) If the sheriff is not fully satisfied, the sheriff may, for good cause shown, decline to issue the license or permit and shall provide to the applicant within seven days of the refusal a written statement of the reason(s) for the refusal. An appeal from the refusal shall lie by way of petition to the chief judge of the district court for the district in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal, and shall be final.

(c) A permit may not be issued to the following persons:

(1) One who is under an indictment or information for or has been convicted in any state, or in any court of the United States, of a felony (other than an offense pertaining to antitrust violations, unfair trade practices, or restraints of trade). However, a person who has been convicted of a felony in a court of any state or in a court of the United States and who is later pardoned may obtain a permit, if the purchase or receipt of a pistol or crossbow permitted in this Article does not violate a condition of the pardon.

(2) One who is a fugitive from justice.

(3) One who is an unlawful user of or addicted to marijuana or any depressant, stimulant, or narcotic drug (as defined in 21 U.S.C. section 802).

(4) One who has been adjudicated mentally incompetent or has been committed to any mental institution.

(5) One who is an alien illegally or unlawfully in the United States.

(6) One who has been discharged from the armed forces under dishonorable conditions.

(7) One who, having been a citizen of the United States, has renounced his or her citizenship.

(8) One who is subject to a court order that:

a. Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;

b. Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner of the person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

c. Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

(d) Nothing in this Article shall apply to officers authorized by law to carry firearms if the officers identify themselves to the vendor or donor as being officers authorized by law to carry firearms and state that the purpose for the purchase of the firearms is directly related to the law officers' official duties.

(e) The sheriff shall charge for the sheriff's services upon issuing the license or permit a fee of five dollars ($5.00).

(f) Each applicant for a license or permit shall be informed by the sheriff within 30 days of the date of the application whether the license or permit will be granted or denied and, if granted, the license or permit shall be immediately issued to the applicant.

(g) An applicant shall not be ineligible to receive a permit under subsection [subdivision] (4) of subsection (c) of this section because of involuntary commitment to mental health services if the individual's rights have been restored under G.S. 122C-54.1. (1919, c. 197, s. 3; C.S., s. 5108; 1959, c. 1073, s. 2; 1969, c. 73; 1981 (Reg. Sess., 1982), c. 1395, s. 1; 1987, c. 518, s. 1; 1995, c. 487, s. 2; 2006-39, s. 1; 2006-264, s. 4; 2008-210, s. 3(a).)

Effect of Amendments. —
Session Laws 2008-210, s. 3(a), effective December 1, 2008, added subsection (g).

CASE NOTES

Involuntarily Committed Applicant. — G.S. 14-404(c)(4) did not support the denial of a gun permit application to an applicant since the G.S. 122C-261(e), 122C-262 122C-263, 122C-266, and 122C-268 requirements were not met, even though the applicant was taken for an involuntary psychiatric examination when the applicant was 21 years old; neither inpatient nor outpatient commitment was recommended. Waldron v. Batten, — N.C. App. —, 662 S.E.2d 568, 2008 N.C. App. LEXIS 1193 (July 1, 2008).

ARTICLE 54A.

The Felony Firearms Act.

§ 14-415.1. Possession of firearms, etc., by felon prohibited.

CASE NOTES

Constitutionality. —
Defendant's prior conviction was not an "offense" within the meaning of the Double Jeopardy Clause when construed with defendant's conviction of possession of a firearm by a felon under G.S. 14-415.1(a). State v. Coltrane, — N.C. App. —, 656 S.E.2d 322, 2008 N.C. App. LEXIS 194 (2008).

Simultaneous Possession Only Supports Single Conviction. — Trial court erred by entering two felony convictions for possession of a firearm by a felon because defendant possessed the firearms simultaneously; defendant should have been convicted and sentenced only once for his possession of both firearms. State v. Garris, — N.C. App. —, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008).

Indictment Upheld. —
Because the date of the offense was not an essential element of the offense of possession of a firearm by a felon in G.S. 14-415.1, the state was properly allowed to amend the indictment under G.S. 15A-923. State v. Coltrane, — N.C. App. —, 656 S.E.2d 322, 2008 N.C. App. LEXIS 194 (2008).

Applied in State v. Cunningham, — N.C. App. —, 656 S.E.2d 697, 2008 N.C. App. LEXIS 260 (2008).

Cited in State v. Hagans, — N.C. App. —, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008); State v. Little, — N.C. App. —, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008).

ARTICLE 54B.

Concealed Handgun Permit.

§ 14-415.12. Criteria to qualify for the issuance of a permit.

(a) The sheriff shall issue a permit to an applicant if the applicant qualifies under the following criteria:

(1) The applicant is a citizen of the United States and has been a resident of the State 30 days or longer immediately preceding the filing of the application.

(2) The applicant is 21 years of age or older.

(3) The applicant does not suffer from a physical or mental infirmity that prevents the safe handling of a handgun.

(4) The applicant has successfully completed an approved firearms safety and training course which involves the actual firing of handguns and instruction in the laws of this State governing the carrying of a concealed handgun and the use of deadly force. The North Carolina Criminal Justice Education and Training Standards Commission shall prepare and publish general guidelines for courses and qualifications of instructors which would satisfy the requirements of this subdivision. An approved course shall be any course which satisfies the requirements of this subdivision and is certified or sponsored by:

a. The North Carolina Criminal Justice Education and Training Standards Commission,

b. The National Rifle Association, or

c. A law enforcement agency, college, private or public institution or organization, or firearms training school, taught by instructors certified by the North Carolina Criminal Justice Education and Training Standards Commission or the National Rifle Association.

Every instructor of an approved course shall file a copy of the firearms course description, outline, and proof of certification annually, or upon modification of the course if more frequently, with the North Carolina Criminal Justice Education and Training Standards Commission.

(5) The applicant is not disqualified under subsection (b) of this section.

(b) The sheriff shall deny a permit to an applicant who:

(1) Is ineligible to own, possess, or receive a firearm under the provisions of State or federal law.

(2) Is under indictment or against whom a finding of probable cause exists for a felony.

(3) Has been adjudicated guilty in any court of a felony.

(4) Is a fugitive from justice.

(5) Is an unlawful user of, or addicted to marijuana, alcohol, or any depressant, stimulant, or narcotic drug, or any other controlled substance as defined in 21 U.S.C. § 802.

(6) Is currently, or has been previously adjudicated by a court or administratively determined by a governmental agency whose decisions are subject to judicial review to be, lacking mental capacity or mentally ill. Receipt of previous consultative services or outpatient treatment alone shall not disqualify an applicant under this subdivision.

(7) Is or has been discharged from the armed forces under conditions other than honorable.

(8) Is or has been adjudicated guilty of or received a prayer for judgment continued or suspended sentence for one or more crimes of violence

constituting a misdemeanor, including but not limited to, a violation of a misdemeanor under Article 8 of Chapter 14 of the General Statutes, or a violation of a misdemeanor under G.S. 14-225.2, 14-226.1, 14-258.1, 14-269.2, 14-269.3, 14-269.4, 14-269.6, 14-276.1, 14-277, 14-277.1, 14-277.2, 14-277.3, 14-281.1, 14-283, 14-288.2, 14-288.4(a)(1) or (2), 14-288.6, 14-288.9, 14-288.12, 14-288.13, 14-288.14, 14-318.2, 14-415.21(b), or 14-415.26(d).

(9) Has had entry of a prayer for judgment continued for a criminal offense which would disqualify the person from obtaining a concealed handgun permit.

(10) Is free on bond or personal recognizance pending trial, appeal, or sentencing for a crime which would disqualify him from obtaining a concealed handgun permit.

(11) Has been convicted of an impaired driving offense under G.S. 20-138.1, 20-138.2, or 20-138.3 within three years prior to the date on which the application is submitted.

(c) An applicant shall not be ineligible to receive a concealed carry permit under subdivision (6) of subsection (b) of this section because of involuntary commitment to mental health services if the individual's rights have been restored under G.S. 122C-54.1. (1995, c. 398, s. 1; c. 509, s. 135.3(d); 1997-441, s. 4; 2007-427, s. 5; 2008-210, s. 3(b).)

Editor's Note. — Former G.S. 14-277.3, referred to above, was repealed by Session Laws 2008-167, s. 1, effective December 1, 2008. For current provisions as to stalking, see G.S. 14-277.3A.

Effect of Amendments. —

Session Laws 2008-210, s. 3(b), effective December 1, 2008, added subsection (c).

Article 58.

Records, Tapes and Other Recorded Devices.

§ 14-435. Recorded devices to show true name and address of manufacturer.

CASE NOTES

Cited in Durham Hous. Auth. v. Partee, — N.C. App. —, 658 S.E.2d 69, 2008 N.C. App. LEXIS 535 (Mar. 18, 2008).

Article 58A.

Audiovisual Recordings.

§ 14-440.1. Unlawful operation of an audiovisual recording device.

(a) Definitions. — The following definitions apply to this section:

(1) "Audiovisual recording device" means a digital or analog video camera, or any other technology or device now known or later developed, capable of recording, copying, or transmitting a motion picture, or any part thereof, regardless of whether audiovisual recording is the sole or primary purpose of the device.

(2) "Motion picture theater" means a movie theater, screening room, or other venue that is being utilized primarily for the exhibition of a motion picture at the time of the offense.

(a1) Misdemeanor Offense. — Any person who knowingly operates or attempts to operate a device capable of functioning as a digital or analog photographic camera for the purpose of recording, copying, or transmitting a part of a motion picture not greater than one image, without the written consent of the motion picture theater owner shall be guilty of a Class 1 misdemeanor.

(b) Felony Offense. — Any person who knowingly operates or attempts to operate an audiovisual recording device in a motion picture theater to transmit, record, or otherwise make a copy of a motion picture, or any part thereof, without the written consent of the motion picture theater owner shall be guilty of a felony, punishable as provided in subsection (c) of this section.

(c) Penalty. — A violation of subsection (b) of this section is punishable as follows:

(1) Unless the conduct is covered under some other provision of law providing greater punishment, any person convicted of a violation of subsection (b) of this section is guilty of:
  a. A Class I felony, if the violation is a first offense under this section, with a minimum fine of two thousand five hundred dollars ($2,500).
  b. A Class I felony, if the violation is a second or subsequent offense under this section, with a minimum fine of five thousand dollars ($5,000).

(2) If a person is convicted of a violation of subsection (b) of this section, the court, in its judgment of conviction, shall order the forfeiture and destruction or other disposition of the following:
  a. All unauthorized copies of motion pictures or other audiovisual works, or any parts thereof.
  b. All implements, devices, and equipment used or intended to be used in connection with the offense.

(d) Immunity of Certain Persons. — The owner or lessee of a motion picture theater, or the authorized agent or employee of the owner or lessee, who detains any person shall not be held civilly liable for claims arising out of such detention, when the detention is upon the premises of the motion picture theater or in a reasonable proximity thereto, is in a reasonable manner for a reasonable length of time, and, if in detaining the person, the owner, lessee, agent, or employee had, at the time of the detention, probable cause to believe that the person committed an offense under this section. If the person being detained by the owner, lessee, agent, or employee is a minor under the age of 18 years, the owner, lessee, agent, or employee shall call or notify, or make a reasonable effort to call or notify, the parent or guardian of the minor during the period of detention. An owner, lessee, agent, or employee who makes a reasonable effort to call or notify the parent or guardian of the minor shall not be held civilly liable for failing to notify the parent or guardian of the minor.

(e) Authorized Activities. — This section does not prevent any lawfully authorized investigative, protective, law enforcement, or intelligence gathering employee or agent of a local, State, or federal government from operating any audiovisual recording device in a motion picture theater, as part of lawfully authorized investigative, protective, law enforcement, or intelligence gathering activities. (2005-301, s. 1; 2007-463, s. 1; 2007-484, s. 43.7J.)

Editor's Note. —
The text of this section has been set out in the supplement to correct a publishing error in the main volume.

Article 60.

Computer-Related Crime.

§ 14-458. Computer trespass; penalty.

CASE NOTES

Applied in Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

Chapter 15.

Criminal Procedure.

ARTICLE 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

CASE NOTES

Constitutionality of Section. — Process of indictment by grand jury pursuant to G.S. 15-144 adequately safeguards a defendant's rights under the Federal and North Carolina Constitutions. State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

Indictment in form prescribed by this section is sufficient, etc.

Short-form murder indictment under G.S. 15-144 was sufficient to allege first-degree murder under theories of both premeditation and deliberation and felony murder. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

§ 15-144.1. Essentials of bill for rape.

CASE NOTES

Use of Words "And/Or" in Indictment Acceptable. — Use of the words "and/or" did not render a short form indictment for rape facially invalid because a person of common understanding would know that the intent of the indictment was to accuse defendant of having sexual intercourse with a person deemed by law to be incapable of giving consent. In turn, this language was sufficient to notify defendant of the charges against him in order to prepare an adequate defense and to protect him from being punished a second time for the same act. State v. Haddock, — N.C. App. —, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

Cited in State v. Smith, — N.C. App. —, 660 S.E.2d 82, 2008 N.C. App. LEXIS 906 (2008).

§ 15-144.2. Essentials of bill for sex offense.

CASE NOTES

Cited in State v. Smith, — N.C. App. —, 660 S.E.2d 82, 2008 N.C. App. LEXIS 906 (2008).

§ 15-153. Bill or warrant not quashed for informality.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007); State v. McCallum, — N.C. App. —, 653 S.E.2d 915, 2007 N.C. App. LEXIS 2561 (2007); State v. Tollison, — N.C. App. —, 660 S.E.2d 647, 2008 N.C. App. LEXIS 1002 (2008).

ARTICLE 17.

Trial in Superior Court.

§ 15-173. Demurrer to the evidence.

CASE NOTES

- V. Denial of Motion.
  - B. Appeal from Denial of Motion.

V. DENIAL OF MOTION.

B. Appeal from Denial of Motion.

Question on Appeal Where Defendant Offers Evidence. — Because defendant failed to renew his motion for dismissal at the close of all the evidence, defendant failed to preserve the issue of whether the court properly denied his motion to dismiss the charges against him for appellate review. State v. Brunson, — N.C. App. —, 653 S.E.2d 552, 2007 N.C. App. LEXIS 2421 (2007).

Denial of Motion to Dismiss Was Proper. — Where the victim, defendant's girlfriend, stated that defendant was angry that she had called the police after she discovered her car was gone, and had strangled, raped, and threatened to kill her, and her testimony was corroborated by witnesses who saw her afterwards, the trial court properly denied defendant's motion to dismiss. State v. Brunson, — N.C. App. —, 653 S.E.2d 552, 2007 N.C. App. LEXIS 2421 (2007).

Chapter 15A.

Criminal Procedure Act.

SUBCHAPTER I. GENERAL.

Article 5.

Expunction of Records.

Sec.
15A-145. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor; expunction of certain other misdemeanors.

SUBCHAPTER V. CUSTODY.

Article 26.

Bail.

Part 1. General Provisions.

15A-533. Right to pretrial release in capital and noncapital cases.

SUBCHAPTER VIII-A. RIGHTS OF CRIME VICTIMS AND WITNESSES.

Article 46.

Crime Victims' Rights Act.

15A-831. Responsibilities of law enforcement agency.

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

Article 81B.

Structured Sentencing of Persons Convicted of Crimes.

Part 2. Felony Sentencing.

15A-1340.16. Aggravated and mitigated sentences.

Sec.
15A-1340.16A. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threatened to use or display a firearm or deadly weapon during the commission of the felony.

Article 82.

Probation.

15A-1342. Incidents of probation.
15A-1344. Response to violations; alteration and revocation.
15A-1345. Arrest and hearing on probation violation.

Article 84A.

Post-Release Supervision.

15A-1368.6. Arrest and hearing on post-release supervision violation.

Article 84B.

Medical Release of Inmates.

15A-1369. Definitions.
15A-1369.1. Authority to release.
15A-1369.2. Eligibility.
15A-1369.3. Procedure for medical release.
15A-1369.4. Conditions of medical release.
15A-1369.5. Change in medical status.

SUBCHAPTER I. GENERAL.

Article 1.

Definitions and General Provisions.

§ 15A-101. Definitions.

CASE NOTES

Applied in State v. Newman, 186 N.C. App. 382, 651 S.E.2d 584, 2007 N.C. App. LEXIS 2201 (2007).

ARTICLE 4.

Entry and Withdrawal of Attorney in Criminal Case.

§ 15A-143. Attorney making general entry obligated to represent defendant at all subsequent stages.

CASE NOTES

Abandoning Client. —

Clear, cogent, and convincing evidence supported the Disciplinary Hearing Commission's findings and conclusions that the attorney violated N.C. Rev. R. Prof. Conduct Rule 1.16, regarding the termination of representation, Rule 1.3, about neglecting client matters, and Rule 8.4, prejudicing the administration of justice, in violation of an earlier Consent Order of Discipline resulting in the attorney's license suspension. The attorney's conduct violated those rules because the attorney stopped representing the client when the client notified the attorney that she could not pay an additional sum to represent the client on probation violation matters, and the attorney did not obtain permission from the trial court to withdraw from representing her after the attorney had appeared on her behalf. N.C. State Bar v. Key, — N.C. App. —, 654 S.E.2d 55, 2007 N.C. App. LEXIS 2576 (2007), aff'd on rehearing, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008).

Willful refusal to appear in court on behalf of a client, in contravention of G.S. 15A-143, violates the Rule of Diligence to a client and amounts to conduct that has a reasonable likelihood of prejudicing the administration of justice, N.C. Rev. R. Prof. Conduct 8.4. N.C. State Bar v. Key, — N.C. App. —, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008).

ARTICLE 5.

Expunction of Records.

§ 15A-145. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor; expunction of certain other misdemeanors.

(a) Whenever any person who has (i) not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor other than a traffic violation, or (ii) not yet attained the age of 21 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor possession of alcohol pursuant to G.S. 18B-302(b)(1), he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than: (i) two years after the date of the conviction, or (ii) the completion of any period of probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the two-year period following that conviction.

(5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against him are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the two-year period that he deems desirable.

(b) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for two years from the date of conviction of the misdemeanor in question, the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against him, and (i) petitioner was not 18 years old at the time of the conviction in question, or (ii) petitioner was not 21 years old at the time of the conviction of possession of alcohol pursuant to G.S. 18B-302(b)(1), it shall order that such person be restored, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of him for any purpose.

(c) The court shall also order that the said misdemeanor conviction, or a civil revocation of a drivers license as the result of a criminal charge, be expunged from the records of the court, and direct all law-enforcement agencies, including the Division of Motor Vehicles, bearing record of the same to expunge their records of the conviction or a civil revocation of a drivers license as the result of a criminal charge. This subsection does not apply to civil or criminal charges based upon the civil revocation, or to civil revocations under G.S. 20-16.2. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The clerk shall forward a certified copy of the order to the Division of Motor Vehicles for the expunction of a civil revocation provided the underlying criminal charge is also expunged. The civil revocation of a drivers license shall not be expunged prior to a final disposition of any pending civil or criminal charge based upon the civil revocation. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(d) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted a discharge under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted a discharge.

(e) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of one hundred twenty-five dollars ($125.00) at the time the petition is filed. Fees collected under this subsection shall be deposited in the General Fund. This subsection does not apply to petitions filed by an indigent. (1973, c. 47, s. 2; c. 748; 1975, c. 650, s. 5; 1977, c. 642, s. 1; c. 699, ss. 1, 2; 1979, c. 431, ss. 1, 2; 1985, c. 636, s. 1; 1999-406, s. 8; 2002-126, ss. 29A.5(a), (b); 2004-133, s. 1; 2005-276, s. 43.1(e); 2007-509, s. 1; 2008-187, s. 35.)

Effect of Amendments. —
Session Laws 2008-187, s. 35, effective August 7, 2008, added clause (i) and (ii) designators in the second sentence of the first paragraph of subsection (a), and made related changes.

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

Article 9.

Search and Seizure by Consent.

§ 15A-221. General authorization; definition of "consent".

CASE NOTES

Cited in State v. Doe, — N.C. App. —, 661 S.E.2d 272, 2008 N.C. App. LEXIS 1085 (2008).

§ 15A-222. Person from whom effective consent may be obtained.

CASE NOTES

Consent of Spouse to Search Hotel Room. — Officer reasonably accepted consent from defendant's wife to search the hotel room where the two were staying, as the wife was found outside the room, identified herself, and explained that the wife was staying in the subject room with defendant. State v. Toney, — N.C. App. —, 653 S.E.2d 187, 2007 N.C. App. LEXIS 2448 (2007).

Cited in State v. Doe, — N.C. App. —, 661 S.E.2d 272, 2008 N.C. App. LEXIS 1085 (2008).

Article 11.

Search Warrants.

§ 15A-244. Contents of the application for a search warrant.

CASE NOTES

III. Affidavits and Informants.

III. AFFIDAVITS AND INFORMANTS.

Affidavit Insufficient. — Evidence seized pursuant to a search warrant was properly suppressed because, inter alia, the affidavit supporting the search warrant merely stated that the confidential informant had visited the described location and made controlled purchases of cocaine at the location, without particularly stating which, if any, of the two dwellings the informant entered to make the purchases. In addition, the special agent had only been working in law enforcement for two years at the time the agent applied for the search warrant, and failed to include facts regarding whether the agent observed the transactions between the confidential informant and the seller, thereby failing to establish the identity of the seller as defendant. State v. Taylor, — N.C. App. —, 664 S.E.2d 421, 2008 N.C. App. LEXIS 1504 (2008).

ARTICLE 13.

DNA Database and Databank.

§ 15A-266.4. Blood sample required for DNA analysis upon conviction or finding of not guilty by reason of insanity.

Editor's Note. —
Former G.S. 14-277.3, referred to in this section, was repealed by Session Laws 2008-167, s. 1, effective December 1, 2008. For current provisions as to stalking, see G.S. 14-277.3A.

ARTICLE 14A.

Eyewitness Identification Reform Act.

§ 15A-284.51. (Effective March 1, 2008) Purpose.

CASE NOTES

Cited in State v. Washington, — N.C. App. —, 665 S.E.2d 799, 2008 N.C. App. LEXIS 1625 (2008).

ARTICLE 16.

Electronic Surveillance.

§ 15A-286. Definitions.

CASE NOTES

Summary Judgment Properly Granted. — In a business dispute involving asserted allegations of breach of a covenant-not-to-compete and other claims, including a counterclaim for interception of wire communication, the trial court properly granted plaintiff summary judgment on the interception of wire communication counterclaim as plaintiff was the provider of the voicemail and e-mail accounts accessed after defendants had left the company. As the provider of those accounts, plaintiff had the right to access them to retrieve business-related correspondence and protect its rights and property. Kinesis Adver., Inc. v. Hill, — N.C. App. —, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008).

§ 15A-287. Interception and disclosure of wire, oral, or electronic communications prohibited.

CASE NOTES

Summary Judgment Properly Granted. — In a business dispute involving asserted allegations of breach of a covenant-not-to-compete and other claims, including a counterclaim for interception of wire communication, the trial court properly granted plaintiff summary judgment on the interception of wire communication counterclaim as plaintiff was the provider of the voicemail and e-mail accounts accessed after defendants had left the company. As the provider of those accounts, plaintiff had the right to access them to retrieve business-related correspondence and protect its rights and property. Kinesis Adver., Inc. v. Hill, — N.C. App. —, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008).

SUBCHAPTER III. CRIMINAL PROCESS.

Article 17.

Criminal Process.

§ 15A-304. Warrant for arrest.

CASE NOTES

Cited in State v. Morgan, — N.C. App. —, 660 S.E.2d 545, 2008 N.C. App. LEXIS 688 (2008).

SUBCHAPTER IV. ARREST.

Article 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

CASE NOTES

IV. Use of Force in Arrest.

IV. USE OF FORCE IN ARREST.

Discretion of Officer in Use of Force. — Defendant was not entitled to a jury instruction on perfect or imperfect self-defense because the trial court could reasonably have found that when the officer fired at defendant, the officer acted within the officer's discretion given defendant's threat to shoot and the officer's belief that defendant had weapons on defendant's person or within the bag defendant carried. State v. Garris, — N.C. App. —, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008).

SUBCHAPTER V. CUSTODY.

Article 23.

Police Processing and Duties upon Arrest.

§ 15A-501. Police processing and duties upon arrest generally.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in State v. Zamora-Ramos, — N.C. App. —, 660 S.E.2d 151, 2008 N.C. App. LEXIS 896 (2008).

Cited in State v. Labinski, — N.C. App. —, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

Article 24.

Initial Appearance.

§ 15A-511. Initial appearance.

CASE NOTES

Cited in State v. Morgan, — N.C. App. —, 660 S.E.2d 545, 2008 N.C. App. LEXIS 688 (2008).

Article 26.

Bail.

Part 1. General Provisions.

§ 15A-533. Right to pretrial release in capital and noncapital cases.

(a) A defendant charged with any crime, whether capital or noncapital, who is alleged to have committed this crime while still residing in or subsequent to his escape or during an unauthorized absence from involuntary commitment in a mental health facility designated or licensed by the Department of Health and Human Services, and whose commitment is determined to be still valid by the judge or judicial officer authorized to determine pretrial release to be valid, has no right to pretrial release. In lieu of pretrial release, however, the individual shall be returned to the treatment facility in which he was residing at the time of the alleged crime or from which he escaped or absented himself for continuation of his treatment pending the additional proceedings on the criminal offense.

(b) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534.

(c) A judge may determine in his discretion whether a defendant charged with a capital offense may be released before trial. If he determines release is warranted, the judge must authorize release of the defendant in accordance with G.S. 15A-534.

(d) There shall be a rebuttable presumption that no condition of release will reasonably assure the appearance of the person as required and the safety of the community if a judicial official finds the following:

(1) There is reasonable cause to believe that the person committed an offense involving trafficking in a controlled substance;

(2) The drug trafficking offense was committed while the person was on pretrial release for another offense; and

(3) The person has been previously convicted of a Class A through E felony or an offense involving trafficking in a controlled substance and not more than five years has elapsed since the date of conviction or the person's release from prison for the offense, whichever is later.

(e) There shall be a rebuttable presumption that no condition of release will reasonably assure the appearance of the person as required and the safety of the community, if a judicial official finds the following:

(1) There is reasonable cause to believe that the person committed an offense for the benefit of, at the direction of, or in association with, any criminal street gang, as defined in G.S. 14-50.16;

(2) The offense described in subdivision (1) of this subsection was committed while the person was on pretrial release for another offense; and

(3) The person has been previously convicted of an offense described in G.S. 14-50.16 through G.S. 14-50.20, and not more than five years has elapsed since the date of conviction or the person's release for the offense, whichever is later.

Persons who are considered for bond under the provisions of subsections (d) and (e) of this section may only be released by a district or superior court judge upon a finding that there is a reasonable assurance that the person will appear and release does not pose an unreasonable risk of harm to the community. (1973, c. 1286, s. 1; 1981, c. 936, s. 2; 1997-443, s. 11A.118(a); 1998-208, s. 1; 2008-214, s. 4.)

Effect of Amendments. — Session Laws 2008-214, s. 4, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "There shall be a rebuttable presumption" for "Subject to rebuttal by the person, it shall be presumed" at the beginning of subsection (d); added subsection (e); redesignated the former concluding paragraph of subsection (d) as the concluding paragraph of subsection (e); and substituted "Persons who are considered for bond under the provisions of subsections (d) and (e) of this section" for "Such person" at the beginning of the concluding paragraph of subsection (e).

CASE NOTES

Defendant Not Prejudiced. — Trial court did not err in denying defendant's pretrial motion to dismiss the G.S. 20-138.1 charge of driving while impaired against defendant because even though (1) there was no evidence, pursuant to G.S. 15A-534.2, that defendant was required to be held because the impairment of defendant's physical or mental faculties presented a danger, if defendant were released, of physical injury to defendant or others or damage to property, and (2) there was no evidence, pursuant to G.S. 15A-534(b), that defendant would pose a danger of injury to any person if defendant were released under conditions other than a secured bond, defendant was not irreparably prejudiced in the preparation of defendant's defense by the denial of defendant's G.S. 15A-533 right to timely pretrial release; defendant was not denied access to friends and family, such that defendant lost the opportunity to gather evidence. State v. Labinski, — N.C. App. —, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

§ 15A-534. Procedure for determining conditions of pretrial release.

CASE NOTES

Defendant Not Prejudiced. — Trial court did not err in denying defendant's pretrial motion to dismiss the G.S. 20-138.1 charge of driving while impaired against defendant because even though (1) there was no evidence, pursuant to G.S. 15A-534.2, that defendant was required to be held because the impairment of defendant's physical or mental faculties presented a danger, if defendant were released, of physical injury to defendant or others or damage to property, and (2) there was no evidence, pursuant to G.S. 15A-534(b), that defendant would pose a danger of injury to any person if defendant were released under conditions other than a secured bond, defendant was not irreparably prejudiced in the preparation of defendant's defense by the denial of defendant's G.S. 15A-533 right to timely pretrial release; defendant was not denied access to friends and family, such that defendant lost the opportunity to gather evidence. State v. Labinski, — N.C. App. —, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

Cited in In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008).

§ 15A-534.2. Detention of impaired drivers.

CASE NOTES

Defendant Not Prejudiced. — Trial court did not err in denying defendant's pretrial motion to dismiss the G.S. 20-138.1 charge of driving while impaired against defendant because even though (1) there was no evidence, pursuant to G.S. 15A-534.2, that defendant was required to be held because the impairment of defendant's physical or mental faculties presented a danger, if defendant were released, of physical injury to defendant or others or damage to property, and (2) there was no evidence, pursuant to G.S. 15A-534(b), that defendant would pose a danger of injury to any person if defendant were released under conditions other than a secured bond, defendant was not irreparably prejudiced in the preparation of defendant's defense by the denial of defendant's G.S. 15A-533 right to timely pretrial release; defendant was not denied access to friends and family, such that defendant lost the opportunity to gather evidence. State v. Labinski, — N.C. App. —, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

§ 15A-535. Issuance of policies on pretrial release.

CASE NOTES

Cited in State v. Labinski, — N.C. App. —, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

§ 15A-544.3. Entry of forfeiture.

CASE NOTES

Forfeiture Insufficient Reason to Set Bond Aside. — Because the evidence supporting a surety's motion to set aside a bond forfeiture, specifically, computer printouts of inmate records from the county sheriff's office indicating that defendant was not in custody, and deportation was an insufficient reason to set a bond aside under G.S. 15A-544.5(b), the bond was improperly set aside. State v. Lazaro, — N.C. App. —, 660 S.E.2d 618, 2008 N.C. App. LEXIS 993 (2008).

Cited in State v. Escobar, — N.C. App. —, 652 S.E.2d 694, 2007 N.C. App. LEXIS 2324 (2007); State v. Rodrigo, — N.C. App. —, 660 S.E.2d 615, 2008 N.C. App. LEXIS 995 (2008).

§ 15A-544.4. Notice of forfeiture.

CASE NOTES

Cited in State v. Escobar, — N.C. App. —, 652 S.E.2d 694, 2007 N.C. App. LEXIS 2324 (2007).

§ 15A-544.5. Setting aside forfeiture.

CASE NOTES

Deportation Insufficient Reason to Set Bond Aside. — Because the evidence supporting a surety's motion to set aside a bond forfeiture, specifically, computer printouts of inmate records from the county sheriff's office indicating that defendant was not in custody, and deportation was an insufficient reason to set a bond aside under G.S. 15A-544.5(b), the bond was improperly set aside. State v. Lazaro, — N.C. App. —, 660 S.E.2d 618, 2008 N.C. App. LEXIS 993 (2008).

Court's Discretion Abused in Granting Motion to Set Aside Forfeiture. — Trial court erred in granting a surety's motions to set aside bond forfeitures because the documents the surety submitted in support of his motions did not support a finding that a defendant was incarcerated in a unit of the North Carolina Department of Correction at the time of his failure to appear in court; the documents the surety presented indicated that defendant was released from the county sheriff's office in July 2006, and defendant's court dates were scheduled in August 2006. State v. Rodrigo, — N.C. App. —, 660 S.E.2d 615, 2008 N.C. App. LEXIS 995 (2008).

§ 15A-544.6. Final judgment of forfeiture.

CASE NOTES

Cited in State v. Escobar, — N.C. App. —, 652 S.E.2d 694, 2007 N.C. App. LEXIS 2324 (2007).

§ 15A-544.8. Relief from final judgment of forfeiture.

CASE NOTES

Extraordinary Cause Not Shown. — When a trial court denied a surety's motion for relief from a bond forfeiture, and the surety did not assign error to the notice the surety received regarding the forfeiture, the surety had to demonstrate extraordinary circumstances justifying relief from the forfeiture, under G.S. 15A-544.8(b)(2), but the surety was not entitled to relief because the surety did not show such extraordinary circumstances when the surety claimed that the district attorney had agreed to extradite the fugitive for whom the forfeited bond was posted upon the surety's promise to pay associated transportation costs because the surety's offer to pay such costs was not extraordinary and the surety assigned no error to the trial court's finding stating that the surety's motion for relief from the forfeiture did not allege extraordinary circumstances justifying remission of the bond, since findings to which no error was assigned were presumed to be supported by competent evidence and were binding on appeal. State v. Bakri, 186 N.C. App. 467, 651 S.E.2d 266, 2007 N.C. App. LEXIS 2187 (2007).

Extraordinary circumstances entitling a bonding company to relief from a judgment of forfeiture did not exist where the bonding company was aware of the defendant's ties to Mexico, failed to verify the defendant's falsified Social Security number, did not stay abreast of the defendant's location prior to the defendant's court date, and was not responsible for the defendant's capture. State v. Escobar, — N.C. App. —, 652 S.E.2d 694, 2007 N.C. App. LEXIS 2324 (2007).

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

Article 31.

The Grand Jury and Its Proceedings.

§ 15A-624. Grand jury the judge of facts; judge the source of legal advice.

CASE NOTES

Grand Jury the Exclusive Judge of the Facts. — G.S. 15A-624(a) provides that a grand jury is the exclusive judge of the facts with respect to any matter before it. State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

§ 15A-626. Who may call witnesses before grand jury; no right to appear without consent of prosecutor or judge.

CASE NOTES

Failure to Name Witness Did Not Render Indictment Fatally Defective. — Although the habitual offender indictment did not clearly indicate that a detective, listed by the State as a witness on the bill of indictment, was called as a witness before the grand jury, the absence of such an endorsement did not render an otherwise valid indictment fatally defective. State v. Sinclair, — N.C. App. —, 663 S.E.2d 866, 2008 N.C. App. LEXIS 1473 (Aug. 5, 2008).

§ 15A-631. Grand jury venue.

CASE NOTES

Questions of venue are waived by the failure to make a pre-trial motion, etc.

Defendant's challenge to venue was waived by defendant's failure to make a pretrial motion regarding venue. State v. Spencer, — N.C. App. —, 654 S.E.2d 69, 2007 N.C. App. LEXIS 2555 (2007).

Article 32.

Indictment and Related Instruments.

§ 15A-641. Indictment and related instruments; definitions of indictment, information, and presentment.

CASE NOTES

Applied in State v. Bollinger, — N.C. App. —, 665 S.E.2d 136, 2008 N.C. App. LEXIS 1518 (2008).

SUBCHAPTER VIII-A. RIGHTS OF CRIME VICTIMS AND WITNESSES.

Article 46.

Crime Victims' Rights Act.

§ 15A-830. Definitions.

Editor's Note. —
Former G.S. 14-277.3, referred to three times in subdivision (a)(7), was repealed by Session Laws 2008-167, s. 1, effective December 1, 2008. For current provisions as to stalking, see G.S. 14-277.3A.

§ 15A-831. Responsibilities of law enforcement agency.

(a) As soon as practicable but within 72 hours after identifying a victim covered by this Article, the investigating law enforcement agency shall provide the victim with the following information:

(1) The availability of medical services, if needed.

(2) The availability of crime victims' compensation funds under Chapter 15B of the General Statutes and the address and telephone number of the agency responsible for dispensing the funds.

(3) The address and telephone number of the district attorney's office that will be responsible for prosecuting the victim's case.

(4) The name and telephone number of an investigating law enforcement agency employee whom the victim may contact if the victim has not been notified of an arrest in the victim's case within six months after the crime was reported to the law enforcement agency.

(5) Information about an accused's opportunity for pretrial release.

(6) The name and telephone number of an investigating law enforcement agency employee whom the victim may contact to find out whether the accused has been released from custody.

(7) The informational sheet described in G.S. 50B-3(c1), if there was a personal relationship, as defined in G.S. 50B-1(b), with the accused.

(b) As soon as practicable but within 72 hours after the arrest of a person believed to have committed a crime covered by this Article, the arresting law enforcement agency shall inform the investigating law enforcement agency of the arrest. As soon as practicable but within 72 hours of being notified of the arrest, the investigating law enforcement agency shall notify the victim of the arrest.

(c) As soon as practicable but within 72 hours after receiving notification from the arresting law enforcement agency that the accused has been arrested, the investigating law enforcement agency shall forward to the district attorney's office that will be responsible for prosecuting the case the defendant's name and the victim's name, address, date of birth, social security number, race, sex, and telephone number, unless the victim refuses to disclose any or all of the information, in which case, the investigating law enforcement agency shall so inform the district attorney's office.

(d) Upon receiving the information in subsection (a) of this section, the victim shall, on a form provided by the investigating law enforcement agency, indicate whether the victim wishes to receive any further notices from the investigating law enforcement agency on the status of the accused during the pretrial process. If the victim elects to receive further notices during the pretrial process, the victim shall be responsible for notifying the investigating law enforcement agency of any changes in the victim's name, address, and telephone number. (1998-212, s. 19.4(c); 2001-433, s. 2; 2001-487, s. 120; 2008-4, s. 1.)

Editor's Note. — Session Laws 2008-4, s. 2 provides: "The North Carolina Domestic Violence Commission, in consultation with the North Carolina Coalition Against Domestic Violence, the North Carolina Attorney General's Office, and the Governor's Crime Commission, shall study the adoption of a statewide automated victim notification system for persons who have received a protective order under Chapter 50B of the General Statutes. As part of its study of this issue, the Domestic Violence Commission shall review:

"(1) Automated notification systems used in other state jurisdictions to notify protective order holders of critical dates, e.g., the date the respondent, if incarcerated, will be released from custody.

"(2) Data, if any, on the effectiveness of other state systems.

"(3) The current statewide system which provides automated notice to crime victims (SAVAN), to determine if it could be enhanced to include the proposed system.

"(4) Sources of grant funding that are available to implement the system.

"(5) Methods utilized for registering into the system, and whether the information should be accessible to the general public, in addition to the person or persons protected by the order.

"(6) Methods to ensure that information relating to the respondent of an order is uploaded in a timely manner and to confirm that notification has been sent to registrants.

"The North Carolina Domestic Violence Commission shall report with the results of its study, and any recommendations, to the Joint Legislative Committee on Domestic Violence and the General Assembly on or before January 1, 2009."

Effect of Amendments. — Session Laws 2008-4, s. 1, effective July 1, 2008, added subdivision (a)(7).

§ 15A-833. Evidence of victim impact.

CASE NOTES

Victim Impact Testimony Properly Allowed. —

With regard to defendant's convictions on two counts of first-degree murder, the trial court did not err in overruling his objection to the testimony of the sister of one of the victims concerning defendant's childhood, which related that the sister did not think that anything relating to defendant's childhood could have impacted his actions as the sister was unable to complete her thought and her incomplete sentence was not so prejudicial to have rendered the proceeding fundamentally unfair. State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007).

Victim Impact Testimony Not Reversible Error. — Though a trial court erred by allowing the State to make specific reference to the testimony of an assault victim's mother during closing argument by calling the mother a second victim of the crime, as victim impact evidence was only admissible during the guilt-innocence phase of the trial. However, because the State presented extensive evidence from two eyewitness who were well-acquainted with defendant and who positively identified him at trial, and evidence that defendant fled to another state shortly after hearing that the crime had been publicized, the appellate court was unable to say, as a matter of law, that absent the erroneous admission of the victim impact evidence, there was a reasonable possibility that the jury's verdict would have been different in light of the considerable evidence of defendant's guilt. State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007).

Cited in State v. Bowman, — N.C. App. —, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

§ 15A-834. Restitution.

CASE NOTES

Restitution Held Proper. — Where defendant raped a victim, an order of restitution to reimburse the victim for medical expenses resulting from the rape complied with the statutory requirements because the relatively modest amount of restitution, $2,301, and the terms of its payment were not such as to lead to a "common sense" conclusion that the trial court did not consider defendant's ability to pay. State v. Person, — N.C. App. —, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-901. Application of Article.

CASE NOTES

North Carolina discovery statutes in criminal cases apply only to cases within the original jurisdiction of the superior courts. State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008).

§ 15A-902. Discovery procedure.

CASE NOTES

Duty of Party Offering Voluntary Disclosure. —
Before filing a motion for discovery before a judge, a defendant must make a written request for voluntary discovery from the State of North Carolina pursuant to G.S. 15A-902(a). If the State voluntarily complies with the discovery request, the discovery is deemed to have been made under an order of the court, under G.S. 15A-902(b), and the State then has a continuing duty to disclose additional evidence or witnesses. State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008).

State Failed to Comply with Disclosure Requirements for Expert Witness. — SBI agent, who was better qualified than the jury to determine if the substance in defendant's shoe was marijuana, was erroneously allowed to testify as an expert where the State did not comply with discovery requirements in G.S. 15A-902(a)(2). State v. Moncree, — N.C. App. —, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008).

Defendant Not Prejudiced. — Defendant did not preserve for review defendant's contention that the State provided discovery to defendant in short notice, as defendant only objected to the introduction of evidence regarding defendant's involvement in subsequent drug transactions. As to the objection defendant made, defendant did not show that a police report only made available to defendant at the start of the trial prejudiced the outcome of the trial. State v. Mack, — N.C. App. —, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

Cited in State v. Hall, 186 N.C. App. 267, 650 S.E.2d 666, 2007 N.C. App. LEXIS 2085 (2007).

§ 15A-903. Disclosure of evidence by the State — Information subject to disclosure.

CASE NOTES

IV. Statements of Witnesses.
V. State Witnesses.
VI. Documents, Tangible Objects, and Reports.

IV. STATEMENTS OF WITNESSES.

Testimony Properly Allowed. —
Trial court did not err by allowing an informant to testify at trial because defendant was provided with notice of the substance of the informant's statements, and defendant did not suffer prejudice or unfair surprise as a result of the admission of the informant's testimony in that the State of North Carolina provided defendant with all reports contained in the prosecution's file, which included reports from the dates of each offense, notations of the detec-

tive's meetings with the informant after each controlled buy from defendant as well as a summary of what the informant told the detective during each meeting. State v. Zamora-Ramos, — N.C. App. —, 660 S.E.2d 151, 2008 N.C. App. LEXIS 896 (2008).

V. STATE WITNESSES.

Properly Treated as Fact Witnesses. — In defendant's trial for common-law robbery, the trial court did not err by allowing a physician's assistant and a deputy to testify without complying with the discovery requirements for expert witnesses set forth in subdivision (a)(2) of G.S. 15A-903, as the assistant offered no opinion and brought no expertise to bear as to the subject at hand, and the deputy did not purport to compare defendant's fingerprints with the latent prints, made no attempt to express an opinion, and was asked no questions requiring him to do so, and thus the trial court properly considered the assistant and the deputy as fact witnesses. State v. Hall, 186 N.C. App. 267, 650 S.E.2d 666, 2007 N.C. App. LEXIS 2085 (2007).

Admission of Expert Testimony After State's Failure to Disclose Evidence Deemed Harmless Error. — Trial court erred in admitting testimony of an SBI agent in which the agent opined that the substance found in defendant's shoe was marijuana because the state did notify defendant that the agent would testify as an expert in this regard; the error was harmless, however, because two deputies provided lay tesitmony identifying the substance as marijuana and, thus, defendant should have anticipated the evidence and should not have been unfairly surprised. State v. Moncree, — N.C. App. —, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008).

Failure to Grant Continuance to Defendant After State's Failure to Disclose Expert Witness Deemed Harmless Error. — Although the State of North Carolina violated G.S. 15A-903(a)(2) by failing to provide defendant with required expert discovery reasonably before trial and the trial court abused its discretion in failing to grant defendant a continuance of the trial for that reason, the trial court's denial of defendants' motion for a continuance was harmless error because defendant suffered no prejudice due to the additional evidence that was against defendant. State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008).

VI. DOCUMENTS, TANGIBLE OBJECTS, AND REPORTS.

Reference to Police Report Not Produced During Discovery. — Additional facts were needed regarding an alleged discovery violation after the State was allowed during cross-examination of a defense witness to reference a police report that had not been produced to defendant during discovery since no determination was made as to whether a law enforcement agency or prosecuting agency was aware of a statement of the witness, former co-defendant, contained in the report, or through due diligence should have been aware of it, and whether while aware of the statement, the law enforcement agency or prosecuting agency should have reasonably known that the statement related to the charges against defendant yet failed to disclose the statement as required by G.S. 15A-903(a)(1) and G.S. 15A-907. State v. Tuck, — N.C. App. —, 664 S.E.2d 27, 2008 N.C. App. LEXIS 1495 (Aug. 5, 2008).

Defendant did not preserve for review defendant's contention that the State provided discovery to defendant on short notice, as defendant only objected to the introduction of evidence regarding defendant's involvement in subsequent drug transactions. As to the objection defendant made, defendant did not show that a police report only made available to defendant at the start of the trial prejudiced the outcome of the trial. State v. Mack, — N.C. App. —, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

Review Not Possible Where Material Not Provided to Appellate Court. — Failure to include non-discoverable materials that the trial court placed under seal in the record on appeal precluded the appellate court from determining whether the trial court erred in classifying certain material as non-discoverable under G.S. 15A-904. State v. Hall, — N.C. App. —, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007).

§ 15A-904. Disclosure by the State — Certain information not subject to disclosure.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Review Not Possible Where Material Not Provided to Appellate Court. — Failure to include non-discoverable materials that the trial court placed under seal in the record on appeal precluded the appellate court from determining whether the trial court erred in classifying certain material as non-discoverable under G.S. 15A-904. State v. Hall, — N.C. App. —, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007).

§ 15A-905. Disclosure of evidence by the defendant — Information subject to disclosure.

CASE NOTES

Sanction for Failure to Give Notice of Defense. — Trial court's decision to allow defendant to use the defenses of accident and duress demonstrated that the court affirmatively exercised the court's discretion and precluded only those defenses that would have prejudiced the State of North Carolina from defendant's failure to timely give notice under G.S. 15A-905(c) of the defenses defendant intended to assert. Thus, the trial court's imposition of sanctions pursuant to G.S. 15A-910 by precluding defendant from asserting the defenses of voluntary intoxication and diminished capacity was not arbitrary and was not an abuse of discretion. State v. McDonald, — N.C. App. —, 663 S.E.2d 462, 2008 N.C. App. LEXIS 1496 (Aug. 5, 2008).

§ 15A-907. Continuing duty to disclose.

CASE NOTES

Duty to Disclose Expert Witness. — Because the State of North Carolina voluntarily provided timely discovery, pursuant to G.S. 15A-902(a), following a request by defendant, the State was obligated to provide discovery as to its expert witness and the report by the expert witness under G.S. 15A-903. State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008).

Section Not Violated. —

Defendant did not preserve for review defendant's contention that the State provided discovery to defendant in short notice, as defendant only objected to the introduction of evidence regarding defendant's involvement in subsequent drug transactions. As to the objection defendant made, defendant did not show that a police report only made available to defendant at the start of the trial prejudiced the outcome of the trial. State v. Mack, — N.C. App. —, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

Additional facts were needed regarding an alleged discovery violation after the State was allowed during cross-examination of a defense witness to reference a police report that had not been produced to defendant during discovery since no determination was made as to whether a law enforcement agency or prosecuting agency was aware of a statement of the witness, former co-defendant, contained in the report, or through due diligence should have been aware of it, and whether while aware of the statement, the law enforcement agency or prosecuting agency should have reasonably known that the statement related to the charges against defendant yet failed to disclose it as required by G.S. 15A-903(a)(1) and G.S. 15A-907. State v. Tuck, — N.C. App. —, 664 S.E.2d 27, 2008 N.C. App. LEXIS 1495 (Aug. 5, 2008).

§ 15A-910. Regulation of discovery — Failure to comply.

CASE NOTES

Trial Court's Sanction Authority Does Not Apply to Actions of Non-Parties. — Defendant, who was convicted of the first-degree murder of his girlfriend, was entitled to a new trial because the trial court exceeded its authority under G.S. 15A-910(a)(3), when it precluded defendant from introducing the testimony of two mental health experts as a sanction for the experts' failure to provide mental health reports to the State, given that the statute did not authorize the trial court to sanction defendant based on the actions of non-parties. State v. Gillespie, 362 N.C. 150, 655 S.E.2d 355, 2008 N.C. LEXIS 29 (2008).

By its plain meaning, G.S. 15A-910(a)(3), ensures that in criminal proceedings the trial court has the authority to require both the State and defendants to comply with North Carolina's discovery statutes and any orders entered pursuant to those statutes. To this end, G.S. 15A-910 authorizes a trial court to impose sanctions on the parties in addition to exercising the court's inherent contempt powers; however, nothing in the language of the statute indicates that this authority extends so far as to punish either the State or a criminal defendant for the actions of non-parties. State v. Gillespie, 362 N.C. 150, 655 S.E.2d 355, 2008 N.C. LEXIS 29 (2008).

Failure to Comply Held Harmless Error. —

Trial court's denial of defendant's motion for a continuance was an abuse of the court's discretion under G.S. 15A-910(a)(2) because the State of North Carolina violated G.S. 15A-903(a)(2) by failing to provide defendant with required discovery as to an expert witness reasonably before trial. However, the error was not prejudicial to defendant given the evidence against defendant. State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008).

Court's Choice of Sanction Found Appropriate. —

Trial court's decision to allow defendant to use the defenses of accident and duress demonstrated that the court affirmatively exercised the court's discretion and precluded only those defenses that would have prejudiced the State of North Carolina from defendant's failure to timely give notice under G.S. 15A-905(c) of the defenses defendant intended to assert. Thus, the trial court's imposition of sanctions pursuant to G.S. 15A-910 by precluding defendant from asserting the defenses of voluntary intoxication and diminished capacity was not arbitrary and was not an abuse of discretion. State v. McDonald, — N.C. App. —, 663 S.E.2d 462, 2008 N.C. App. LEXIS 1496 (Aug. 5, 2008).

ARTICLE 49.

Pleadings and Joinder.

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

CASE NOTES

Change of Date on Indictment. —

Because the date of the offense was not an essential element of the offense of possession of a firearm by a felon in G.S. 14-415.1, the state was properly allowed to amend the indictment under G.S. 15A-923. State v. Coltrane, — N.C. App. —, 656 S.E.2d 322, 2008 N.C. App. LEXIS 194 (2008).

Trial court properly allowed the State to amend the indictments to change the date of each count because defendant did not present an alibi defense and time was not an element of the offense of third degree sexual exploitation of a minor under G.S. 14-190.17A. State v. Riffe, — N.C. App. —, 661 S.E.2d 899, 2008 N.C. App. LEXIS 1166 (June 17, 2008).

Amendment of Indictment Permitted. —

Amendment of an indictment alleging robbery with a dangerous weapon to remove allegations concerning the amount of money taken during the robberies was permissible because the amendment did not constitute substantial alterations in that the value of the property taken was not an element of the offense but merely surplusage. State v. McCallum, — N.C. App. —, 653 S.E.2d 915, 2007 N.C. App. LEXIS 2561 (2007).

In a case in which the defendant was prosecuted for stalking and for having previously been convicted of stalking, the State was properly allowed to amend the indictment to place the allegation of the prior offense in a count separate from that of the current offense because the amendment was not a substantial alteration of the charge, prohibited by G.S. 15A-923(e); the amendment merely placed the last two sentences of the single count in the original indictment into a separate count, to comply with G.S. 15A-928, and defendant had prior notice that the State alleged defendant's prior conviction and intended to prove that conviction, so defendant had the opportunity to prepare a defense. State v. Stephens, — N.C. App. —, 655 S.E.2d 435, 2008 N.C. App. LEXIS 74 (2008).

Instruction Did Not Constructively Amend Indictment. — Trial court did not constructively amend the bill of indictment by submitting aiding and abetting instructions to the jury where defendant was charged with obtaining property by false pretenses by acting in-concert with others. State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007).

Jury Instruction at Variance with Indictment Benefitted Defendant and Was Not Prejudicial Error. — Defendant's first-degree burglary conviction was not improper because, although the jury instructions, which stated that the State had to prove, inter alia, that at the time of the breaking and entering, defendant intended to commit robbery with a firearm or attempted to commit robbery with a firearm, were at variance with the indictment, which alleged that defendant committed the offense by breaking and entering with the intent to commit felony larceny, the jury instructions actually benefitted defendant by adding an additional element for the State to prove, and thus there was no prejudicial error; any error in the jury charge was not prejudicial because larceny was a lesser-included offense of robbery with a dangerous weapon. State v. Farrar, 361 N.C. 675, 651 S.E.2d 865, 2007 N.C. LEXIS 1097 (2007).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Indictment Held Sufficient. — Indictment was sufficient under G.S. 15A-924(a)(5) to charge defendant with felonious breaking and entering under G.S. 14-54(a) because the statement that defendant did break and enter a building used as a residence was surplusage as whether a building was a residence or not was not an essential element of the crime; the garage that defendant allegedly broke into was within the curtilage of the residence although it was an independent structure. State v. Jones, — N.C. App. —, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (Feb. 5, 2008).

Indictment which was clearly couched in the language of the statute and alleged all of the essential elements was sufficient. State v. Canady, — N.C. App. —, 664 S.E.2d 380, 2008 N.C. App. LEXIS 1498 (2008).

Indictment Held Insufficient. — Defendant was entitled to reversal of convictions for first degree kidnapping and entry of convictions for second degree kidnapping because the indictment only alleged that defendant did something "for the purpose of doing other serious bodily harm" and failed to allege actual serious injury. State v. Rodriguez, — N.C. App. —, 664 S.E.2d 654, 2008 N.C. App. LEXIS 1542 (2008).

§ 15A-925. Bill of particulars.

CASE NOTES

Cited in State v. Hall, — N.C. App. —, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007).

§ 15A-926. Joinder of offenses and defendants.

CASE NOTES

I. General Consideration.
II. Joinder of Offenses.
  B. Illustrative Cases.

I. GENERAL CONSIDERATION.

Oral Motion to Consolidate Not Error. — Trial court did not err by allowing the State's oral motion for joinder of a juveniles' cases for trial when the motion was not written as required by G.S. 15A-926(b)(2) and the juvenile did not object to joinder at trial. Regardless, the trial court had discretion to allow the oral motion for joinder pursuant to G.S. 15A-926(b)(2), 15A-951(a), and 15A-952(b) and (f). In re R.D.L., — N.C. App. —, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (Aug. 5, 2008).

Cited in State v. Walker, — N.C. App. —, 654 S.E.2d 722, 2008 N.C. App. LEXIS 71 (2008).

II. JOINDER OF OFFENSES.

B. Illustrative Cases.

Two Trafficking Offenses. — Defendant did not show that he did not receive a fair trial as the result of the trial court's joining of his two cocaine trafficking charges. Joinder of the offenses pursuant to G.S. 15A-926(b)(2) was not error, as the charges arose from the same series of events on the same day, and the evidence indicated that defendant was involved in a common scheme to sell drugs. State v. Llamas-Hernandez, — N.C. App. —, 659 S.E.2d 79, 2008 N.C. App. LEXIS 714 (2008).

§ 15A-928. Allegation and proof of previous convictions in superior court.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Failure to be Present. — In light of the fact that defendant had waived his right to be at his trial on drug charges due to his unexplained absence from the court, there was no error on the part of the trial court with continuing with the habitual offender portion of defendant's trial since he was informed of the previous convictions the State intended to use and was given a fair opportunity to either admit or deny them or remain silent. State v. Davis, 186 N.C. App. 242, 650 S.E.2d 612, 2007 N.C. App. LEXIS 2109 (2007).

Amendment of Indictment. — In a case in which the defendant was prosecuted for stalking and for having previously been convicted of stalking, the State was properly allowed to amend the indictment to place the allegation of the prior offense in a count separate from that of the current offense because the amendment was not a substantial alteration of the charge, prohibited by G.S. 15A-923(e); the amendment merely placed the last two sentences of the single count in the original indictment into a separate count, to comply with G.S. 15A-928, and defendant had prior notice that the State alleged defendant's prior conviction and intended to prove that conviction, so defendant had the opportunity to prepare a defense. State v. Stephens, — N.C. App. —, 655 S.E.2d 435, 2008 N.C. App. LEXIS 74 (2008).

Article 50.

Voluntary Dismissal.

§ 15A-932. Dismissal with leave when defendant fails to appear and cannot be readily found or pursuant to a deferred prosecution agreement.

CASE NOTES

Waiver by Failure to Object. — State was authorized pursuant to G.S. 15A-932(d) to reinstate the charges filed against defendant that it had dismissed with leave, including practicing massage therapy without a license in violation of G.S. 90-634(a)(1). Although defendant claimed that the State had not followed the proper procedure in reinstating the charges, the record showed that defendant did not object at defendant's arraignment, and, thus, any error was waived. State v. Viera, — N.C. App. —, 658 S.E.2d 529, 2008 N.C. App. LEXIS 608 (Apr. 1, 2008).

ARTICLE 52.

Motions Practice.

§ 15A-951. Motions in general; definition, service, and filing.

CASE NOTES

Oral Motion for Joinder Not Error. — Trial court did not err by allowing the State's oral motion for joinder of a juveniles' cases for trial when the motion was not written as required by G.S. 15A-926(b)(2) and the juvenile did not object to joinder at trial. Regardless, the trial court had discretion to allow the oral motion for joinder pursuant to G.S. §§ 15A-926(b)(2), 15A-951(a), and 15A-952(b) and (f). In re R.D.L., — N.C. App. —, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (Aug. 5, 2008).

§ 15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

CASE NOTES

II. Motions to Continue.
IV. Motions for Joinder.

II. MOTIONS TO CONTINUE.

Denial of Motion Held Proper. — Trial court did not err when the court denied defendant's first motion to continue, which was made pro se, because nearly three months passed between defendant's indictment and the trial date, and defendant offered the names of no witnesses who were necessary to his defense and made no showing as to any relevant facts for which he needed time to gather evidence. Furthermore, defendant was not prejudiced by the denial of his second motion to continue, which was made by his court-appointed counsel, because defendant contributed to the delay in appointment of counsel, and the trial court granted a two business day recess for the procurement of the necessary witness. State v. Worrell, — N.C. App. —, 660 S.E.2d 183, 2008 N.C. App. LEXIS 855 (2008).

IV. MOTIONS FOR JOINDER.

Oral Motion for Joinder Not Error. — Trial court did not err by allowing the State's oral motion for joinder of a juveniles' cases for trial when the motion was not written as required by G.S. 15A-926(b)(2) and the juvenile did not object to joinder at trial. Regardless, the trial court had discretion to allow the oral motion for joinder pursuant to G.S. §§ 15A-926(b)(2), 15A-951(a), and 15A-952(b) and (f). In re R.D.L., — N.C. App. —, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (Aug. 5, 2008).

§ 15A-954. Motion to dismiss — Grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

CASE NOTES

I. General Consideration.
III. Flagrant Violation of Constitutional Rights.
VI. Previous Adjudication of Issue.

I. GENERAL CONSIDERATION.

Sufficiency of the Evidence. — Defendant was not entitled to dismissal of the charge of assault with a deadly weapon inflicting serious injury because evidence showing that the victim went to the hospital, took pain medication for two weeks, walked with a limp for one to two weeks, and did not fully heal for approximately one month after being shot in the knee was sufficient to show that the victim sustained a serious injury as required to support defendant's conviction. State v. Tice, — N.C. App. —, 664 S.E.2d 368, 2008 N.C. App. LEXIS 1507 (2008).

Trial court did not err in denying defendant juvenile's motion to dismiss the charge of felonious breaking and entering and larceny and then finding defendant delinquent on the charges because the State presented substantial evidence of a felonious breaking and entry sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt; the office of a county cooperative extension service director was not held out to the public, and even if defendant had implied consent to enter the office because it was necessary for the general public to have access to it, stealing cash from the director's purse constituted an act sufficient to render implied consent void ab initio. In re S.D.R., — N.C. App. —, 664 S.E.2d 414, 2008 N.C. App. LEXIS 1481 (2008).

Denial of defendant's motion to dismiss was not erroneous because the State presented sufficient evidence to submit the charge of third degree sexual exploitation of a minor to the jury even if G.S. 14-190.17A required knowledge of both the character and content of the material as the jury was allowed to review all twelve computer files to determine if the names reflected the materials' content, and there was sufficient evidence to support a finding that defendant possessed the material in question, including the fact that the computer and a receipt for its purchase by defendant were found at defendant's place of business. State v. Riffe, — N.C. App. —, 661 S.E.2d 899, 2008 N.C. App. LEXIS 1166 (June 17, 2008).

Given that the State presented sufficient evidence showing that defendant and two other men committed a breaking and entering into the victims' occupied residence, at night, taking a chain necklace, a PlayStation, some games, and a VCR and asking, "where is the money?" every element of a charge of first-degree burglary was shown to support the denial of a motion to dismiss. State v. Farrar, — N.C. App. —, 660 S.E.2d 116, 2008 N.C. App. LEXIS 898 (2008).

Even if defendant was not observed entering a vehicle, denial of the defendant's motion to dismiss a charge of violating G.S. 14-56, breaking and entering a motor vehicle with intent to commit larceny, was supported by sufficient circumstantial evidence that he committed the violation. His unlawful possession of property which had been in the vehicle a short time before was sufficient to support an inference of entry. State v. Baskin, — N.C. App. —, 660 S.E.2d 566, 2008 N.C. App. LEXIS 895 (2008).

Trial court did not err by denying defendant's motion to dismiss for insufficiency of the evidence as defendant did not challenge the admission of evidence of a mitochondrial DNA match between defendant's mother and two hairs found in the victim's bedroom. This evidence strongly suggested that the assailant was someone in the same maternal line as defendant's mother, and defendant's two brothers were in custody when the attack on the victim took place. State v. McAllister, — N.C. App. —, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

Refusal to Dismiss Was Proper. —

Trial court did not err in denying defendant's motion to dismiss for insufficient evidence as the evidence supported defendant's conviction for first-degree murder; there was sufficient evidence to support the elements of premeditation and deliberation in the form of defendant's statements and conduct before and after the killing, ill will between the parties, and the nature and number of the victim's wounds. The victim's back was turned when defendant fired defendant's weapon, giving defendant adequate time to weigh the consequences of the act. State v. Bass, — N.C. App. —, 660 S.E.2d 123, 2008 N.C. App. LEXIS 864 (2008).

Motion to Dismiss on Basis of Insufficient Evidence Properly Denied. —

Trial court did not err in denying defendant's motion to dismiss for insufficient evidence because the evidence established that: (1) defendant failed the field sobriety tests; (2) defendant's eyes were bloodshot and defendant's speech was slurred; (3) there was an empty can of beer in defendant's vehicle and defendant admitted to having had four beers; and (4) defendant refused to take an Intoxilyzer test. State v. Johnson, — N.C. App. —, 651 S.E.2d 907, 2007 N.C. App. LEXIS 2305 (2007).

Denial of Motion Held Appropriate. —

Denial of defendant's motion to dismiss was proper, as the State established defendant's knowing possession of child pornography. Defendant had written in a chat dialogue, "thanks for the pics" or "thanks for the pictures," several files bore date stamps that matched the date stamp on the chat, and the evidence suggested defendant deleted temporary Internet files so that defendant would avoid being caught with too many at once. State v. Dexter, — N.C. App. —, 651 S.E.2d 900, 2007 N.C. App. LEXIS 2313 (2007).

Defendant's appeal of an order denying his motion to dismiss the charges of misdemeanor and felony habitual driving while intoxicated (DWI) was dismissed because defendant had no right to appeal pursuant to G.S. 15A-1444(e); defendant, who pled guilty to the felony habitual DWI charge after his motion to dismiss was denied, had no statutory right to appeal his conviction, and he waived appellate review of his double jeopardy argument. State v. Corbett, — N.C. App. —, 661 S.E.2d 759, 2008 N.C. App. LEXIS 1132 (June 17, 2008).

Denial of Motion Held Inappropriate. — Trial court erred in denying a juvenile's motion to dismiss the charge of disorderly conduct in a school in violation of G.S. 14-288.4(a)(6) because although the juvenile's behavior was an annoyance to the dean of students of a high school, it did not rise to the level of criminal activity; there was no evidence that the school or classroom instruction was substantially disrupted, that the juvenile was aggressive or violent, or that the juvenile used disturbing or vulgar language. In re S.M., — N.C. App. —, 660 S.E.2d 653, 2008 N.C. App. LEXIS 992 (2008).

Sufficient Evidence to Sustain Conviction. — Trial court did not err in denying defendant juvenile's motion to dismiss the charge of felonious larceny and then finding defendant delinquent on the charges because the State presented substantial evidence of a felonious larceny sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt; the State's evidence tended to show that: (1) a county cooperative extension service director observed defendant sitting in the library across the hall from her office; (2) she left her office; (3) when the director returned she was greeted by defendant, who was standing in her office; (4) defendant had not been given permission to enter the director's office; and (5) upon entering her office, the director discovered that her pocketbook had been tampered with and money was missing. In re S.D.R., — N.C. App. —, 664 S.E.2d 414, 2008 N.C. App. LEXIS 1481 (2008).

III. FLAGRANT VIOLATION OF CONSTITUTIONAL RIGHTS.

State Suppressed Relevant Evidence Requiring Granting of Defendant's Motion to Dismiss. — Trial court properly granted defendant's motion to dismiss the charge of felony assault on a government officer or employee on the grounds of prosecutorial misconduct and a Brady violation because the State suppressed material and exculpatory evidence, which flagrantly violated defendant's rights to due process of law under Brady, G.S. 15A-954(a)(4), and defendant was irreparably prejudiced by the State's failure to provide the evidence; a poster and photograph, which had been destroyed, were relevant to defendant's case because the crime with which he was charged arose out of the incident that gave rise to the injuries depicted in the photograph. State v. Williams, — N.C. App. —, 660 S.E.2d 189, 2008 N.C. App. LEXIS 856 (2008).

No Grounds Warranting Dismissal. — Defendant's constitutional rights were not violated under G.S. 15A-954(a)(4) by the prosecutor's statements to the court during a pretrial detention hearing concerning defendant's possible presence on the National Terrorist Watch List. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

VI. PREVIOUS ADJUDICATION OF ISSUE.

Collateral Estoppel Did Not Bar Trial. — Collateral estoppel under G.S. 15A-954(a)(7) did not bar trial on a second set of 10 checks that were the subject of obtaining money by false pretenses indictments since even if the victim gave permission as to the first four checks litigated in a first trial, a jury could still find that the victim did not give permission to defendant to cash the 10 checks; because of the lack of joinder and the fact that the transactions in the second case occurred at a different time, the only issues decided in the first trial were whether defendant obtained money by false pretenses when negotiating each of the first four checks. State v. Spargo, — N.C. App. —, 652 S.E.2d 50, 2007 N.C. App. LEXIS 2312 (2007).

No Double Jeopardy Where Prior Crimes Used in Sentencing. — Defendant was not entitled to dismissal of a habitual felon indictment because the use of defendant's prior conviction for possession of cocaine to support defendant's conviction for possession of a firearm by a felon and defendant's sentencing as a habitual felon did not constitute double jeopardy. State v. Williams, — N.C. App. —, 662 S.E.2d 397, 2008 N.C. App. LEXIS 1152 (2008).

§ 15A-955. Motion to dismiss — Grounds applicable to indictments.

CASE NOTES

Sufficiency of the Evidence. — Denial of defendant's motion to dismiss a driving while intoxicated charge for insufficient evidence was not error. The State presented sufficient evidence to take the case to a jury, as defendant was pulled over with open containers of alcohol in the passenger compartment of defendant's vehicle, and officers observed defendant in a visibly impaired condition. State v. Johnson, — N.C. App. —, 652 S.E.2d 341, 2007 N.C. App. LEXIS 2254 (2007).

G.S. 15A-955 limits the grounds on which an indictment may be dismissed and omits sufficiency of the evidence to sustain a conviction as a possible basis. State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

ARTICLE 53.

Motion to Suppress Evidence.

§ 15A-972. Motion to suppress evidence before trial in superior court in general.

CASE NOTES

Motion to Suppress Properly Denied. — Because Miranda warnings were not required before defendant consented to a search of a vehicle, and because any error in admitting the fruits of the search was harmless, the trial court properly denied defendant's motion to suppress. State v. Cummings, — N.C. App. —, 656 S.E.2d 329, 2008 N.C. App. LEXIS 198 (2008).

Because a reasonable person would have understood from the circumstances and exchanges between the officers and defendant that police intended to conduct a strip search of defendant's person, and she consented to the strip search without withdrawing that consent at any time, the trial court properly denied her motion to suppress the evidence seized. State v. Neal, — N.C. App. —, 660 S.E.2d 586, 2008 N.C. App. LEXIS 835 (2008).

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Motion to Suppress Properly Denied. — Trial court did not err in denying defendant's motion to suppress based on defendant's claim that there was insufficient cause or suspicion to stop defendant's car because defendant's improper tags, standing alone, gave the deputies sufficient cause to stop defendant. State v. Johnson, — N.C. App. —, 651 S.E.2d 907, 2007 N.C. App. LEXIS 2305 (2007).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

CASE NOTES

II. Findings of Fact.

II. FINDINGS OF FACT.

Oral Findings of Fact Held Sufficient. — Trial judge's failure to make written findings of fact did not violate G.S. 15A-977(f), because there was no material conflict of evidence, and thus, oral findings were sufficient. State v. Toney, — N.C. App. —, 653 S.E.2d 187, 2007 N.C. App. LEXIS 2448 (2007).

Findings Sufficient to Support Denial of Motion to Suppress. — Although the trial court's findings in support of its denial of defendant's motion to suppress an officer's identification of defendant were cursory, the findings were sufficient to support the order because the trial court saw and observed the witnesses, found the identification was not suggestive, and indicated that any doubts went to credibility and weight not to admissibility. State v. Marsh,

— N.C. App. —, 652 S.E.2d 744, 2007 N.C. App. LEXIS 2357 (2007).

Failure to File Written Findings Not Error. — Although trial court failed to enter written order with the clerk regarding its decision on defendant's motion to suppress identification testimony, no error was found because there was no conflict in the evidence, as the witness was the only voir dire witness on the issue of the admissibility of her identification. State v. Thompson, — N.C. App. —, 654 S.E.2d 486, 2007 N.C. App. LEXIS 2432 (2007).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

CASE NOTES

I. General Consideration.
II. Appeal From Denial of Motion.

I. GENERAL CONSIDERATION.

Applied in State v. Rollins, — N.C. App. —, 658 S.E.2d 43, 2008 N.C. App. LEXIS 547 (Mar. 18, 2008); State v. Hatley, — N.C. App. —, 661 S.E.2d 43, 2008 N.C. App. LEXIS 1013 (2008).

Cited in State v. Styles, — N.C. —, 665 S.E.2d 438, 2008 N.C. LEXIS 685 (2008).

II. APPEAL FROM DENIAL OF MOTION.

Notice of Intention to Appeal Required. —

Although defendant pled guilty to a driving while impaired charge, defendant properly preserved the issue of whether the trial court erred in denying defendant's motion to suppress by notifying both the State and the trial court that she intended to appeal. State v. Hatley, — N.C. App. —, 661 S.E.2d 43, 2008 N.C. App. LEXIS 1013 (2008).

Motion Properly Denied. —

Where an officer observed defendant drive over a curb, back away from the officer, and reach into a pocket in a location known for drug activity, defendant's motion to suppress was properly denied because the officer had reasonable suspicion to make an investigatory stop and had probable cause to seize a film canister from defendant's pocket during a pat-down for weapons based on, inter alia, defendant's actions, the area's reputation, and the officer's prior experiences. State v. Robinson, — N.C. App. —, 658 S.E.2d 501, 2008 N.C. App. LEXIS 648 (Apr. 1, 2008).

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

Article 56.

Incapacity to Proceed.

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

CASE NOTES

II. Hearing.

II. HEARING.

Trial court did not err by not holding a competency hearing sua sponte, etc.

Trial court did not err by failing to conduct a hearing on defendant's capacity to stand trial because there was no bona fide doubt as to defendant's competency when his actions and courtroom behavior did not indicate that he was incompetent, and the only examination conducted as to defendant's capacity resulted in a determination that he was fit to stand trial; defendant participated in the proceedings, his demeanor was appropriate, and his trial counsel represented that defendant was competent. State v. Johnson, — N.C. App. —, 661 S.E.2d 287, 2008 N.C. App. LEXIS 1081 (2008).

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

CASE NOTES

Cited in In re Mecklenburg County., — N.C. App. —, 662 S.E.2d 570, 2008 N.C. App. LEXIS 1189 (July 1, 2008).

§ 15A-1022.1. Procedure in accepting admissions of the existence of aggravating factors in felonies.

CASE NOTES

Applicability. — Because defendant admitted, through counsel, that defendant committed an offense while on pretrial release on another charge for purposes of the aggravating factor under G.S. 15A-1340.16(d)(12) in sentencing defendant, no Blakely right to a jury trial under U.S. Const., Amend. VI was invoked, as such was within the exception to Blakely; the trial court had authority to impose an aggravated sentence on defendant's convictions based on that finding, as the North Carolina Blakely Act, G.S. 15A-1022.1, was inapplicable where defendant's offenses were committed prior to June 30, 2005. State v. Everette, 361 N.C. 646, 652 S.E.2d 241, 2007 N.C. LEXIS 1107 (2007).

§ 15A-1027. Limitation on collateral attack on conviction.

CASE NOTES

Reviewability. —

An inmate's complaint for declaratory relief was not barred by G.S. 15A-1027 because the inmate challenged the application of the parole eligibility statute, G.S. 15A-1340.4, to his 40-year sentence; the complaint did not directly challenge the 40-year sentence itself. Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

Although a trial court found that a 40-year sentence exceeded the total of presumptive terms for each felony offense and concluded that the maximum sentence it could impose for a kidnapping charge was 15 years, the order entered in the inmate's declaratory judgment case was not a collateral attack on the sentence imposed because the order was limited to the calculation of parole eligibility based on a 40-year sentence and did not change the inmate's original sentence. Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

ARTICLE 61.

Granting of Immunity to Witnesses.

§ 15A-1051. Immunity; general provisions.

CASE NOTES

Cited in State v. Rankin, — N.C. App. —, 663 S.E.2d 438, 2008 N.C. App. LEXIS 1320 (2008).

§ 15A-1052. Grant of immunity in court proceedings.

CASE NOTES

Cited in State v. Rankin, — N.C. App. —, 663 S.E.2d 438, 2008 N.C. App. LEXIS 1320 (2008).

Article 62.

Mistrial.

§ 15A-1061. Mistrial for prejudice to defendant.

CASE NOTES

Mistrial Is Matter of Court's Discretion. —

Trial court did not abuse its discretion by denying defendant's motion for a mistrial based on his absence from the courtroom during his trial on drug charges as defendant waived his general right to be present at his trial through his voluntary and unexplained absence from the court after his trial had already commenced. State v. Davis, 186 N.C. App. 242, 650 S.E.2d 612, 2007 N.C. App. LEXIS 2109 (2007).

Remedy Less Drastic Than Mistrial Held Sufficient. —

Although a victim suffered an emotional breakdown while on the stand, given the rapidity with which the trial court removed the jury and gave a curative instruction, the refusal to grant a mistrial was not an abuse of discretion under G.S. 15A-1061. State v. Simmons, — N.C. App. —, 662 S.E.2d 559, 2008 N.C. App. LEXIS 1188 (July 1, 2008).

Mistrial Properly Denied. —

Trial court did not abuse the court's discretion in denying defendants' motion for a mistrial as the trial court specifically found that an eyewitness was just trying to offer what the eyewitness thought was logical testimony and that a steamroller driver's counsel had not intended to elicit the eyewitness's improper response. Outlaw v. Johnson, — N.C. App. —, 660 S.E.2d 550, 2008 N.C. App. LEXIS 907 (2008).

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

Article 72.

Selecting and Impaneling the Jury.

§ 15A-1212. Grounds for challenge for cause.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Question to Jurors on "Intestinal Fortitude" for Death Penalty. — Prosecutor's question to the potential jurors, asking whether they possessed the "intestinal fortitude" to vote for a sentence of death was not made to badger the prospective jurors but, rather, to elicit from the jurors answers which would have provided grounds for a challenge for cause. State v. Murrell, — N.C. —, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008).

§ 15A-1214. Selection of jurors; procedure.

CASE NOTES

II. Authority of Trial Judge.

II. AUTHORITY OF TRIAL JUDGE.

Discretion of Trial Court. —
In a murder prosecution, as a prospective juror's responses to the trial court's questions left no doubt that he would be unable to give a fair trial if the murder arose out of a drug deal, the trial court did not abuse its discretion in sua sponte dismissing the prospective juror for cause under G.S. 15A-1214(g). State v. Brower, 186 N.C. App. 397, 651 S.E.2d 390, 2007 N.C. App. LEXIS 2209 (2007).

Reopening Examination After Acceptance by Both Parties. —

Trial court acted within its discretion when it reopened voir dire in defendant's capital murder trial as to two jurors who erroneously stated during voir dire that they had no close friends or relatives who had been witness, a defendant, or a victim in a criminal case, while one had some cousins who had been convicted of capital crimes and the other's biological father had been convicted of murder and uncle was a fugitive from justice suspected of murder. State v. Goss, 361 N.C. 610, 651 S.E.2d 867, 2007 N.C. LEXIS 1106 (2007).

§ 15A-1217. Number of peremptory challenges.

CASE NOTES

I. General Consideration.
III. Capital Cases.

I. GENERAL CONSIDERATION.

Cited in Golphin v. Branker, 519 F.3d 168, 2008 U.S. App. LEXIS 5033 (4th Cir. 2008).

III. CAPITAL CASES.

Batson Challenge Not Basis to Obviate Juror's Death Qualification. — State's peremptory challenge to a prospective juror who stated he would have "a bit of a struggle" imposing the death penalty did not violate defendant's rights under the Fourteenth Amendment, as he could not use the batson process to obviate the death qualification of a juror in a capital case. State v. Brower, 186 N.C. App. 397, 651 S.E.2d 390, 2007 N.C. App. LEXIS 2209 (2007).

Article 73.

Criminal Jury Trial in Superior Court.

§ 15A-1222. Expression of opinion prohibited.

CASE NOTES

II. Questions by Trial Judge.

II. QUESTIONS BY TRIAL JUDGE.

Questioning Held Not Improper. —
Because none of the questions asked by the trial judge related to any question of fact to be decided by the jury, and defendant did not demonstrate how he was prejudiced by the questions, defendant was not deprived of a fair trial. State v. Ware, — N.C. App. —, 656 S.E.2d 662, 2008 N.C. App. LEXIS 263 (2008).

§ 15A-1223. Disqualification of judge.

CASE NOTES

Judge Should Have Granted Attorney's Motion to Recuse. — Judge should have granted the attorney's motion to recuse because the criminal contempt with which the attorney was charged was based upon acts so involving the judge, including the attorney's actions in an underlying criminal case in which the attorney unsuccessfully sought the judge's recusal, that the judge's objectivity may reasonably have been questioned. In re Marshall, — N.C. App. —, 662 S.E.2d 5, 2008 N.C. App. LEXIS 1131 (June 17, 2008).

§ 15A-1227. Motion for dismissal.

CASE NOTES

- I. General Consideration.
- III. Evidence on Motion.
  - B. Substantial Evidence.
- IV. Appeal from Ruling on Motion.
  - A. In General.

I. GENERAL CONSIDERATION.

Timing of Request for Relief. — G.S. 15A-1227 provides that a motion for dismissal for insufficiency of the evidence to sustain a conviction may not be made earlier than upon close of the State of North Carolina's evidence. State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

Applied in State v. Simpson, — N.C. App. —, 653 S.E.2d 249, 2007 N.C. App. LEXIS 2431 (2007).

III. EVIDENCE ON MOTION.

B. Substantial Evidence.

Substantial Evidence Established. — Trial court did not err when it denied defendant's motion to dismiss the embezzlement charges against defendant because the State of North Carolina presented substantial evidence of defendant's agency or fiduciary relationship with the vendors who contracted with defendant sufficient to survive a motion to dismiss on that element. Additionally, the State also presented evidence sufficient to survive the motion to dismiss on the issue of intent as the State presented evidence that defendant received money on behalf of the vendors, did not pay them when it was due, and was experiencing personal financial problems. State v. Newell, — N.C. App. —, 657 S.E.2d 400, 2008 N.C. App. LEXIS 427 (2008).

State submitted substantial evidence to show both that defendant, a salon's massage therapist, had sexual contact with two female clients through the use of force and against their will, and, thus, committed two sexual batteries in violation of G.S. 14-27.5(a)(1), and that defendant while working at the salon was practicing massage therapy without a license in violation of G.S. 90-634(a)(1). As a result, dismissal of those charges on defendant's motion was not warranted. State v. Viera, — N.C. App. —, 658 S.E.2d 529, 2008 N.C. App. LEXIS 608 (Apr. 1, 2008).

IV. APPEAL FROM RULING ON MOTION.

A. In General.

Trial Court's Failure to Rule on Defendant's Motion to Dismiss Was Prejudicial. — Trial court's failure to rule on defendant's motion to dismiss the charge of robbery with a dangerous weapon at the close of the state's evidence, as required by G.S. 15A-1227(c), prejudiced defendant because the only evidence of defendant's involvement in the robbery was hearsay testimony that was admitted for impeachment, not substantive, purposes. State v. Batchelor, — N.C. App. —, 660 S.E.2d 158, 2008 N.C. App. LEXIS 894 (2008).

When Motion for Dismissal Not Ground for Appeal. — Defendant's argument that the trial court erred in denying his motion to dismiss the charge of possession of stolen property was not properly before the appellate court where he had offered evidence following the trial court's denial of his motion for dismissal at the close of the State's evidence and thus, under G.S. 15A-1227(a)(1), he could not urge the motion as a ground for appeal. State v. Southards, — N.C. App. —, 657 S.E.2d 419, 2008 N.C. App. LEXIS 403 (2008).

No Prejudice Shown. — When defendants moved to dismiss charges at the close of all the evidence, a trial court's reservation of a ruling on defendants' motions, which was contrary to G.S. 15A-1227(c), requiring the court to rule immediately, did not create reversible error or violate defendants' rights under U.S. Const., Amends. V and XIV, or N.C. Const., Art. I, § 19, because no prejudice was shown, as required by G.S. 15A-1443; it was more likely that the trial court would have denied the motions had the court not deferred the court's ruling, and the evidence was sufficient to withstand the motions to dismiss. State v. Hernandez, — N.C. App. —, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008).

§ 15A-1230. Limitations on argument to the jury.

CASE NOTES

Remarks Held Not to Necessitate Ex Mero Motu Correction. —

Prosecutor's remarks in closing argument were improper because the remarks demeaned the integrity of a witness and improperly injected the prosecutor's opinion as to the character of witnesses, but the trial court's failure to correct the remarks ex mero motu did not entitle defendant to a new trial since defendant did not object to the remarks; defendant did not show the comments were extreme and calculated to prejudice the jury. State v. Thompson, — N.C. App. —, 654 S.E.2d 814, 2008 N.C. App. LEXIS 82 (2008).

Argument as Reasonable Inference from the Record. —

Prosecutor's statement that "if one has a disposition toward murder. . ." did not amount to misconduct because, viewed in the context of the arguments being made, the prosecutor properly argued the evidence that was presented and all reasonable inferences that could have been drawn from that evidence. State v. Hall, — N.C. App. —, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007).

Argument Held Not Improper. —

Prosecutor's closing arguments to the jury, in which the prosecutor advocated that the jury return a binding recommendation of death, did not express the prosecutor's personal desires, opinions, or beliefs, but were well within the "wide latitude" of what was permissible. State v. Murrell, — N.C. —, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008).

§ 15A-1233. Review of testimony; use of evidence by the jury.

CASE NOTES

Applied in State v. Wilson, — N.C. App. —, 665 S.E.2d 751, 2008 N.C. App. LEXIS 1615 (2008).

§ 15A-1234. Additional instructions.

CASE NOTES

Repeated or Clarified Instructions Are Not Additional Instructions. —

Defendant's rights under G.S. 15A-1234 were not violated when the trial court clarified its original instructions based on questions the jury sent to the trial court during deliberations; that statute applied when the trial court gave additional instructions and the trial court did not give any additional instructions in the case. State v. Smith, — N.C. App. —, 654 S.E.2d 730, 2008 N.C. App. LEXIS 92 (Jan. 15, 2008).

§ 15A-1235. Length of deliberations; deadlocked jury.

CASE NOTES

I. General Consideration.
II. Instructing Jurors Not to Surrender Convictions.
III. Comment on Expense of Retrial.

I. GENERAL CONSIDERATION.

Trial judge has no right to coerce a verdict, etc.

Trial court did not abuse the court's discretion when, only two hours after the jury began deliberating, the court inquired into the numerical division of the jury and gave an Allen instruction because the trial court did not attempt to coerce the jury into reaching a verdict. State v. Streeter, — N.C. App. —, 663 S.E.2d 879, 2008 N.C. App. LEXIS 1482 (Aug. 5, 2008).

Jury Verdict Not Coerced by Repeated Allen Instructions. — Although it was possible that a trial court gave Allen charges more frequently than was necessary to assist the jury in reaching a verdict, the trial court did not deprive defendant of a fair trial by concluding that after each one-to-two hour period of deliberation, the jury was having difficulty reaching a verdict and an Allen charge would be appropriate under G.S. 15A-1235(c). State v. Boston, — N.C. App. —, 663 S.E.2d 886, 2008 N.C. App. LEXIS 1487 (Aug. 5, 2008).

No Rule as to How Long Before Allen Instruction. — G.S. 15A-1235(c) does not require an affirmative indication from the jury that it is having difficulty reaching a verdict, nor does it require that the jury deliberate for a lengthy period of time before the trial court may give an Allen instruction. Rather, G.S. 15A-1235(c) provides that the trial court may give the Allen instruction if it appears to the judge that the jury is unable to reach a verdict. State v. Boston, — N.C. App. —, 663 S.E.2d 886, 2008 N.C. App. LEXIS 1487 (Aug. 5, 2008).

Cited in State v. Wilson, — N.C. App. —, 665 S.E.2d 751, 2008 N.C. App. LEXIS 1615 (2008).

II. INSTRUCTING JURORS NOT TO SURRENDER CONVICTIONS.

Instruction Held Sufficient. —

Jury instructions that the trial court gave to the jury were not coercive and, thus, the trial court did not err in giving them in defendant's murder trial; the record did not support defendant's contention that the jury was deadlocked and the trial court instructed the jurors not to surrender their honest convictions in trying to reach a verdict. State v. Smith, — N.C. App. —, 654 S.E.2d 730, 2008 N.C. App. LEXIS 92 (Jan. 15, 2008).

III. COMMENT ON EXPENSE OF RETRIAL.

Instruction Held Not Error. —

Despite the trial court's erroneously informing a deadlocked jury under G.S. 15A-1235 that if they did not agree upon a verdict another jury might be called upon to try the case, and that the state and defendant had a tremendous amount of time and money invested, given the evidence, defendant was not entitled to a new trial; the error was not so fundamental under G.S. 15A-1443 that absent the error, the jury probably would have reached a different verdict or the error constituted a miscarriage of justice. State v. Pate, — N.C. App. —, 653 S.E.2d 212, 2007 N.C. App. LEXIS 2423 (2007).

§ 15A-1236. Admonitions to jurors; regulation and separation of jurors.

CASE NOTES

Cited in State v. Jackson, — N.C. App. —, 659 S.E.2d 73, 2008 N.C. App. LEXIS 689 (2008).

§ 15A-1237. Verdict.

CASE NOTES

Unanimous Verdict. —

Because the trial court did not give any disjunctive instruction and, in any event, the unanimity cases relied upon by defendant did not apply to a charge of conspiracy to traffic in cocaine, the trial court's instruction did not create a risk of a non-unanimous verdict. State v. Davis, — N.C. App. —, 656 S.E.2d 632, 2008 N.C. App. LEXIS 278 (2008).

Applied in State v. Haddock, — N.C. App. —, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

§ 15A-1240. Impeachment of the verdict.

CASE NOTES

Applied in State v. Lewis, — N.C. App. —, 654 S.E.2d 808, 2008 N.C. App. LEXIS 65 (2008).

Cited in State v. Jackson, — N.C. App. —, 659 S.E.2d 73, 2008 N.C. App. LEXIS 689 (2008).

§ 15A-1241. Record of proceedings.

CASE NOTES

Ineffective Assistance of Counsel Not Found. — Defendant did not receive ineffective assistance of counsel, even though counsel did not request recordation under G.S. 15A-1241(b) of opening/closing arguments, jury selection, and rulings on matters of law, as defendant acknowledged that defendant could not show prejudice. State v. Thomas, — N.C. App. —, 651 S.E.2d 924, 2007 N.C. App. LEXIS 2309 (2007).

Cited in State v. Daniels, — N.C. App. —, 659 S.E.2d 22, 2008 N.C. App. LEXIS 711 (2008).

§ 15A-1242. Defendant's election to represent himself at trial.

CASE NOTES

Failure to Conduct Inquiry. —

Trial court at defendant's revocation hearing failed to comply with the requirements of G.S. 15A-1242 regarding defendant's decision to proceed pro se because the verbal exchange between the trial court and defendant presented no indication defendant understood or appreciated the consequences of defendant's decision to proceed pro se or comprehended the nature of the proceedings and the range of permissible punishments. State v. Jackson, — N.C. App. —, 660 S.E.2d 165, 2008 N.C. App. LEXIS 877 (2008).

Adequate Inquiry Not Made. — Trial court did not make an adequate determination pursuant to G.S. 15A-1242 and N.C. Const., Art. I, § 23 that defendant's decision to proceed pro se was knowingly, intelligently, and voluntarily made because: (1) defendant did not show that defendant appreciated the consequences of proceeding without counsel, or that defendant understood that murder was punishable by death; (2) it was not sufficient that defendant agreed that defendant had been afforded excellent legal counsel, or that defendant claimed the decision was made without "haste" and was "something that (defendant had) thought about for quite some time"; and (3) that defendant's responses were clear and succinct and that defendant was calm and revealed no sign of confusion, reticence, or hesitation could not substitute for the required inquiry. State v. Moore, 362 N.C. 319, 661 S.E.2d 722, 2008 N.C. LEXIS 493 (2008).

Remand for Noncompliance. —

Because a trial court failed to comply with G.S. 15A-1242 as it failed to properly inform defendant regarding the range of permissible punishments that he faced, and its conclusion that he was not entitled to appointed counsel was also erroneous as defendant faced a fine of greater than $500, his speeding convictions had to be reversed and the matter had to be remanded for a new trial. State v. Taylor, — N.C. App. —, 652 S.E.2d 741, 2007 N.C. App. LEXIS 2358 (2007).

Request to Proceed Pro Se Properly Granted. —

Trial court did not err in allowing defendant to proceed pro se with standby counsel as the court fully complied with G.S. 15A-1242 because on two separate occasions prior to defendant's jury trial defendant waived his right to counsel, and the trial court in both instances engaged in and applied the appropriate statutory inquiry and safeguards to defendant's election to proceed pro se in that the trial court found defendant understood the nature of the charges, the proceedings, his rights to the assistance of counsel and to self-representation, and the range of permissible punishments. State v. Petrick, — N.C. App. —, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007).

§ 15A-1243. Standby counsel for defendant representing himself.

CASE NOTES

Cited in State v. Worrell, — N.C. App. —, 660 S.E.2d 183, 2008 N.C. App. LEXIS 855 (2008).

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

Article 78.

Order of Commitment to Imprisonment.

§ 15A-1301. Order of commitment to imprisonment when not otherwise specified.

CASE NOTES

Cited in State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007).

Article 80.

Defendants Found Not Guilty by Reason of Insanity.

§ 15A-1321. Automatic civil commitment of defendants found not guilty by reason of insanity.

CASE NOTES

Request for Instruction. — Denial of defendant's request for a modified jury instruction regarding post-verdict commitment procedures after a verdict of not guilty by reason of insanity was not erroneous because the trial court properly instructed the jury on the "central meaning of the statute," and its instruction substantially complied with defendant's request. State v. Hall, — N.C. App. —, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007).

Article 81.

General Sentencing Provisions.

§ 15A-1331. Authorized sentences; conviction.

CASE NOTES

Prior Record Level at Resentencing. — For purposes of calculating a defendant's prior record level under G.S. 15A-1340.14(a) at resentencing, a trial court may consider the defendant's conviction that was entered after the defendant's original sentencing, but prior to the defendant's resentencing; under G.S. 15A-1340.11(7), a person has a prior conviction if the person has that conviction, as determined by G.S. 15A-1331(b) on the date a judgment is entered. State v. Pritchard, 186 N.C. App. 128, 649 S.E.2d 917, 2007 N.C. App. LEXIS 1957 (2007).

§ 15A-1334. The sentencing hearing.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Clerk's Comment Not Violative of G.S. 15A-1334. — General Assembly did not intend by specifying in G.S. 15A-1334(b) who could "comment to the court on sentencing" to prohibit routine communication between trial courts and clerks of court during sentencing proceedings. As a result, the trial court's imposition of consecutive sentences against defendant was not error even though the trial court did not realize that it had not specified whether defendant's sentences were to run consecutively until an assistant superior court clerk informed the trial court of that fact at defendant's sentencing. State v. Mead, 362 N.C. 218, 657 S.E.2d 367, 2008 N.C. LEXIS 147 (2008).

ARTICLE 81B.

Structured Sentencing of Persons Convicted of Crimes.

Part 1. General Provisions.

§ 15A-1340.10. Applicability of structured sentencing.

CASE NOTES

Because a trial court's calculation of an inmate's parole eligibility did not disturb his 40-year sentence, a question as to whether the trial court erred in concluding that the 40-year sentence violated the presumptive term provision of former G.S. 15A-1340.4 (see now G.S. 15A-1340.10), part of the Fair Sentencing Act, was immaterial. Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

§ 15A-1340.11. Definitions.

CASE NOTES

Prior Record Level at Resentencing. — For purposes of calculating a defendant's prior record level under G.S. 15A-1340.14(a) at resentencing, a trial court may consider the defendant's conviction that was entered after the defendant's original sentencing, but prior to the defendant's resentencing; under G.S. 15A-1340.11(7), a person has a prior conviction if the person has that conviction, as determined by G.S. 15A-1331(b) on the date a judgment is entered. State v. Pritchard, 186 N.C. App. 128, 649 S.E.2d 917, 2007 N.C. App. LEXIS 1957 (2007).

Cited in State v. Melvin, — N.C. App. —, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008).

Part 2. Felony Sentencing.

§ 15A-1340.13. Procedure and incidents of sentence of imprisonment for felonies.

CASE NOTES

Extraordinary Mitigation. —

Trial court did not err in concluding that there were no factors in defendant's case that warranted a finding, pursuant to G.S. 15A-1340.13(g)(1), that there existed extraordinary mitigation factors justifying imposition of a lesser punishment. The trial court was correct in finding that the sheer number of mitigating factors present did not permit a trial court to find as a result that an extraordinary mitigating existed. State v. Melvin, — N.C. App. —, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008).

Trial court did not err in imposing an active sentence in defendant's case because defendant pled guilty to multiple felonies. Pursuant to G.S. 15A-1340.13(g), the trial court acted within its discretion in determining that there were no extraordinary factors present that warranted a lesser, intermediate sentence.

State v. Melvin, — N.C. App. —, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008).

Defendant who pled guilty to multiple felonies did not show, pursuant to G.S. 15A-1340.13(g)(2), (3), that there existed any extraordinary mitigation factors or that a manifest injustice would occur if the trial court imposed active punishment in defendant's case rather than an intermediate, lesser punishment. As a result, the trial court did not err in ordering that defendant serve an active sentence. State v. Melvin, — N.C. App. —, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008).

§ 15A-1340.14. Prior record level for felony sentencing.

CASE NOTES

Determination of Prior Record Level. — For purposes of calculating a defendant's prior record level under G.S. 15A-1340.14(a) at resentencing, a trial court may consider the defendant's conviction that was entered after the defendant's original sentencing, but prior to the defendant's resentencing; under G.S. 15A-1340.11(7), a person has a prior conviction if the person has that conviction, as determined by G.S. 15A-1331(b) on the date a judgment is entered. State v. Pritchard, 186 N.C. App. 128, 649 S.E.2d 917, 2007 N.C. App. LEXIS 1957 (2007).

Trial court did not err in calculating defendant's prior record level, as it was proven by stipulation as permitted by G.S. 15a-1340.14(f)(1). State v. Spencer, — N.C. App. —, 654 S.E.2d 69, 2007 N.C. App. LEXIS 2555 (2007).

Use of Same Factors to Increase Prior Record Level and Aggravate Sentence Not Prohibited. — Although defendant contended that using the same factors to increase his prior record level and aggravate his sentence violated "his state and federal rights," defendant failed to point to any specific right, and instead, argued that such a procedure was improper; the General Assembly had not provided any statutory right prohibiting use of the same factors to increase a defendant's prior record level and aggravate his sentence. State v. Moore, — N.C. App. —, 656 S.E.2d 287, 2008 N.C. App. LEXIS 208 (2008).

Harmless Error. — Any Blakely error in determining that defendant discharged a firearm into occupied property while defendant was on probation, which increased defendant's prior record level points, was harmless as defendant admitted that defendant was on probation on the date of an offense since defendant's prior record level worksheet showed that defendant received eight points for prior convictions, and defendant received one point for purposes of G.S. 15A-1340.14(b)(7) for committing the offense while on probation; the State and defense counsel signed the prior record level worksheet, and defense counsel agreed that defendant had one prior record level point because defendant was on probation at the time of the offense. State v. Wissink, — N.C. App. —, 652 S.E.2d 17, 2007 N.C. App. LEXIS 2249 (2007).

Prior Out-of-State Conviction. — State met its burden of proving defendant's prior conviction in Virginia, for inflicting bodily injury on an employee of a juvenile detention center in violation of Va. Code Ann. § 18.2-55, was "substantially similar" to a Class A1 or Class 1 misdemeanor as required by G.S. 15A-1340.14(e), for the purpose of considering prior convictions for sentencing defendant for murder, kidnapping, rape, and burglary convictions in North Carolina. Indeed, the Virginia conviction was substantially similar to bodily injury caused in violation of G.S. 14-33(c), a class A1 misdemeanor, for North Carolina purposes. State v. Sapp, — N.C. App. —, 661 S.E.2d 304, 2008 N.C. App. LEXIS 1098 (2008).

Stipulation. — Sufficient evidence existed to show that defendant was properly sentenced at a prior record level. Defense counsel at sentence stated the prior record level when asked about it and stipulation was one of the ways that the prior record level could be shown. State v. Mack, — N.C. App. —, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

Stipulation as to Prior Out-of-State Convictions Ineffective. — Although defendant stipulated to the state's prior record level worksheet, his stipulation was ineffective as to his prior Ohio convictions; the state failed to present evidence that the Ohio offenses were substantially similar to North Carolina offenses. State v. Moore, — N.C. App. —, 656 S.E.2d 287, 2008 N.C. App. LEXIS 208 (2008).

Calculating Prior Record Level. — Defendant's claim that defendant's prior record level was improperly calculated pursuant to G.S. 15A-1340.14(a)-(d) had to be rejected. Defendant's argument was based on the contention that prior record level points could not be imposed for the possession of a firearm by a felon and for the felony underlying that offense, but the same conviction was not being used to elevate defendant's sentencing status; possession of a firearm by a felon was a separate substantive offense from defendant's prior felony upon which defendant's status as a felon was based. State v. Goodwin, — N.C. App. —, 661 S.E.2d 46, 2008 N.C. App. LEXIS 1020 (2008).

Cited in State v. Melvin, — N.C. App. —, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008).

§ 15A-1340.15. Multiple convictions.

CASE NOTES

Remand for Resentencing. — Trial court erred in sentencing defendant on defendant's conviction for selling cocaine and, thus, that part of the case had to be remanded for resentencing. The trial court concluded that an additional sentencing point should be added for that offense because defendant's prior offenses included all of the elements of defendant's present conviction for selling cocaine, but the sentencing worksheet revealed that defendant had never been convicted of any offense containing all of the elements of selling cocaine. State v. Mack, — N.C. App. —, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

Cited in State v. Cobb, — N.C. App. —, 652 S.E.2d 699, 2007 N.C. App. LEXIS 2367 (2007); State v. Mead, 362 N.C. 218, 657 S.E.2d 367, 2008 N.C. LEXIS 147 (2008).

§ 15A-1340.16. Aggravated and mitigated sentences.

(a) Generally, Burden of Proof. — The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

(a1) Jury to Determine Aggravating Factors; Jury Procedure if Trial Bifurcated. — The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury pursuant to the procedures in this subsection. Admissions of the existence of an aggravating factor must be consistent with the provisions of G.S. 15A-1022.1. If the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense. The jury impaneled for the trial of the felony may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination. If the court determines that a separate proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of whether one or more aggravating factors exist, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which the juror was selected. If the trial jury is unable to reconvene for a hearing on the issue of whether one or more aggravating factors exist after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue. A jury selected to determine whether one or more aggravating factors exist shall be selected in the same manner as juries are selected for the trial of criminal cases.

(a2) Procedure if Defendant Admits Aggravating Factor Only. — If the defendant admits that an aggravating factor exists, but pleads not guilty to the underlying felony, a jury shall be impaneled to dispose of the felony charge. In that case, evidence that relates solely to the establishment of an aggravating factor shall not be admitted in the felony trial.

(a3) Procedure if Defendant Pleads Guilty to the Felony Only. — If the defendant pleads guilty to the felony, but contests the existence of one or more aggravating factors, a jury shall be impaneled to determine if the aggravating factor or factors exist.

(a4) Pleading of Aggravating Factors. — Aggravating factors set forth in subsection (d) of this section need not be included in an indictment or other charging instrument. Any aggravating factor alleged under subdivision (d)(20) of this section shall be included in an indictment or other charging instrument, as specified in G.S. 15A-924.

(a5) Procedure to Determine Prior Record Level Points Not Involving Prior Convictions. — If the State seeks to establish the existence of a prior record level point under G.S. 15A-1340.14(b)(7), the jury shall determine whether the point should be assessed using the procedures specified in subsections (a1) through (a3) of this section. The State need not allege in an indictment or other pleading that it intends to establish the point.

(a6) Notice of Intent to Use Aggravating Factors or Prior Record Level Points. — The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

(b) When Aggravated or Mitigated Sentence Allowed. — If the jury, or with respect to an aggravating factor under G.S. 15A-1340.16(d)(12a) or (18a), the court, finds that aggravating factors exist or the court finds that mitigating factors exist, the court may depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4). If the court finds that mitigating factors are present and are sufficient to outweigh any aggravating factors that are present, it may impose a sentence that is permitted by the mitigated range described in G.S. 15A-1340.17(c)(3).

(c) Written Findings; When Required. — The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If the jury finds factors in aggravation, the court shall ensure that those findings are entered in the court's determination of sentencing factors form or any comparable document used to record the findings of sentencing factors. Findings shall be in writing. The requirement to make findings in order to depart from the presumptive range applies regardless of whether the sentence of imprisonment is activated or suspended.

(d) Aggravating Factors. — The following are aggravating factors:

(1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

(2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

(2a) The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy. A "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.

(3) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(4) The defendant was hired or paid to commit the offense.

(5) The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(6) The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, social worker, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.

(6a) The offense was committed against or proximately caused serious harm as defined in G.S. 14-163.1 or death to a law enforcement agency animal or assistance animal as defined in G.S. 14-163.1, while engaged in the performance of the animal's official duties.

(7) The offense was especially heinous, atrocious, or cruel.

(8) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(9) The defendant held public office at the time of the offense and the offense related to the conduct of the office.

(10) The defendant was armed with or used a deadly weapon at the time of the crime.

(11) The victim was very young, or very old, or mentally or physically infirm, or handicapped.

(12) The defendant committed the offense while on pretrial release on another charge.

(12a) The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration.

(13) The defendant involved a person under the age of 16 in the commission of the crime.

(14) The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

(15) The defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.

(16) The offense involved the sale or delivery of a controlled substance to a minor.

(16a) The offense is the manufacture of methamphetamine and was committed where a person under the age of 18 lives, was present, or was otherwise endangered by exposure to the drug, its ingredients, its by-products, or its waste.

(16b) The offense is the manufacture of methamphetamine and was committed in a dwelling that is one of four or more contiguous dwellings.

(17) The offense for which the defendant stands convicted was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.

(18) The defendant does not support the defendant's family.

(18a) The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

(19) The serious injury inflicted upon the victim is permanent and debilitating.

(20) Any other aggravating factor reasonably related to the purposes of sentencing.

Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. Evidence necessary to establish that an enhanced sentence is required under G.S. 15A-1340.16A may not be used to prove any factor in aggravation.

The judge shall not consider as an aggravating factor the fact that the defendant exercised the right to a jury trial.

Notwithstanding the provisions of subsection (a1) of this section, the determination that an aggravating factor under G.S. 15A-1340.16(d)(18a) is present in a case shall be made by the court, and not by the jury. That determination shall be made in the sentencing hearing.

(e) Mitigating Factors. — The following are mitigating factors:

(1) The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability.

(2) The defendant was a passive participant or played a minor role in the commission of the offense.

(3) The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.

(4) The defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense.

(5) The defendant has made substantial or full restitution to the victim.

(6) The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct or consented to it.

(7) The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(8) The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.

(9) The defendant could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.

(10) The defendant reasonably believed that the defendant's conduct was legal.

(11) Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

(12) The defendant has been a person of good character or has had a good reputation in the community in which the defendant lives.

(13) The defendant is a minor and has reliable supervision available.

(14) The defendant has been honorably discharged from the United States armed services.

(15) The defendant has accepted responsibility for the defendant's criminal conduct.

(16) The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.

(17) The defendant supports the defendant's family.
(18) The defendant has a support system in the community.
(19) The defendant has a positive employment history or is gainfully employed.
(20) The defendant has a good treatment prognosis, and a workable treatment plan is available.
(21) Any other mitigating factor reasonably related to the purposes of sentences. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 7, s. 6; c. 22, s. 22; c. 24, s. 14(b); 1995, c. 509, s. 13; 1997-443, ss. 19.25(w), 19.25(ee); 2003-378, s. 6; 2004-178, s. 2; 2004-186, s. 8.1; 2005-101, s. 1; 2005-145, s. 1; 2005-434, s. 4; 2007-80, s. 2; 2008-129, ss. 1, 2.)

Effect of Amendments. —

Session Laws 2008-129, ss. 1 and 2, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "G.S. 15A-1340.16(d)(12a) or (18a)" for "G.S. 15A-1340.16(d)(18a)" in subsection (b); and added subdivision (d)(12a).

CASE NOTES

Use of Same Factors to Increase Prior Record Level and Aggravate Sentence Not Prohibited. — Although defendant contended that using the same factors to increase his prior record level and aggravate his sentence violated "his state and federal rights," defendant failed to point to any specific right, and instead, argued that such a procedure was improper; the General Assembly had not provided any statutory right prohibiting use of the same factors to increase a defendant's prior record level and aggravate his sentence. State v. Moore, — N.C. App. —, 656 S.E.2d 287, 2008 N.C. App. LEXIS 208 (2008).

Discretion of Trial Court. —

Trial court did not violate defendant's constitutional right to a jury trial when it submitted aggravating factors to the jury by means of a special verdict. To the contrary, the trial court was scrupulously protecting defendant's constitutional right to a jury trial, exactly as Blakely required, when it relied on the jury's findings to aggravate defendant's sentence. State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007).

Pretrial Release. —

Because defendant admitted, through counsel, that defendant committed an offense while on pretrial release on another charge for purposes of the aggravating factor under G.S. 15A-1340.16(d)(12) in sentencing defendant, no Blakely right to a jury trial under U.S. Const., Amend. VI was invoked, as such was within the exception to Blakely; the trial court had authority to impose an aggravated sentence on defendant's convictions based on that finding, as the North Carolina Blakely Act, G.S. 15A-1022.1, was inapplicable where defendant's offenses were committed prior to June 30, 2005. State v. Everette, 361 N.C. 646, 652 S.E.2d 241, 2007 N.C. LEXIS 1107 (2007).

Proper Aggravation. —

Because the trial court had determined that the aggravating factor under G.S. 15A-1340.16(d)(12), that defendant was on pretrial release at the time that defendant committed other offenses for which convictions were issued, outweighed the lone mitigating factor and supported imposition of an aggravated sentence, defendant was not entitled to a new sentencing hearing; defendant had admitted to the aggravator through counsel, which admission was sufficiently clear, definite, and certain for Blakely purposes. State v. Everette, 361 N.C. 646, 652 S.E.2d 241, 2007 N.C. LEXIS 1107 (2007).

Improper Aggravation. —

The trial court erred in sentencing defendant under G.S. 15A-1340.16(d)(2) because defendant's testimony constituted conflicting evidence and did not support a finding beyond a reasonable doubt that defendant joined with more than one other person in committing the offense, and it was impossible to know upon which evidence the jury based its verdict. State v. Walker, — N.C. App. —, 654 S.E.2d 722, 2008 N.C. App. LEXIS 71 (2008).

Submission of Factor to Jury Held Proper. — Trial court did not err in submitting aggravating factor to the jury because the state presented ample evidence that defendant was operating his vehicle in a reckless manner by driving at a high rate of speed while legally intoxicated; any reasonable person should have known that an automobile operated by a legally intoxicated driver was reasonably likely to cause death to any and all persons who may find themselves in the automobile's path. State v. Lopez, — N.C. App. —, 655 S.E.2d 895, 2008 N.C. App. LEXIS 199 (Feb. 5, 2008).

Great Monetary Loss as Aggravating Factor. — Since the ratio of the amounts embezzled to the threshold amount of the offense charged was a factor to be considered in determining whether the imposition of an aggravated sentence was proper, defendant's embezzlement of $404,436 and $296,901 supported the imposition of an aggravated sentence, as they were sums of "great monetary value" when compared with threshold amount required for embezzlement of amounts over $100,000.00. State v. Cobb, — N.C. App. —, 652 S.E.2d 699, 2007 N.C. App. LEXIS 2367 (2007).

***Blakely* Errors Were Harmless.** — Although the trial judge's consideration of evidence of an aggravating factor not found by the jury or admitted by defendant violated the Sixth Amendment, the error was harmless beyond a reasonable doubt because, pursuant to G.S. 15A-1340.16(d)(8), a great risk of death was knowingly created to the lives of several people through defendant's actions of firing a semiautomatic pistol at police officers in the parking lot of a store where customers were present. Furthermore, the jury considered the issue of whether defendant's actions were excused by defendant's insanity defense, but did not find that defendant was insane. State v. Sellars, — N.C. App. —, 664 S.E.2d 45, 2008 N.C. App. LEXIS 1470 (Aug. 5, 2008).

Cited in State v. Melvin, — N.C. App. —, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008).

§ 15A-1340.16A. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threatened to use or display a firearm or deadly weapon during the commission of the felony.

(a), (b) Repealed by Session Laws 2003-378, s. 2, effective August 1, 2003.

(c) If a person is convicted of a Class A, B1, B2, C, D, or E felony and it is found as provided in this section that: (i) the person committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and (ii) the person actually possessed the firearm or deadly weapon about his or her person, then the person shall have the minimum term of imprisonment to which the person is sentenced for that felony increased by 60 months. The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 60 months, as specified in G.S. 15A-1340.17(e) and (e1).

(d) An indictment or information for the Class A, B1, B2, C, D, or E felony shall allege in that indictment or information the facts set out in subsection (c) of this section. The pleading is sufficient if it alleges that the defendant committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and the defendant actually possessed the firearm or deadly weapon about the defendant's person. One pleading is sufficient for all Class A, B1, B2, C, D, or E felonies that are tried at a single trial.

(e) The State shall prove the issues set out in subsection (c) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to the issues. If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issues set out in subsection (c) of this section, then a jury shall be impaneled to determine the issues.

(f) Subsection (c) of this section does not apply if the evidence of the use, display, or threatened use or display of the firearm or deadly weapon is needed to prove an element of the felony or if the person is not sentenced to an active term of imprisonment. (1994, Ex. Sess., c. 22, s. 20; 2003-378, s. 2; 2008-214, s. 5.)

Effect of Amendments. — Session Laws 2008-214, s. 5, effective December 1, 2008, and applicable to offenses committed on or after that date, inserted "or deadly weapon" following "firearm" in the section heading and throughout the section.

§ 15A-1340.17. Punishment limits for each class of offense and prior record level.

CASE NOTES

Sentence Below Statutory Minimum Required Remand. — Because defendant's 64-month minimum sentence was below the 80-month minimum for a class C felon in the level IV mitigated range prescribed by G.S. 15A-1340.17(c), remand for resentencing was required. State v. Watkins, — N.C. App. —, 659 S.E.2d 58, 2008 N.C. App. LEXIS 687 (2008).

Cited in State v. Mack, — N.C. App. —, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008); State v. Hagans, — N.C. App. —, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008); State v. Melvin, — N.C. App. —, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008).

Part 3. Misdemeanor Sentencing.

§ 15A-1340.23. Punishment limits for each class of offense and prior conviction level.

CASE NOTES

Cited in State v. Taylor, — N.C. App. —, 652 S.E.2d 741, 2007 N.C. App. LEXIS 2358 (2007).

ARTICLE 81C.

Restitution.

§ 15A-1340.34. Restitution generally.

CASE NOTES

Restitution Held Proper. — Where defendant raped a victim, an order of restitution to reimburse the victim for medical expenses resulting from the rape complied with the statutory requirements because the relatively modest amount of restitution, $2,301, and the terms of its payment were not such as to lead to a "common sense" conclusion that the trial court did not consider defendant's ability to pay. State v. Person, — N.C. App. —, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

Restitution Award Held Inappropriate. — Trial court erred in awarding restitution under G.S. 15A-1340.34(c) because (1) the losses for the victim's unrecovered tools and lost wages were not related to possession of stolen property act for which defendant was convicted, (2) there was no evidence of how much income the victim lost as a result of the stolen tools, and (3) the State admitted that its request for restitution included an amount for tools that were not found in defendant's possession. State v. Southards, — N.C. App. —, 657 S.E.2d 419, 2008 N.C. App. LEXIS 403 (2008).

§ 15A-1340.36. Determination of restitution.

CASE NOTES

Consideration of Restitution Award Factors. —

Where defendant raped a victim, an order of restitution to reimburse the victim for medical expenses resulting from the rape complied with the statutory requirements because the relatively modest amount of restitution, $2,301, and the terms of its payment were not such as to lead to a "common sense" conclusion that the trial court did not consider defendant's ability to pay. State v. Person, — N.C. App. —, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

Findings of Fact Not Required. — Trial court did not err in failing to make findings of fact as to restitution in sentencing defendant as the court was not required to make such findings under G.S. 15A-1340.36(a). State v. Tuck, — N.C. App. —, 664 S.E.2d 27, 2008 N.C. App. LEXIS 1495 (Aug. 5, 2008).

Ability to Pay. —

Trial court did not err in ordering defendant to pay restitution in a case in which defendant shot and wounded another person; defendant's counsel pointed out that: (1) defendant was working and (2) that defendant could pay restitution if defendant was granted work release, and defendant did not contradict those assertions even though defendant was given an opportunity to address the restitution requirement. State v. Tate, — N.C. App. —, 653 S.E.2d 892, 2007 N.C. App. LEXIS 2553 (2007).

ARTICLE 82.

Probation.

§ 15A-1342. Incidents of probation.

(a) Period. — The court may place a convicted offender on probation for the appropriate period as specified in G.S. 15A-1343.2(d), not to exceed a maximum of five years. The court may place a defendant as to whom prosecution has been deferred on probation for a maximum of two years. The probation remains conditional and subject to revocation during the period of probation imposed, unless terminated as provided in subsection (b) or G.S. 15A-1341(c).

Extension. — In addition to G.S. 15A-1344, the court with the consent of the defendant may extend the period of probation beyond the original period (i) for the purpose of allowing the defendant to complete a program of restitution, or (ii) to allow the defendant to continue medical or psychiatric treatment ordered as a condition of the probation. The period of extension shall not exceed three years beyond the original period of probation. The special extension authorized herein may be ordered only in the last six months of the original period of probation. Any probationary judgment form provided to a defendant on supervised probation shall state that probation may be extended pursuant to this subsection.

(b) Early Termination. — The court may terminate a period of probation and discharge the defendant at any time earlier than that provided in subsection (a) if warranted by the conduct of the defendant and the ends of justice.

(c) Conditions; Suspended Sentence. — When the court places a convicted offender on probation, it must determine conditions of probation as provided in G.S. 15A-1343. In addition, it must impose a suspended sentence of imprisonment, determined as provided in Article 83, Imprisonment, which may be activated upon violation of conditions of probation.

(d) Mandatory Review of Probation. — Each probation officer must bring the cases of each probationer assigned to him before a court with jurisdiction to review the probation when the probationer has served three years of a probationary period greater than three years. The probation officer must give reasonable notice to the probationer, and the probationer may appear. The court must review the case file of a probationer so brought before it and determine whether to terminate his probation.

(e) Out-of-State Supervision. — Supervised probationers are subject to out-of-State supervision under the provisions of G.S. 148-65.1.

(f) Appeal from Judgment of Probation. — A defendant may seek post-trial relief from a judgment which includes probation notwithstanding the authority of the court to modify or revoke the probation.

(g) Invalid Conditions; Timing of Objection. — The regular conditions of probation imposed pursuant to G.S. 15A-1343(b) are in every circumstance valid conditions of probation. A court may not revoke probation for violation of an invalid condition imposed pursuant to G.S. 15A-1343(b1). The failure of a defendant to object to a condition of probation imposed pursuant to G.S. 15A-1343(b1) at the time such a condition is imposed does not constitute a waiver of the right to object at a later time to the condition.

(h) Limitation on Jurisdiction to Alter or Revoke Unsupervised Probation. — In the judgment placing a person on unsupervised probation, the judge may limit jurisdiction to alter or revoke the sentence under G.S. 15A-1344. When jurisdiction to alter or revoke is limited, the effect is as provided in G.S. 15A-1344(b).

(i) Immunity from Prosecution upon Compliance. — Upon the expiration or early termination as provided in subsection (b) of a period of probation imposed after deferral of prosecution and before conviction, the defendant shall be immune from prosecution of the charges deferred.

(j) Immunity for Injury to Defendant Performing Community Service. — Immunity from liability for injury to a defendant performing community service shall be as set forth in G.S. 143B-475.1(d). (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 6, 7; 1981, c. 377, ss. 4-6; 1983, c. 435, s. 5.1; c. 561, s. 7; 1985 (Reg. Sess., 1986), c. 960, s. 1; 1993, c. 84, s. 1; 1993 (Reg. Sess., 1994), c. 767, s. 6; 1995, c. 330, s. 1; 2008-129, s. 3.)

Effect of Amendments. — Session Laws 2008-129, s. 3, effective December 1, 2008, and applicable to probation violation hearings on or after that date, inserted "In addition to G.S. 15A-1344" at the beginning of the second paragraph of subsection (a).

§ 15A-1343. Conditions of probation.

CASE NOTES

III. Invalid Conditions.

III. INVALID CONDITIONS.

Firearm Ammunition Not an Explosive Device. — Trial court erred in finding that defendant was in possession of an explosive device, pursuant to G.S. 15A-1343(b)(5), and in revoking defendant's probation as a result because the firearm ammunition which was found in defendant's residence was not an explosive device as connoted in G.S. 15A-1343(b)(5). State v. Sherrod, — N.C. App. —, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (Aug. 5, 2008).

§ 15A-1344. Response to violations; alteration and revocation.

(a) Authority to Alter or Revoke. — Except as provided in subsection (b), probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides. Upon a finding that an offender sentenced to community punishment under Article 81B has violated one or more conditions of probation, the court's authority to modify the probation judgment includes the authority to require the offender to comply with conditions of probation that would otherwise make the sentence an intermediate punishment. The district attorney of the prosecutorial district as defined in G.S. 7A-60 in which probation was imposed must be given reasonable notice of any hearing to affect probation substantially.

(b) Limits on Jurisdiction to Alter or Revoke Unsupervised Probation. — If the sentencing judge has entered an order to limit jurisdiction to consider a sentence of unsupervised probation under G.S. 15A-1342(h), a sentence of unsupervised probation may be reduced, terminated, continued, extended, modified, or revoked only by the sentencing judge or, if the sentencing judge is no longer on the bench, by a presiding judge in the court where the defendant was sentenced.

(c) Procedure on Altering or Revoking Probation; Returning Probationer to District Where Sentenced. — When a judge reduces, terminates, extends, modifies, or revokes probation outside the county where the judgment was entered, the clerk must send a copy of the order and any other records to the court where probation was originally imposed. A court on its own motion may return the probationer to the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where probation was imposed or where the probationer resides for reduction, termination, continuation, extension, modification, or revocation of probation. In cases where the probation is revoked in a county other than the county of original conviction the clerk in that county must issue a commitment order and must file the order revoking probation and the commitment order, which will constitute sufficient permanent record of the proceeding in that court, and must send a certified copy of the order revoking probation, the commitment order, and all other records pertaining thereto to the county of original conviction to be filed with the original records. The clerk in the county other than the county of original conviction must issue the formal commitment to the North Carolina Department of Correction.

(d) Extension and Modification; Response to Violations. — At any time prior to the expiration or termination of the probation period or in accordance with subsection (f) of this section, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing, if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence, but the reduction shall be consistent with subsection (d1) of this section. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

(d1) Reduction of Initial Sentence. — If the court elects to reduce the sentence of imprisonment for a felony, it shall not deviate from the range of minimum durations established in Article 81B of this Chapter for the class of offense and prior record level used in determining the initial sentence. If the presumptive range is used for the initial suspended sentence, the reduced sentence shall be within the presumptive range. If the mitigated range is used for the initial suspended sentence, the reduced sentence shall be within the mitigated range. If the aggravated range is used for the initial suspended sentence, the reduced sentence shall be within the aggravated range. If the court elects to reduce the sentence for a misdemeanor, it shall not deviate from the range of durations established in Article 81B for the class of offense and prior conviction level used in determining the initial sentence.

(e) Special Probation in Response to Violation. — When a defendant has violated a condition of probation, the court may modify his probation to place him on special probation as provided in this subsection. In placing him on special probation, the court may continue or modify the conditions of his probation and in addition require that he submit to a period or periods of imprisonment, either continuous or noncontinuous, at whatever time or intervals within the period of probation the court determines. In addition to any other conditions of probation which the court may impose, the court shall impose, when imposing a period or periods of imprisonment as a condition of special probation, the condition that the defendant obey the Rules and Regulations of the Department of Correction governing conduct of inmates, and this condition shall apply to the defendant whether or not the court imposes it as a part of the written order. If imprisonment is for continuous periods, the confinement may be in either the custody of the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. Except for probationary sentences for impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense. For probationary sentences for impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, shall not exceed one-fourth the maximum penalty allowed by law. No confinement other than an activated suspended sentence may be required beyond the period of probation or beyond two years of the time the special probation is imposed, whichever comes first.

(e1) Criminal Contempt in Response to Violation. — If a defendant willfully violates a condition of probation, the court may hold the defendant in criminal contempt as provided in Article 1 of Chapter 5A of the General Statutes. A finding of criminal contempt by the court shall not revoke the probation. If the offender serves a sentence for contempt in a local confinement facility, the Department of Correction shall pay for the confinement at the standard rate set by the General Assembly pursuant to G.S. 148-32.1(a) regardless of whether the offender would be eligible under the terms of that subsection.

(e2) Mandatory Satellite-Based Monitoring Required for Extension of Probation in Response to Violation by Certain Sex Offenders. — If a defendant who is in the category described by G.S. 14-208.40(a)(1) or G.S. 14-208.40(a)(2) violates probation and if the court extends the probation as a result of the violation, then the court shall order satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes as a condition of the extended probation.

(f) Extension, Modification, or Revocation after Period of Probation. — The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

(1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

(2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

(3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.
(4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a). (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 11, 11A, 13A; 1979, c. 749, ss. 1-3; 1981, c. 377, s. 7; 1983, c. 536; 1987, (Reg. Sess., 1988), c. 1037, ss. 67, 68; 1993, c. 538, s. 18; 1994, Ex. Sess., c. 19, s. 2; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 9; c. 769, s. 21.7(a); 1998-212, s. 17.21(c); 2003-151, s. 1; 2006-247, s. 15(e); 2008-129, s. 4; 2008-187, s. 46.)

Editor's Note. —

Session Laws 2008-187, s. 46, amended G.S. 15A-1344(f)(2), as enacted by House Bill 1003 of the 2007 Regular Session of the General Assembly, contingent on that act becoming law. House Bill 1003 was enacted as Session Laws 2008-129.

Effect of Amendments. —

Session Laws 2008-129, s. 4, effective December 1, 2008, and applicable to probation violation hearings on or after that date, inserted "or in accordance with subsection (f) of this section" near the middle of the first sentence of subsection (d); and rewrote subsection (f).

Session Laws 2008-187, s. 46, effective August 7, 2008, inserted "of the" preceding "period of probation" in subdivision (f)(2).

CASE NOTES

Court Has Discretion to Run Revoked Probation Sentence Either Concurrently or Consecutively with Other Sentences. —

Pursuant to G.S. 15A-1344(d), the trial court did not err by activating defendant's suspended sentences and specifying that the sentences should run consecutively instead of concurrently after defendant's probation was revoked. State v. Hanner, — N.C. App. —, 654 S.E.2d 820, 2008 N.C. App. LEXIS 70 (2008).

Trial Court Lacked Jurisdiction to Revoke Probation. —

Because defendant's probation expired on the date when the trial court entered the first of two extensions, the trial court also lacked jurisdiction to enter the second extension. Hence, the court lacked jurisdiction to revoke defendant's probation in the second extension, warranting vacation of that revocation. State v. Satanek, — N.C. App. —, 660 S.E.2d 623, 2008 N.C. App. LEXIS 997 (2008).

Probation Properly Revoked. —

Because an order granting defendant a continuance of his probation violation hearing did not amount to an adjudication of a probation violation, the trial court not only retained jurisdiction over the case, but thereafter, properly revoked said probation upon defendant's admission at the later-scheduled hearing, pursuant to G.S. 15A-1344(d). State v. Bridges, — N.C. App. —, 658 S.E.2d 527, 2008 N.C. App. LEXIS 609 (Apr. 1, 2008).

Because defendant's probationary period was automatically suspended when new criminal charges were brought under G.S. 15A-1344(d), the hearing was conducted during defendant's probation, and the trial court had jurisdiction to revoke his probation and activate his sentences in the three files. State v. Patterson, — N.C. App. —, 660 S.E.2d 155, 2008 N.C. App. LEXIS 875 (2008).

Failure to Make Findings Required Remand. — Remand for the trial court at defendant's revocation of probation hearing to enter sufficient material findings was required because the revocation hearing occurred after the term of defendant's probation had expired and, although the record provided sufficient evidence for the trial court to find that the State of North Carolina made reasonable efforts to conduct a hearing prior to the expiration of defendant's probation, the trial court, as required by G.S. 15A-1344(f), failed to make a finding that the State made reasonable efforts to hold the hearing during defendant's probationary term. State v. Jackson, — N.C. App. —, 660 S.E.2d 165, 2008 N.C. App. LEXIS 877 (2008).

§ 15A-1345. Arrest and hearing on probation violation.

(a) Arrest for Violation of Probation. — A probationer is subject to arrest for violation of conditions of probation by a law-enforcement officer or probation officer upon either an order for arrest issued by the court or upon the written request of a probation officer, accompanied by a written statement signed by the probation officer that the probationer has violated specified conditions of his probation. However, a probation revocation hearing under subsection (e) may be held without first arresting the probationer.

(b) Bail Following Arrest for Probation Violation. — If at any time during the period of probation the probationer is arrested for a violation of any of the conditions of probation, he must be taken without unnecessary delay before a judicial official to have conditions of release pending a revocation hearing set in the same manner as provided in G.S. 15A-534. If the probationer has been convicted of an offense at any time that requires registration under Article 27A of Chapter 14 of the General Statutes or an offense that would have required registration but for the effective date of the law establishing the Sex Offender and Public Protection Registration Program, the court must make a finding that the probationer is not a danger to the public prior to release with or without bail.

(c) When Preliminary Hearing on Probation Violation Required. — Unless the hearing required by subsection (e) is first held or the probationer waives the hearing, a preliminary hearing on probation violation must be held within seven working days of an arrest of a probationer to determine whether there is probable cause to believe that he violated a condition of probation. Otherwise, the probationer must be released seven working days after his arrest to continue on probation pending a hearing.

(d) Procedure for Preliminary Hearing on Probation Violation. — The preliminary hearing on probation violation must be conducted by a judge who is sitting in the county where the probationer was arrested or where the alleged violation occurred. If no judge is sitting in the county where the hearing would otherwise be held, the hearing may be held anywhere in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. At the hearing the probationer may appear and speak in his own behalf, may present relevant information, and may, on request, personally question adverse informants unless the court finds good cause for not allowing confrontation. Formal rules of evidence do not apply at the hearing. If probable cause is found or if the probable cause hearing is waived, the probationer may be held for a revocation hearing, subject to release under the provisions of subsection (b). If the hearing is held and probable cause is not found, the probationer must be released to continue on probation.

(e) Revocation Hearing. — Before revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. The notice, unless waived by the probationer, must be given at least 24 hours before the hearing. At the hearing, evidence against the probationer must be disclosed to him, and the probationer may appear and speak in his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation. The probationer is entitled to be represented by counsel at the hearing and, if indigent, to have counsel appointed. Formal rules of evidence do not apply at the hearing, but the record or recollection of evidence or testimony introduced at the preliminary hearing on probation violation are inadmissible as evidence at the revocation hearing. When the violation alleged is the nonpayment of fine or costs, the issues and procedures at the hearing include those specified in G.S. 15A-1364 for response to nonpayment of fine. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 12, 13;

1979, c. 749, s. 4; 1979, 2nd Sess., c. 1316, s. 39; 1987 (Reg. Sess., 1988), c. 1037, s. 69; 2008-117, s. 19.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 19, effective December 1, 2008, and applicable to offenses committed on or after that date, added the last sentence in subsection (b).

CASE NOTES

I. General Consideration.
IV. Evidence.

I. GENERAL CONSIDERATION.

Right to Counsel Violated. — Trial court erred in denying defendant's request to withdraw his waiver of court appointed counsel, and the error violated defendant's right to an attorney, under G.S. 15A-1345(e), because defendant carried his burden of proving a change in his desire for the assistance of counsel, and his request was for good cause in that (1) defendant withdrew his prior waiver by explicitly asking the trial court to appoint counsel to represent him; (2) defendant indicated that he had sought to hire an attorney, but that he did not know it would have been that much; (3) the contention that defendant made no inquiry into the cost of retaining counsel was simply not supported by the transcript; (4) defendant's request for appointed counsel was not a tactic to delay and frustrate the orderly processes of the trial court; and (5) defendant's "tactic" amounted to an attempt to withdraw his waiver at his second appearance, less than one month after signing the waiver form. State v. Scott, — N.C. App. —, 653 S.E.2d 908, 2007 N.C. App. LEXIS 2552 (2007).

Applied in State v. Jackson, — N.C. App. —, 660 S.E.2d 165, 2008 N.C. App. LEXIS 877 (2008).

Cited in State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

IV. EVIDENCE.

Rules of Evidence. —

Formal rules of evidence do not apply in a probation revocation hearing pursuant to G.S. 15A-1345(e). State v. Young, — N.C. App. —, 660 S.E.2d 574, 2008 N.C. App. LEXIS 863 (2008).

Evidence Sufficient to Revoke Probation. —

Judge's decision to revoke the probationary sentence of defendant was supported by competent evidence showing constructive possession of firearms in violation of a condition of probation because defendant, when visited by a police officer at the home defendant shared with two other people, knew the precise location of the firearms in the home, needed no assistance in locating them, appeared to make statements demonstrating ownership, and never made statements either during the search or at trial denying ownership. Though the State of North Carolina was not able to show that defendant had exclusive possession of the premises, the evidence established sufficient incriminating circumstances to support constructive possession. State v. Young, — N.C. App. —, 660 S.E.2d 574, 2008 N.C. App. LEXIS 863 (2008).

§ 15A-1346. Commencement of probation; multiple sentence.

CASE NOTES

Probationary Term Runs Concurrently. — While two probationary sentences were ordered to run consecutively, the two probationary judgments were devoid of any language that would have suggested that defendant was to have two consecutive terms of 36 months probation. In the absence of any specific language, the provisions of G.S. 15A-1346 controlled and the period of probation, if not specified, ran concurrently. State v. Cousar, — N.C. App. —, 660 S.E.2d 902, 2008 N.C. App. LEXIS 1076 (June 3, 2008).

Because the revocation order did not specify that defendant's probation was to run consecutively with defendant's remaining term of imprisonment, this two-year probationary period ran concurrently with the other probationary period set to begin four days later. State v. Patterson, — N.C. App. —, 660 S.E.2d 155, 2008 N.C. App. LEXIS 875 (2008).

§ 15A-1347. Appeal from revocation of probation or imposition of special probation upon violation.

CASE NOTES

Trial Court Lacked Jurisdiction to Revoke Probation. — Because defendant's probation expired on the date when the trial court entered the first of two extensions, the trial court lacked jurisdiction to enter the second extension. Hence, the court lacked jurisdiction to revoke defendant's probation in the second extension, warranting vacation of that revocation. State v. Satanek, — N.C. App. —, 660 S.E.2d 623, 2008 N.C. App. LEXIS 997 (2008).

Article 83.

Imprisonment.

§ 15A-1354. Concurrent and consecutive terms of imprisonment.

CASE NOTES

Applied in State v. Hagans, — N.C. App. —, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

Cited in State v. Hanner, — N.C. App. —, 654 S.E.2d 820, 2008 N.C. App. LEXIS 70 (2008); State v. Mead, 362 N.C. 218, 657 S.E.2d 367, 2008 N.C. LEXIS 147 (2008).

Article 84A.

Post-Release Supervision.

§ 15A-1368.3. Incidents of post-release supervision.

CASE NOTES

Cited in State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

§ 15A-1368.6. Arrest and hearing on post-release supervision violation.

(a) Arrest for Violation of Post-Release Supervision. — A supervisee is subject to arrest by a law enforcement officer or a post-release supervision officer for violation of conditions of post-release supervision only upon issuance of an order of temporary or conditional revocation of post-release supervision by the Commission. However, a post-release supervision revocation hearing under subsection (e) of this section may be held without first arresting the supervisee.

(b) When and Where Preliminary Hearing on Post-Release Supervision Violation Required. — Unless the hearing required by subsection (e) of this section is first held or a continuance is requested by the supervisee, a preliminary hearing on supervision violation shall be held reasonably near the place of the alleged violation or arrest and within seven working days of the arrest of a supervisee to determine whether there is probable cause to believe that the supervisee violated a condition of post-release supervision. Otherwise, the supervisee shall be released seven working days after arrest to continue on supervision pending a hearing. If the supervisee is not within the State, the preliminary hearing is as prescribed by G.S. 148-65.1A.

(b1) Bail Following Arrest for Violation of Post-Release Supervision if Releasee Is a Sex Offender. — Notwithstanding subsection (b) of this section, if the releasee has been convicted of an offense that requires registration under Article 27A of Chapter 14 of the General Statutes and is arrested for a violation in accordance with this section, the releasee shall be detained without bond until the preliminary hearing is conducted.

(c) Officers to Conduct Preliminary Hearing. — The preliminary hearing on post-release supervision violation shall be conducted by a judicial official, or by a hearing officer designated by the Commission. A person employed by the Department of Correction shall not serve as a hearing officer at a hearing provided by this section unless that person is a member of the Commission, or is employed solely as a hearing officer.

(d) Procedure for Preliminary Hearing. — The Department of Correction shall give the supervisee notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the supervisee may appear and speak in the supervisee's own behalf, may present relevant information, and may, on request, personally question witnesses and adverse informants, unless the hearing officer finds good cause for not allowing confrontation. If the person holding the hearing determines there is probable cause to believe the supervisee violated conditions of supervision, the hearing officer shall summarize the reasons for the determination and the evidence relied on. Formal rules of evidence do not apply at the hearing. If probable cause is found, the supervisee may be held in the custody of the Department of Correction to serve the appropriate term of imprisonment, subject to the outcome of a revocation hearing under subsection (e) of this section.

(e) Revocation Hearing. — Before finally revoking post-release supervision, the Commission shall, unless the supervisee waived the hearing or the time limit, provide a hearing within 45 days of the supervisee's reconfinement to determine whether to revoke supervision finally. For purposes of this subsection, the 45-day period begins when the preliminary hearing required by subsection (b) of this section is held or waived, or upon the passage of seven working days after arrest, whichever is sooner. The Commission shall adopt rules governing the hearing. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.15(b); 1997-237, s. 1; 2000-189, s. 1; 2008-117, s. 20.)

Editor's Note. —

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 20, effective December 1, 2008, and applicable to offenses committed on or after that date, added subsection (b1).

CASE NOTES

Cited in State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

ARTICLE 84B.

Medical Release of Inmates.

§ 15A-1369. Definitions.

For purposes of this Article, the term:

(1) "Commission" means the Post-Release Supervision and Parole Commission.

(2) "Department" means the Department of Correction.
(3) "Geriatric" describes an inmate who is 65 years of age or older and suffers from chronic infirmity, illness, or disease related to aging that has progressed such that the inmate is incapacitated to the extent that he or she does not pose a public safety risk.
(4) "Inmate" means any person sentenced to the custody of the Department of Correction.
(5) "Medical release" means a program enabling the Commission to release inmates who are permanently and totally disabled, terminally ill, or geriatric.
(6) "Medical release plan" means a comprehensive written medical and psychosocial care plan that is specific to the inmate and includes, at a minimum:
  a. The proposed course of treatment;
  b. The proposed site for treatment and post-treatment care;
  c. Documentation that medical providers qualified to provide the medical services identified in the medical release plan are prepared to provide those services; and
  d. The financial program in place to cover the cost of this plan for the duration of the medical release, which shall include eligibility for enrollment in commercial insurance, Medicare, or Medicaid or access to other adequate financial resources for the duration of the medical release.
(7) "Permanently and totally disabled" describes an inmate who, as determined by a licensed physician, suffers from permanent and irreversible physical incapacitation as a result of an existing physical or medical condition that was unknown at the time of sentencing or, since the time of sentencing, has progressed to render the inmate permanently and totally disabled, such that the inmate does not pose a public safety risk.
(8) "Terminally ill" describes an inmate who, as determined by a licensed physician, has an incurable condition caused by illness or disease that was unknown at the time of sentencing or, since the time of sentencing, has progressed to render the inmate terminally ill, and that will likely produce death within six months, and that is so debilitating such that the inmate does not pose a public safety risk. (2008-2, s. 1.)

Editor's Note. — Session Laws 2008-2, s. 2, made this Article effective June 10, 2008.

§ 15A-1369.1. Authority to release.

The Commission shall establish a medical release program to be administered by the Department. The Commission shall prescribe when and under what conditions an inmate may be released for medical release, consistent with the provisions of G.S. 15A-1369.4. The Commission may adopt rules to implement the medical release program. (2008-2, s. 1.)

§ 15A-1369.2. Eligibility.

(a) Except as otherwise provided in this section, notwithstanding any other provision of law, an inmate is eligible to be considered for medical release if the Department determines that the inmate is:
(1) Diagnosed as permanently and totally disabled, terminally ill, or geriatric under the procedure described in G.S. 15A-1369.3(b)(1); and
(2) Incapacitated to the extent that the inmate does not pose a public safety risk.

(b) Persons convicted of a capital felony or a Class A, B1, or B2 felony and persons convicted of an offense that requires registration under Article 27A of Chapter 14 of the General Statutes shall not be eligible for release under this Article. (2008-2, s. 1.)

§ 15A-1369.3. Procedure for medical release.

(a) The Commission shall consider an inmate for medical release upon referral by the Department. The Department may base its referral upon either a request or petition for release filed by the inmate, the inmate's attorney, or the inmate's next of kin or upon a recommendation from within the Department.

(b) The referral shall include an assessment of the inmate's medical and psychosocial condition and the risk the inmate poses to society, as follows:

(1) The Department medical director, or a designee of the director who is a licensed physician, shall review the case of each inmate who meets the eligibility requirements for medical release set forth in G.S. 15A-1369.2. Any physician who examines an inmate being considered for medical release shall prepare a written diagnosis that includes:
   a. A description of any and all terminal conditions, physical incapacities, and chronic conditions; and
   b. A prognosis concerning the likelihood of recovery from any and all terminal conditions, physical incapacities, and chronic conditions.

(2) The Department shall make an assessment of the risk for violence and recidivism that the inmate poses to society. In order to make this assessment, the Department may consider such factors as the inmate's medical condition, the severity of the offense for which the inmate is incarcerated, the inmate's prison record, and the release plan.

(c) If the Department determines that the inmate meets the criteria for release, the Department shall forward its referral and medical release plan for the inmate to the Commission. The Department shall complete the risk assessment and forward its referral and medical release plan within 45 days of receiving a request, petition, or recommendation for release.

(d) The Commission shall make a determination of whether to grant medical release within 15 days of receiving a referral from the Department for release of a terminally ill inmate and within 20 days of receiving a referral from the Department for release of a permanently and totally disabled inmate or a geriatric inmate. In making the determination, the Commission shall make an independent assessment of the risk for violence and recidivism that the inmate poses to society. The Commission also shall provide the victim or victims of the inmate or the victims' family or families with an opportunity to be heard.

(e) A denial of medical release by the Commission shall not affect an inmate's eligibility for any other form of parole or release under applicable law.

(f) If the Department determines that an inmate should not be considered for release under this Article or the Commission denies medical release under this Article, the inmate may not reapply or be reconsidered unless there is a demonstrated change in the inmate's medical condition. (2008-2, s. 1.)

§ 15A-1369.4. Conditions of medical release.

(a) The Commission shall set reasonable conditions upon an inmate's medical release that shall apply through the date upon which the inmate's sentence would have expired. These conditions shall include:

(1) That the released inmate's care be consistent with the care specified in the medical release plan as approved by the Commission;

(2) That the released inmate shall cooperate with and comply with the prescribed medical release plan and with reasonable requirements of medical providers to whom the released inmate is to be referred to continued treatment;

(3) That the released inmate shall be subject to supervision by the Division of Community Corrections and shall permit officers from the Division to visit the inmate at reasonable times at the inmate's home or elsewhere;

(4) That the released inmate shall comply with any conditions of release set by the Commission; and

(5) That the Commission shall receive periodic assessments from the inmate's treating physician.

(b) The Commission shall promptly order an inmate returned to the custody of the Department to await a revocation hearing if the Commission receives credible information that an inmate has failed to comply with any reasonable condition set upon the inmate's release. If the Commission subsequently revokes an inmate's medical release for failure to comply with conditions of release, the inmate shall resume serving the balance of the sentence with credit given only for the duration of the inmate's medical release served in compliance with all reasonable conditions set forth pursuant to subsection (a) of this section. Revocation of an inmate's medical release for violating a condition of release shall not preclude an inmate's eligibility for any other form of parole or release provided by law but may be used as a factor in determining eligibility for that parole or release. (2008-2, s. 1.)

§ 15A-1369.5. Change in medical status.

(a) If a periodic medical assessment reveals that an inmate released on medical release has improved so that the inmate would not be eligible for medical release if being considered at that time, the Commission shall order the inmate returned to the custody of the Department to await a revocation hearing. In determining whether to revoke medical release, the Commission shall consider the most recent medical assessment of the inmate and a risk assessment of the inmate conducted pursuant to G.S. 15A-1369.3(b)(2). If the Commission revokes the inmate's medical release, the inmate shall resume serving the balance of the sentence with credit given for the duration of the medical release.

(b) Revocation of an inmate's medical release due to a change in the inmate's medical condition shall not preclude an inmate's eligibility for medical release in the future or for any other form of parole or release provided by law. (2008-2, s. 1.)

§ 15A-1371. Parole eligibility, consideration, and refusal.

Editor's Note. — The former introductory language of subsection (b) and subdivisions (b)(1) and (2) were repealed, effective October 1, 1994, for offenses occurring on or after that date, by 1993, c. 538, s. 22, as amended by 1994, Ex. Sess., c. 24, s. 14(b). The amendatory language of Session Laws 2008-133, s. 1, effective October 1, 2008, and applicable to parole reviews conducted on and after that date, provides: "G.S. 15A-1371(b), repealed by Section 22 of Chapter 538 of the 1993 Session Laws, but still applicable to sentences based on offenses occurring before October 1, 1994, under Section 56 of that act, reads as rewritten."

Subsection (b) was also amended by Session Laws 1994, Extra Session, c. 25, s. 1, and this amendment remains applicable to offenses committed prior to the effective date of Session Laws 1993, c. 538, s. 22. As amended by Session Laws 1994, Extra Session, c. 25, s. 1, and by Session Laws 2008-133, s. 1, applicable to offenses occurring before October 1, 1994, and to parole reviews conducted on or after October 1, 2008, subsection (b) reads:

"(b) Consideration for Parole. — The Parole Commission must consider the desirability of parole for each person sentenced as a felon for a maximum term of 18 months or longer:

"(1) Within the period of 90 days prior to his eligibility for parole, if he is ineligible for parole until he has served more than a year;

"(2) Within the period of 90 days prior to the expiration of the first year of the sentence, if he is eligible for parole at any time. Whenever the Parole Commission will be considering for parole a prisoner who, if released, would have served less than half of the maximum term of his sentence, the Commission must notify the prisoner and the district attorney of the district where the prisoner was convicted at least 30 days in advance of considering the parole. If the district attorney makes a written request in such cases, the Commission must publicly conduct its consideration of parole. Following its consideration, the Commission must give the prisoner written notice of its decision. If parole is denied, the Commission must consider its decision while the prisoner is eligible for parole at least once a year until parole is granted and must give the prisoner written notice of its decision at least once a year, except as provided in subdivision (4) of this subsection, or

"(3) Whenever the Parole Commission will be considering for parole a prisoner convicted of first- or second-degree murder, first-degree rape, or first-degree sexual offense, the Commission must notify, at least 30 days in advance of considering the parole, by first class mail at the last known address:

"a. The prisoner;

"b. The district attorney of the district where the prisoner was convicted;

"c. The head of the law enforcement agency that arrested the prisoner, if the head of the agency has requested in writing that he be notified;

"d. Any of the victim's immediate family members who have requested in writing to be notified;

"e. The victim, in cases of first-degree rape or first-degree sexual offense, if the victim has requested in writing to be notified; and

"f. As many newspapers of general circulation and other media in the county where the prisoner was convicted and if different, in the county where the prisoner was charged, as reasonable.

"The Parole Commission must consider any information provided by any such parties before consideration of parole. The Commission must also give the district attorney, the head of the law enforcement agency who has requested in writing to be notified, the victim, any member of the victim's immediate family who has requested to be notified, and as many newspapers of general circulation and other media in the county or counties designated in sub-subdivision f. of this section [subsection] as reasonable, written notice of its decision within 10 days of that decision. The Parole Commission shall not, however, include the name of any victim in its notification to the newspapers and other media.

"(4) The Commission shall review cases where the prisoner was convicted of first or second degree murder, and in its discretion, give consideration of parole and written notice of its decision once every third year; except that the Commission may give more frequent parole consideration if it finds that exigent circumstances or the interests of justice demand it."

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Habitual Felon Status Determines Parole Eligibility. — Because an inmate's kidnapping conviction was only part of a 40-year consolidated sentence, his habitual felon status should have determined his parole eligibility, under G.S. 15A-1371. Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

§ 15A-1373. Incidents of parole.

CASE NOTES

Cited in State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

§ 15A-1376. Arrest and hearing on parole violation.

CASE NOTES

Cited in State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

Article 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

§ 15A-1411. Motion for appropriate relief.

CASE NOTES

Entitlement to a New Trial. — Defendant was granted a new trial because the trial court committed plain error by instructing the jury as to the burden of proof on a voluntary manslaughter charge when it charged the jury correctly as to the burden of proof and then incorrectly shifted the burden to defendant; the trial court further compounded the problem by providing the jury with a written document that contained the same misstatement as to the burden of proof. State v. Hunt, — N.C. App. —, 664 S.E.2d 662, 2008 N.C. App. LEXIS 1511 (2008).

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

CASE NOTES

Notice of Appeal. — Because the record on appeal contained no evidence that defendant filed timely notice of appeal from an order denying his motion for appropriate relief, the court lacked jurisdiction to review defendant's assignment of error to the extent it challenged the denial of his motion for appropriate relief. State v. Hagans, — N.C. App. —, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

Motion Properly Denied. — Evidence that defendant fired several shots in the direction of three individuals, in a small trailer occupied by six persons, and that he admitted shooting one of the individuals, was sufficient to support his conviction of the second degree murder of that individual under G.S. 14-17. Therefore, defendant's post-trial motion for appropriate relief under G.S. 15A-1414 on the basis of insufficient evidence was properly denied. State v. Brower, 186 N.C. App. 397, 651 S.E.2d 390, 2007 N.C. App. LEXIS 2209 (2007).

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict; limitation as to time.

CASE NOTES

Applicability of Subsection (f). — Trial court properly denied defendant's G.S. 15A-1415(f) motions for discovery after a remand in his direct appeal for a Batson hearing. By its plain language, G.S. 15A-1415 applied only to proceedings surrounding a postconviction motion for appropriate relief. State v. Barden, 362 N.C. 277, 658 S.E.2d 654, 2008 N.C. LEXIS 336 (2008).

Cited in Golphin v. Branker, 519 F.3d 168, 2008 U.S. App. LEXIS 5033 (4th Cir. 2008); State v. Murrell, — N.C. —, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008).

§ 15A-1418. Motion for appropriate relief in the appellate division.

CASE NOTES

Issues Preserved for Review. — Because defendant filed defendant's brief after filing the Motion for Appropriate Relief and incorporated by reference in the brief each of the three stated grounds for relief set forth in the Motion, and because defendant was evidently acting upon a good faith misunderstanding of the law, defendant, under those particular circumstances, did adequately raise on appeal each of the grounds underlying the motion in the brief. State v. Murrell, — N.C. —, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008).

§ 15A-1419. When motion for appropriate relief denied.

CASE NOTES

Federal Habeas Corpus Petition Not a Substitute for State Review Provisions. — Under G.S. 15A-1419(a)(3), defendant, who was convicted of first-degree murder, burglary, kidnapping, conspiracy to commit kidnapping, and conspiracy to commit murder, and who was sentenced to death for the first-degree murder conviction, procedurally defaulted his claim of ineffective assistance, which was based on his counsel's concession of guilt to kidnapping and rape without his consent; defendant was in a position to bring this claim on direct appeal because the trial record contained all the relevant facts regarding this matter, but defendant failed to do so, and G.S. 15A-1419(a)(2) provided an adequate and independent state law ground for the decision and required the state courts to determine if this claim could have been brought on direct review. Lawrence v. Branker, 517 F.3d 700, 2008 U.S. App. LEXIS 3761 (4th Cir. 2008).

Applicability of State Procedural Bar to Federal Habeas Review. — Subdivision (a)(3) of G.S. 15A-1419 is an independent and adequate basis for procedural default of a claim of ineffective assistance of counsel. Cole v. Branker, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 69904 (E.D.N.C. Sept. 20, 2007).

Claims Lacked Merit and Relief Denied. — Arguments in defendant's motion for appropriate relief failed because they lacked merit; among other things, an allegedly perjured statement made by a witness for the State was in fact true and a jury instruction on accomplice testimony was not required. State v. Murrell, — N.C. —, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008).

§ 15A-1422. Review upon appeal.

CASE NOTES

Failure to File Timely Notice of Appeal. — Because the record on appeal contained no evidence that defendant filed timely notice of appeal from an order denying his motion for appropriate relief, the court lacked jurisdiction to review defendant's assignment of error to the extent it challenged the denial of his motion for appropriate relief, State v. Hagans, — N.C. App. —, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

ARTICLE 90.

Appeals from Magistrates and District Court Judges.

§ 15A-1432. Appeals by State from district court judge.

CASE NOTES

Applicability. — While the State was otherwise allowed to appeal a district court's dismissal of a criminal charge to the trial court pursuant to G.S. 15A-1432(a)(1), the district court's dismissal of defendant's DWI charge for insufficient evidence as a matter of law barred further proceedings. The Double Jeopardy Clause of the United

States Constitution dictated that once the finding was made that the evidence could not as a matter of law support a conviction, the State could not continue to prosecute even if the finding was patently wrong in the law. State v. Morgan, — N.C. App. —, 660 S.E.2d 545, 2008 N.C. App. LEXIS 688 (2008).

Reinstatement of Charges Was Error. — Although a trial court was directed pursuant to G.S. 15A-1432(d) to reinstate a criminal charge and remand a case where dismissal of the charge was in error, the trial court could not do so where the dismissal occurred, as in defendant's DWI case, due to insufficient evidence as a matter of law. In that case, the Double Jeopardy Clause of the United States Constitution barred the State from further prosecution, even if the finding of insufficiency of the evidence involved an error patently wrong in the law. State v. Morgan, — N.C. App. —, 660 S.E.2d 545, 2008 N.C. App. LEXIS 688 (2008).

Article 91.

Appeal to Appellate Division.

§ 15A-1442. Grounds for correction of error by appellate division.

CASE NOTES

Admission of Hearsay Statements not Prejudicial. — Even assuming the State presented no evidence to support admission of hearsay statements under either the present sense impression or excited utterance exceptions, and the admission of the hearsay statements was an abuse of discretion, there was no prejudicial error under G.S. 15A-1442(4)(c) as other evidence established that defendant was armed while on a bus. A witness testified that the witness saw an imprint of a gun in defendant's pocket while on the bus. State v. Bass, — N.C. App. —, 660 S.E.2d 123, 2008 N.C. App. LEXIS 864 (2008).

§ 15A-1443. Existence and showing of prejudice.

CASE NOTES

I. General Consideration.
II. Prejudicial Error.
III. Harmless Error.

I. GENERAL CONSIDERATION.

Prejudice Not Found. —

When defendants moved to dismiss charges at the close of all the evidence, a trial court's reservation of a ruling on defendants' motions, which was contrary to G.S. 15A-1227(c), requiring the court to rule immediately, did not create reversible error or violate defendants' rights under U.S. Const., Amends. V and XIV, or N.C. Const., Art. I, § 19, because no prejudice was shown, as required by G.S. 15A-1443; it was more likely that the trial court would have denied the motions had the court not deferred the court's ruling, and the evidence was sufficient to withstand the motions to dismiss. State v. Hernandez, — N.C. App. —, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008).

Even if a trial court erred in sustaining the State's hearsay objection to a question posed to a detective during defendant's trial on an assault with a deadly weapon charge, the error would not require reversal of defendant's conviction because defendant could not show prejudice; the overwhelming evidence against defendant, which included his own admission of guilt, defeated any claim for a new trial based on trial error. State v. Hairston, — N.C. App. —, 661 S.E.2d 39, 2008 N.C. App. LEXIS 1015 (2008).

Error Not Shown. — Trial court did not err in admitting evidence that law enforcement officers identified defendant in a shooting case by defendant's nickname, because the evidence was not admitted to show the truth of the matter asserted and, thus, did not violate defendant's Confrontation Clause rights; rather, defendant did not show that error occurred in admitting the evidence because that evidence was introduced to show why defendant became the focus of the shooting investigation. State v. Tate, — N.C. App. —, 653 S.E.2d 892, 2007 N.C. App. LEXIS 2553 (2007).

Applied in State v. Graham, 186 N.C. App.

182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007); State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007); State v. Hope, — N.C. App. —, 657 S.E.2d 909, 2008 N.C. App. LEXIS 544 (Mar. 18, 2008); State v. Lawrence, — N.C. App. —, 663 S.E.2d 898, 2008 N.C. App. LEXIS 1509 (2008); State v. Boston, — N.C. App. —, 663 S.E.2d 886, 2008 N.C. App. LEXIS 1487 (Aug. 5, 2008).

Cited in State v. Parker, — N.C. App. —, 653 S.E.2d 6, 2007 N.C. App. LEXIS 2239 (2007); State v. Harris, — N.C. App. —, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008); State v. Lee, — N.C. App. —, 658 S.E.2d 294, 2008 N.C. App. LEXIS 647 (Apr. 1, 2008); State v. Beatty, — N.C. App. —, 658 S.E.2d 508, 2008 N.C. App. LEXIS 651 (Apr. 1, 2008); State v. Worrell, — N.C. App. —, 660 S.E.2d 183, 2008 N.C. App. LEXIS 855 (2008); State v. Spencer, — N.C. App. —, 664 S.E.2d 601, 2008 N.C. App. LEXIS 1533 (2008).

II. PREJUDICIAL ERROR.

When Errors Relating to Constitutional Rights Prejudicial. —

As the evidence against defendant, which consisted of a codefendant's testimony, was not overwhelming absent the drugs found in defendant's apartment as a result of the illegal search, the constitutional error was not harmless beyond a reasonable doubt and defendant was entitled to a new trial. State v. McDougald, — N.C. App. —, 665 S.E.2d 99, 2008 N.C. App. LEXIS 1530 (2008).

Error Must Affect Probable Result of Trial. —

Even assuming that the trial court erred in allowing a police officer to testify as to the victim's prior statements, defendant did not establish that the error was prejudicial under G.S. 15A-1443(a) because it was entirely unlikely that the statements at issue had any serious effect on the trial's outcome as the State of North Carolina presented other evidence that the jury could have used to find defendant guilty. State v. Streeter, — N.C. App. —, 663 S.E.2d 879, 2008 N.C. App. LEXIS 1482 (Aug. 5, 2008).

And Cannot Result from Defendant's Own Conduct. —

Trial court committed no error when the court did not instruct the jury in defendant's murder case on the defense of imperfect self-defense given that defendant's attorney and defendant both agreed when asked that they did not want the instruction given. Based on G.S. 15A-1443(c), the defendant could not claim error when the trial court followed defendant's wish and did not give the instruction. State v. Goodwin, — N.C. App. —, 661 S.E.2d 46, 2008 N.C. App. LEXIS 1020 (2008).

Incorrect Instruction. —

Defendant was entitled to a new trial under G.S. 15A-1443(a) because there was a reasonable possibility that a different result would have been reached at trial if the jury had been properly instructed by the trial court. State v. Haddock, — N.C. App. —, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

Erroneously Admitted Character Evidence. —

Defendant was prejudiced pursuant to G.S. 15A-1443(a) by the trial court's decision to allow the State to cross-examine defendant regarding two prior criminal charges that had been voluntarily dismissed against him, as the State sought to show that defendant had engaged in violent conduct previously with only slight provocation and that he then claimed self-defense against those charges; however, such evidence of an alleged violent propensity was specifically not allowed under N.C. R. Evid. 404(b), and there was insufficient evidence regarding the factual circumstances of the other incidents to determine whether defendant acted similarly in the charge that defendant was on trial for. State v. Goodwin, — N.C. App. —, 652 S.E.2d 36, 2007 N.C. App. LEXIS 2266 (2007).

Exclusion of Evidence Relevant to Defense. —

Although the State conceded it had committed a discovery violation by failing to disclose an officer's handwritten notes until the middle of the trial, the violation was not a Brady violation; as defendant had the handwritten notes while the officer was still being cross-examined, the violation was not sufficiently material or prejudicial so as to undermine confidence in the outcome of the trial. Defendant was not entitled to a new trial. State v. Icard, — N.C. App. —, 660 S.E.2d 142, 2008 N.C. App. LEXIS 866 (2008).

As the trial court's preclusion of evidence regarding defendant's peaceful and law-abiding character prevented defendant from offering evidence of two character traits which were both relevant and admissible as to his self-defense claim, and defendant demonstrated a reasonable possibility that, had the trial court not committed the error, the result at trial would have been different; thus, the defendant was prejudiced by the error. State v. Ledarius Montreal Banks, — N.C. App. —, 664 S.E.2d 355, 2008 N.C. App. LEXIS 1484 (2008).

Error Held Prejudicial. —

Trial court erred in admitting into evidence at the guilt stage of the trial the alleged emotional impact on others as a result of defendant's prior sexual misconduct. Defendant also showed that the error was prejudicial pursuant to G.S. 15A-1443(a) because the inflammatory nature of such evidence created a reasonable possibility that had the error not been committed a different result other than defendant being convicted might have been reached. State v. Bowman, — N.C. App. —, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

State did not show harmless error pursuant to G.S. 15A-1443(b) beyond a reasonable doubt regarding trial court's denial of defendant's request for an instruction that defendant had to know the age of the victims in order to be convicted of aiding and abetting statutory rape. That offense had an element of knowledge and, thus, defendant was entitled to (1) present a defense of mistake of fact and (2) have the jury instructed on that defense. State v. Bowman, — N.C. App. —, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

Testimony on Chain of Custody Procedures by SBI Not Prejudicial. — Admission of testimony referring to the chain of custody procedures followed by the state bureau of investigation (SBI), stating that the evidence from a crime scene is transferred back to the local police department once the district attorney clears the police officer of any wrongdoing, was not prejudicial since defendant failed to show a reasonable possibility that, had the testimony not been allowed, the result would have been different; the testimony referred to all items collected for evidence and was allowed only to show the SBI's general procedure regarding evidence. State v. Garris, — N.C. App. —, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008).

Trial Court's Failure to Rule on Defendant's Motion to Dismiss Was Prejudicial. — Trial court's failure to rule on defendant's motion to dismiss the charge of robbery with a dangerous weapon at the close of the State's evidence, as required by G.S. 15A-1227(c), prejudiced defendant because the only evidence of defendant's involvement in the robbery was hearsay testimony that was admitted for impeachment, not substantive, purposes. State v. Batchelor, — N.C. App. —, 660 S.E.2d 158, 2008 N.C. App. LEXIS 894 (2008).

Prejudicial Error Not Shown. —

Because the jury was satisfied that defendant had the requisite intent for first degree murder and rejected other possible verdicts, including involuntary manslaughter, which required no intent, defendant was not prejudiced under G.S. 15A-1443(a) by the trial court's failure to instruct on accident. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

On appeal from convictions including rape and kidnapping, the trial court did not err or abuse its discretion in admitting into evidence a receipt for pornographic movies that listed the movie titles, and for admitting evidence of defendant's alleged prior acts of domestic violence against the victim, as: (1) defendant failed to state his grounds for objection to the admission of physical evidence; (2) the evidence was relevant; (3) the prior acts evidence was properly admitted to show defendant's motive, intent or purpose, opportunity, and plan; (4) defendant failed to request a limiting instruction at the time of the admission of the receipt, and failed to request that the trial court redact the movie titles from the receipt; and (5) even assuming that defendant's general objection preserved the matter for appellate review, the record revealed that the admission of the receipt into evidence did not prejudice defendant. State v. Daniels, — N.C. App. —, 659 S.E.2d 22, 2008 N.C. App. LEXIS 711 (2008).

Admission of a nine-millimeter bullet, although irrelevant, did not amount to prejudicial error under G.S. 15A-1443(a), because there was no reasonable possibility that admission of the bullet contributed to defendant's conviction considering the other evidence presented. Witnesses testified that defendant was at the scene of the murder, argued with the victim before the shooting, threatened to kill the victim, and the victim identified defendant as the person who shot him. State v. Bodden, — N.C. App. —, 661 S.E.2d 23, 2008 N.C. App. LEXIS 1022 (2008).

III. HARMLESS ERROR.

Denial of Defendant's Right to Counsel. — Defendant was improperly forced to choose between testifying in defendant's own behalf or being represented by counsel at trial; by choosing to testify, defendant was forced to relinquish defendant's constitutional right to the assistance of counsel under the Sixth Amendment and N.C. Const., Art. I, § 23. The error was not harmless under G.S. 15A-1443(b) since the right to counsel was so basic to a fair trial that its infraction could never be treated as harmless error. State v. Colson, 186 N.C. App. 281, 650 S.E.2d 656, 2007 N.C. App. LEXIS 2084 (2007), review denied, 362 N.C. 89, 656 S.E.2d 280 (2007), State v. Colson, 186 N.C. App. 281, 650 S.E.2d 656, 2007 N.C. App. LEXIS 2084 (2007).

No Reasonable Possibility of Affecting Verdict. —

Although defendant's constitutional right to be present at every stage of defendant's criminal trial was violated when the trial court refused to allow defense counsel to review jury questions, the violation of that right was harmless beyond a reasonable doubt; the record revealed that the questions indicated that the jury had already agreed unanimously on second-degree murder, which was defendant's ultimate conviction, and was confused about whether their rejection of first-degree murder had to be unanimous. State v. Smith, — N.C. App. —, 654 S.E.2d 730, 2008 N.C. App. LEXIS 92 (Jan. 15, 2008).

State's Failure to Disclose Expert Wit-

ness Deemed Harmless Error. — Although the State of North Carolina violated G.S. 15A-903(a)(2) by failing to provide defendant with required expert discovery reasonably before trial and the trial court abused its discretion in failing to grant defendant a continuance of the trial for that reason, the trial court's denial of defendants' motion for a continuance was harmless error under G.S. 15A-1443(b) because defendant suffered no prejudice due to the additional evidence that was against defendant. State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008).

Prosecution's Improper Closing Argument to Jury Held Harmless Error. — Trial court abused its discretion in allowing the state, over defendant's objection, to make arguments referencing the amount of punishment that the finding of an aggravating factor would empower a judge to impose and the effect of the merger doctrine on defendant's convictions in the closing argments, as those issues were irrelevant to the issue of a factor's presence in an offense; however, based on the overwhelming evidence that defendant was operating his vehicle at a dangerously high rate of speed while legally intoxicated, there was no reasonable possibility that, had the error in question not been committed, a different result would have been reached, and the error was therefore not prejudicial. State v. Lopez, — N.C. App. —, 655 S.E.2d 895, 2008 N.C. App. LEXIS 199 (Feb. 5, 2008).

Prosecutor's Improper Vouching for Credibility of Witness Did Not Warrant New Trial. — Defendant failed to meet the burden of showing, in the totality of the trial and closing arguments, that the jury would have reached a different result had the trial court sustained defendant's objection to the prosecutor's improper statements, wherein the prosecutor improperly vouched for the credibility of witnesses, or instructed the jury in a broader manner so as to preclude consideration of all of the improper arguments; thus, the prosecutor's improper statements were not found to be so egregious as to require a new trial. State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007).

No Error Where Defendant Failed to Show Prejudice. —

Defendant failed to show that he was prejudiced under G.S. 15A-1443(a) by the exclusion of the testimony of two witnesses, who would have stated that certain power tools and extension cords were given or lent to him, in his prosecution for, inter alia, felonious larceny; other evidence, including that the extension cords had the victim's initials on them, was sufficient to convict. State v. Jones, — N.C. App. —, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (Feb. 5, 2008).

Error in Jury Instructions Held Not Prejudicial. —

Despite the trial court's erroneously informing a deadlocked jury under G.S. 15A-1235 that if they did not agree upon a verdict another jury might be called upon to try the case, and that the state and defendant had a tremendous amount of time and money invested, given the evidence, defendant was not entitled to a new trial; the error was not so fundamental under G.S. 15A-1443 that absent the error, the jury probably would have reached a different verdict or the error constituted a miscarriage of justice. State v. Pate, — N.C. App. —, 653 S.E.2d 212, 2007 N.C. App. LEXIS 2423 (2007).

Admission into Evidence of Inculpatory Statement by Defendant Not Error. — Trial court did not err in admitting into evidence inculpatory statements made by defendant in response to police questioning as the police detective advised defendant of the Miranda rights, and any error present in the court's conclusion that defendant was not in custody at the time of the questioning was harmless beyond a reasonable doubt under G.S. 15A-1443. State v. Dewalt, — N.C. App. —, 660 S.E.2d 111, 2008 N.C. App. LEXIS 903 (2008).

Error Held Harmless. —

Admission of evidence seized pursuant to an invalid search warrant was harmless beyond a reasonable doubt because it was merely cumulative of properly admitted evidence and the other of defendant's guilty and possible motives was overwhelming. State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007).

§ 15A-1444. When defendant may appeal; certiorari.

CASE NOTES

No Right to Appeal from Extension Orders. — On appeal from an order revoking probation, defendant did not waive his right to appeal because he had no right to appeal the extension orders. State v. Satanek, — N.C. App. —, 660 S.E.2d 623, 2008 N.C. App. LEXIS 997 (2008).

Dismissal of Appeal. —

Defendant's appeal of an order denying his motion to dismiss the charges of misdemeanor and felony habitual driving while intoxicated (DWI) was dismissed because defendant had no right to appeal pursuant to G.S. 15A-1444(e); defendant, who pled guilty to the felony habitual DWI charge after his motion to dismiss was denied, had no statutory right to appeal his conviction, and he waived appellate review of his double jeopardy argument. State v. Corbett, — N.C. App. —, 661 S.E.2d 759, 2008 N.C. App. LEXIS 1132 (June 17, 2008).

Claim that Sentencing Judge Biased Not Barred. — G.S. 15A-1444(a1) did not bar an appeal because defendant was not contending that his sentence was not supported by the evidence, but rather that the sentencing judge was biased. State v. Hagans, — N.C. App. —, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

§ 15A-1445. Appeal by the State.

CASE NOTES

II. Appealable Orders and Judgments.
III. Nonappealable Orders and Judgments.

II. APPEALABLE ORDERS AND JUDGMENTS.

Dismissal of Criminal Charges. —

State's appeal from the dismissal of one count against defendant was not interlocutory because G.S. 15A-1445(a)(1) permitted appeal from a "decision" as well as a "judgment." Although there was not a judgment because a sentence was not pronounced, as required by G.S. 15A-101, there was a decision, dismissal of the resisting charge; therefore, defendant's motion to dismiss the State's appeal was denied. State v. Newman, 186 N.C. App. 382, 651 S.E.2d 584, 2007 N.C. App. LEXIS 2201 (2007).

Where Jury Verdict Vacated. — When a trial court granted defendants' motions to dismiss criminal charges and vacated jury verdicts finding defendants guilty, the state could properly appeal, under G.S. 15A-1445(a)(1), because double jeopardy did not prohibit a prosecution since the jury had already rendered verdicts; thus, if the State succeeded on appeal, defendants would not be subject to re-trial, as the court would reinstate the jury's verdicts. State v. Hernandez, — N.C. App. —, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008).

III. NONAPPEALABLE ORDERS AND JUDGMENTS.

Concurrent Sentence. — State had no right to appeal from a concurrent sentence because the sentence was governed by G.S. 14-7.6, which was outside the scope of appeal of G.S. 15A-1445(a)(3)(c); however, because the concurrent sentence was contrary to G.S. 14-7.6, under N.C. R. App. P. 2 the court would treat the appeal as a mandamus petition, vacate the judgment, and remand for resentencing. State v. Watkins, — N.C. App. —, 659 S.E.2d 58, 2008 N.C. App. LEXIS 687 (2008).

§ 15A-1446. Requisites for preserving the right to appellate review.

CASE NOTES

Miscalculation of Prior Record Level was Appealable. — Even though defendant's prior record level for sentencing purposes may have been miscalculated, and defendant was entitled to appellate review of the calculation pursuant to G.S. 15A-1446(d)(18) despite defendant stipulating to defendant's prior conviction worksheet, defendant did not show that defendant's sentence was improper. When defendant's sentence was properly calculated, defendant still had the same point total and prior offense level, and, thus, any error did not prejudice defendant. State v. Goodwin, — N.C. App. —, 661 S.E.2d 46, 2008 N.C. App. LEXIS 1020 (2008).

Certain Errors Subject to Appellate Review Even Though No Objection, Exception or Motion Made. —

Where defendant argued that the trial court committed error in ordering restitution to the victim in the amount of $2,301, even though defendant did not voice an objection to restitution at sentencing, this assignment of error was fully reviewable on appeal. State v. Person, — N.C. App. —, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

Since the indictment for first degree rape did not include the purpose element included in the sexual battery statute, it was insufficient to confer subject matter jurisdiction, the trial court lacked jurisdiction to enter a judgment of defendant's guilt on that offense, and arrest of judgment was proper; defendant was not required to object to the indictment defect at trial in order to preserve the issue, and the court declined to apply the invited error doctrine, based on precedent. State v. Kelso, — N.C. App. —, 654 S.E.2d 28, 2007 N.C. App. LEXIS 2523 (2007).

Although defendant failed to object at trial to the trial court's use of the fact that defendant was on probation and pre-trial release at the time he committed the instant offenses to both increase his prior record level and aggravate his sentence, defendant nevertheless was permitted to raise the issue on appeal, because the issue concerned whether his sentence was illegally imposed or was otherwise invalid as a matter of law, pursuant to G.S. 15A-1446(d)(18). State v. Moore, — N.C. App. —, 656 S.E.2d 287, 2008 N.C. App. LEXIS 208 (2008).

Applied in State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007).

Cited in State v. Mack, — N.C. App. —, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

§ 15A-1447. Relief available upon appeal.

CASE NOTES

Defendant Not Entitled to New Trial. — Although the trial court erred by the erroneous admission of extrinsic evidence of a specific incident, which attacked defendant's character for truthfulness, the error was not reversible under G.S. 15A-1447(a), and defendant was not entitled to a new trial, because defendant failed to show prejudice resulting from the admission of the evidence given the other evidence presented by witnesses at defendant's trial as the state presented testimony from two of the individuals who were present with defendant when the victim was murdered. Thus, the appellate court could not say as a matter of law that absent the erroneous admission of extrinsic evidence of the specific incident, which attacked defendant's character for truthfulness, there was a reasonable possibility that the jury's verdict would have been different. State v. Lee, — N.C. App. —, 658 S.E.2d 294, 2008 N.C. App. LEXIS 647 (Apr. 1, 2008).

Applied in State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007).

§ 15A-1448. Procedures for taking appeal.

CASE NOTES

Loss of Jurisdiction to Rule on Motion for Appropriate Relief. — Because the record on appeal contained no evidence that defendant filed timely notice of appeal from an order denying his motion for appropriate relief, the court lacked jurisdiction to review defendant's assignment of error to the extent it challenged the denial of his motion for appropriate relief. State v. Hagans, — N.C. App. —, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

Article 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

CASE NOTES

I. General Consideration.
II. Review of Judgment and Sentence.

III. Aggravating Circumstances.
  A. In General.
  E. Especially Heinous, Atrocious, or Cruel Act.
IV. Mitigating Circumstances.
  C. Mental or Emotional Disturbance.
  F. Age of Defendant.

I. GENERAL CONSIDERATION.

Cited in State v. Lopez, — N.C. App. —, 655 S.E.2d 895, 2008 N.C. App. LEXIS 199 (Feb. 5, 2008); Golphin v. Branker, 519 F.3d 168, 2008 U.S. App. LEXIS 5033 (4th Cir. 2008);

II. REVIEW OF JUDGMENT AND SENTENCE.

Habeas Corpus Relief Denied. — Where a jury found two aggravating factors under G.S. 15A-2000(e)(5) and (11) based on the fact that each of two murders was committed in conjunction with the other murder, a prisoner was not entitled to federal habeas corpus relief from death sentences imposed in connection with his state convictions for first-degree murder because there was no reasonable probability that, but for counsel's failure to present mitigating evidence under G.S. 15A-2000(f)(2), (6), and (7) regarding the prisoner's mental health and character, at least one juror would have found that the mitigating circumstances outweighed the aggravating circumstances for purposes of G.S. 15A-2000(b) and (c)(3). The mental health evidence was equivocal, and the evidence of the prisoner's alcoholism could have been viewed as detracting from the mitigating circumstances of immaturity and youthfulness; furthermore, the additional mitigating evidence was substantially duplicative of evidence already presented to the jury. Bowie v. Branker, 512 F.3d 112, 2008 U.S. App. LEXIS 38 (4th Cir. 2008).

III. AGGRAVATING CIRCUMSTANCES.

A. In General.

Necessity of Aggravating Factors for Death Sentence. — Pursuant to G.S. 15A-2000(c), a defendant may not receive a sentence of death in the absence of an aggravating circumstance. State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

Submission of Multiple Factors Upheld. —

With regard to defendant's convictions on two counts of first-degree murder, the trial court did properly instructed the jury to consider only the theft of the firearms, credit cards, and checks in the robbery committed by defendant in determining whether the G.S. 15A-2000(e)(6) pecuniary gain circumstance was present and to not consider the vehicle theft in making that determination; as to the G.S. 15A-2000(e)(5) aggravator, the trial court instructed the jury to consider only the evidence related to the theft of the truck. Therefore, the trial court properly submitted both aggravating circumstances to the jury. State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007).

Aggravating Factors Supported Death Sentence. —

Sentence of death for first-degree murder was proportional to the offense where the evidence supported a finding that defendant committed the murder for the purpose of avoiding lawful arrest and the evidence showed that defendant twice beat the victim into an unconscious state, needlessly stabbed the victim over 50 times, and left the victim's three-year-old grandson alone in the residence after the murder, making it highly probable that the child would awaken to find the victim dead on the living room floor, half naked in a pool of blood with knives protruding from the victim's body. State v. Goss, 361 N.C. 610, 651 S.E.2d 867, 2007 N.C. LEXIS 1106 (2007).

E. Especially Heinous, Atrocious, or Cruel Act.

Evidence Held Sufficient. —

Supreme Court of North Carolina upheld the imposition of the death penalty with regard to the double homicide committed by defendant of the two individuals who had ever shown him any affection and concern; defendant's sentence was not disproportionate considering he brutally beat both of them with a wrench and then mercilessly fired bullets into their skulls for monetary gain. State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007).

IV. MITIGATING CIRCUMSTANCES.

C. Mental or Emotional Disturbance.

Peremptory Instruction Not Required. —

With regard to defendant's convictions on two counts of first-degree murder, the trial court did not err by failing to submit a peremptory instruction on the G.S. 15A-2000(f)(2) mitigating circumstance of whether defendant was under the influence of mental or emotional disturbance at the time of the murders as neither party pointed to, nor could the Supreme Court of North Carolina, find in the record defendant's written request for such an instruction; however, even if defendant had submitted the proposed instruction to the trial court, he would not have been entitled to such an instruction as the evidence was not uncontroverted that defendant acted under the influence of mental or emotional disturbance at the time of the crime. State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007).

F. Age of Defendant.

No Ineffective Assistance for Failing to Object to Issues on Age. — Trial counsel's failure to object to a number of questions posed by the prosecution during jury selection concerning the prospective jurors "sympathy" for defendant on account of defendant's age did not amount to ineffective assistance, because it was not clear that the subject questions were directed at defendant's age rather than toward any bias and counsel did make repeated references to defendant's youth throughout the penalty proceeding. State v. Murrell, — N.C. —, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008).

§ 15A-2005. Mentally retarded defendants; death sentence prohibited.

CASE NOTES

Federal Habeas Corpus Review. —
Where the record was replete with evidence that an inmate was not mentally retarded under North Carolina's statutory definition found in G.S. 15A-2005, his death sentence did not violate the Eighth Amendment. Cole v. Branker, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 69904 (E.D.N.C. Sept. 20, 2007).

Chapter 15C.

Address Confidentiality Program.

§ 15C-2. Definitions.

Editor's Note. — Former G.S. 14-277.3, referred to in subdivision (12), was repealed by Session Laws 2008-167, s. 1, effective December 1, 2008. For current provisions as to stalking, see G.S. 14-277.3A.

Chapter 16.

Gaming Contracts and Futures.

ARTICLE 1.

Gaming Contracts.

§ 16-1. Gaming and betting contracts void.

CASE NOTES

Loan Agreement Based on Personal Injury Claim was not an Illegal Gaming Contract. — Injured driver's claim that a loan agreement based on the driver's personal injury claim was void as an illegal gaming contract under G.S. 16-1 was properly dismissed since the parties desired the same outcome in the litigation and thus, the agreement was not a bet, and the driver had an independent interest in the litigation's outcome as it defined her rights and obligations under the agreement, and thus, it was not a wager. Odell v. Legal Bucks, LLC, — N.C. App. —, 665 S.E.2d 767, 2008 N.C. App. LEXIS 1619 (2008).

Chapter 18B.

Regulation of Alcoholic Beverages.

Article 9.

Issuance of Permits.

Sec.
18B-902. Application for permit; fees.
18B-903. Duration of permit; renewal and transfer.

Article 10.

Retail Activity.

Sec.
18B-1002. Special one-time permits.
18B-1006.1. Additional requirement for certain permittees to recycle beverage containers.

ARTICLE 1.

General Provisions.

§ 18B-101. Definitions.

CASE NOTES

Malt Beverage Evidence Lacking. — State did not provide substantial evidence to show defendant's actual or constructive possession of a malt beverage to prove that defendant had been a person less than 21-years-old in possession of a malt beverage in violation of G.S. 18B-302(b)(1). In particular, the State did not have anyone testify that the alcohol that defendant consumed or which had been in the vehicle that defendant had been driving was a malt beverage, as defined by G.S. 18B-101(9) according to the percentage of alcohol present in a drink. State v. Hensley, — N.C. App. —, 661 S.E.2d 18, 2008 N.C. App. LEXIS 1014 (2008).

ARTICLE 3.

Sale, Possession, and Consumption.

§ 18B-302. Sale to or purchase by underage persons.

CASE NOTES

Consumption Does Not Qualify as Possession. — State did not provide substantial evidence sufficient to convict defendant of possession of a malt beverage by a person less than 21-years-old and, thus, defendant could not be convicted of that offense. Too, although defendant was charged with consumption of a malt beverage by a person less than 21-years-old in violation of G.S. 18B-302(b)(3), it did not pursue that charge at trial and consumption, which meant "to drink," did not qualify as possession such that defendant could be convicted of possessing a malt beverage based on defendant's consumption of it. State v. Hensley, — N.C. App. —, 661 S.E.2d 18, 2008 N.C. App. LEXIS 1014 (2008).

Evidence Insufficient for Conviction. — Trial court should have granted defendant's motion to dismiss the charge against defendant of possession of a malt beverage by a person less than 21-years-old in violation of G.S. 18B-302(b)(1) as the State did not introduce substantial evidence that defendant had actual or constructive possession of a beverage that qualified as a malt beverage. State v. Hensley, — N.C. App. —, 661 S.E.2d 18, 2008 N.C. App. LEXIS 1014 (2008).

ARTICLE 9.

Issuance of Permits.

§ 18B-902. Application for permit; fees.

(a) Form. — An application for an ABC permit shall be on a form prescribed by the Commission and shall be notarized. Each person required to qualify under G.S. 18B-900(c) shall sign and swear to the application and shall submit a full set of fingerprints with the application.

(b) Investigation. — Before issuing a new permit, the Commission, with the assistance of the ALE Division, shall investigate the applicant and the premises for which the permit is requested. The Commission may request the assistance of local ABC officers in investigating applications. An applicant shall cooperate fully with the investigation.

The Department of Justice may provide a criminal record check to the ALE Division for a person who has applied for a permit through the Commission. The ALE Division shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The ALE Division and the Commission shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection.

(c) False Information. — Knowingly making a false statement in an application for an ABC permit shall be grounds for denying, suspending, revoking or taking other action against the permit as provided in G.S. 18B-104 and shall also be unlawful.

(d) Fees. — An application for an ABC permit shall be accompanied by payment of the following application fee:

(1) On-premises malt beverage permit — $400.00.
(2) Off-premises malt beverage permit — $400.00.
(3) On-premises unfortified wine permit — $400.00.
(4) Off-premises unfortified wine permit — $400.00.
(5) On-premises fortified wine permit — $400.00.
(6) Off-premises fortified wine permit — $400.00.
(7) Brown-bagging permit — $400.00, unless the application is for a restaurant seating less than 50, in which case the fee shall be $200.00.
(8) Special occasion permit — $400.00.
(9) Limited special occasion permit — $50.00.
(10) Mixed beverages permit — $1,000.
(11) Culinary permit — $200.00.
(12) Unfortified winery permit — $300.00.
(13) Fortified winery permit — $300.00.
(14) Limited winery permit — $300.00.
(15) Brewery permit — $300.00.
(16) Distillery permit — $300.00.
(17) Fuel alcohol permit — $100.00.

(18) Wine importer permit — $300.00.
(19) Wine wholesaler permit — $300.00.
(20) Malt beverage importer permit — $300.00.
(21) Malt beverage wholesaler permit — $300.00.
(22) Bottler permit — $300.00.
(23) Salesman permit — $100.00.
(24) Vendor representative permit — $50.00.
(25) Nonresident malt beverage vendor permit — $100.00.
(26) Nonresident wine vendor permit — $100.00.
(27) Any special one-time permit under G.S. 18B-1002 — $50.00.
(28) Winery special event permit — $200.00.
(29) Mixed beverages catering permit — $200.00.
(30) Guest room cabinet permit — $1,000.
(31) Liquor importer/bottler permit — $500.00.
(32) Cider and vinegar manufacturer permit — $200.00.
(33) Brew on premises permit — $400.00.
(34) Wine producer permit — $300.00.
(35) Wine tasting permit — $100.00.
(36) Repealed by Session Laws 2005-380, s. 1, effective September 8, 2005, and applicable to wine shipper permit applications submitted on or after that date.
(37) Wine shop permit — $100.00.
(38) Winemaking on premises permit — $400.00.
(39) Wine shipper packager permit — $100.00.

(e) Repealed by Session Laws 1998-95, s. 29, effective May 1, 1999.

(f) Fee Not Refundable. — The fee required by subsection (d) shall not be refunded.

(g) Fees to Treasurer. — All fees collected by the Commission under this or any other section of this Chapter shall be remitted to the State Treasurer for the General Fund.

(h) Recycling Plan Required. — Each applicant for an on-premises malt beverage permit, on-premises unfortified wine permit, on-premises fortified wine permit, or a mixed beverages permit shall prepare and submit with the application a plan for the collection and recycling of all recyclable beverage containers of all beverages to be sold at retail on the premises. (1949, c. 974, ss. 1, 2; 1963, c. 119; c. 426, s. 12; 1965, c. 326; 1971, c. 872, s. 1; 1973, c. 758, s. 2; c. 1012; 1975, c. 19, s. 5; 1977, c. 70, s. 19.1; c. 668, s. 3; c. 977, ss. 1, 2; 1979, c. 286, s. 4; 1981, c. 412, s. 2; c. 747, ss. 55, 56; 1983, c. 713, s. 105; 1989, c. 737, s. 3; c. 800, s. 7; 1991, c. 267, s. 2; c. 565, ss. 2, 7; c. 669, s. 2; c. 689, ss. 307, 308; 1991 (Reg. Sess., 1992), c. 920, s. 5; 1993, c. 415, s. 11; 1993 (Reg. Sess., 1994), c. 745, s. 28; 1995, c. 404, s. 2; c. 466, s. 7; 1997-134, s. 3; 1997-467, s. 2; 1998-95, s. 29; 2001-262, s. 6; 2001-487, s. 49(f); 2002-147, s. 1; 2003-402, s. 1; 2005-350, s. 2(b); 2005-380, s. 1; 2006-222, s. 2.3; 2006-227, s. 3; 2007-402, s. 2(b); 2008-187, s. 6.)

Effect of Amendments. — Session Laws 2008-187, s. 6 amended subsection (h) to add the subsection catchline, which was not included in Session Laws 2007-402, s. 2(b).

§ 18B-903. Duration of permit; renewal and transfer.

(a) Duration. — Once issued, ABC permits shall be valid for the following periods, unless earlier surrendered, suspended or revoked:

(1) On-premises and off-premises malt beverage, unfortified wine, and fortified wine permits; culinary permits; and all permits listed in G.S. 18B-1100 shall remain valid indefinitely;

(2) Limited special occasion permits shall be valid for 48 hours before and after the occasion for which the permit was issued;
(3) Special one-time permits issued under G.S. 18B-1002 shall be valid for the period stated on the permit;
(4) Temporary permits issued under G.S. 18B-905 shall be valid for 90 days; and
(5) All other ABC permits shall be valid for one year, from May 1 to April 30.

(b) Renewal. — Application for renewal of an ABC permit shall be on a form provided by the Commission. An application for renewal shall be accompanied by an application fee of twenty-five percent (25%) of the original application fee set in G.S. 18B-902, except that the renewal application fee for each wine shop permit shall be five hundred dollars ($500.00), and the renewal application fee for each mixed beverages permit and each guest room cabinet permit shall be seven hundred fifty dollars ($750.00). A renewal fee shall not be refundable.

(b1) Registration. — Each person holding a malt beverage, fortified wine, or unfortified wine permit issued pursuant to G.S. 18B-902(d)(1) through G.S. 18B-902(d)(6) shall register by May 1 of each year on a form provided by the Commission, in order to provide information needed by the State in enforcing this Chapter and to support the costs of that enforcement. The registration required by this subsection shall be accompanied by an annual registration and inspection fee of two hundred dollars ($200.00) for each permit held. The fee shall be paid by May 1 of each year. A registration fee shall not be refundable. Failure to pay the annual registration and inspection fee shall result in revocation of the permit.

(b2) Recycling Plan Required. — Each person holding an on-premises malt beverage permit, on-premises unfortified wine permit, on-premises fortified wine permit, or a mixed beverages permit shall submit, along with the annual registration or renewal application, a current plan for the collection and recycling of all recyclable beverage containers of all beverages sold at retail on the premises.

(c) Change in Ownership. — All permits for an establishment shall automatically expire and shall be surrendered to the Commission if:
(1) Ownership of the establishment changes; or
(2) There is a change in the membership of the firm, association or partnership owning the establishment, involving the acquisition of a twenty-five percent (25%) or greater share in the firm, association or partnership by someone who did not previously own a twenty-five percent (25%) or greater share; or
(3) Twenty-five percent (25%) or more of the stock of the corporate permittee owning the establishment is acquired by someone who did not previously own twenty-five percent (25%) or more of the stock.

(d) Change in Management. — A corporation holding a permit for an establishment for which the manager is required to qualify as an applicant under G.S. 18B-900(c) shall, within 30 days after employing a new manager, submit to the Commission an application for substitution of a manager. The application shall be signed by the new manager, shall be on a form provided by the Commission, and shall be accompanied by a fee of ten dollars ($10.00). The fee shall not be refundable.

(e) Transfer. — An ABC permit may not be transferred from one person to another or from one location to another.

(f) Lost Permits. — The Commission may issue duplicate ABC permits for an establishment when the existing valid permits have been lost or damaged. The request for duplicate permits shall be on a form provided by the Commission, certified by the permittee and the Alcohol Law Enforcement Division, and accompanied by a fee of ten dollars ($10.00).

(g) Name Change. — The Commission may issue new permits to a permittee upon application and payment of a fee of ten dollars ($10.00) for each location when the permittee's name or name of the business is changed. (1971, c. 872, s. 1; 1975, c. 330, s. 1; c. 411, s. 4; 1981, c. 412, s. 2; c. 747, s. 57; 1983, c. 713, s. 106; 1989, c. 800, s. 8; 1991, c. 565, ss. 3, 7; 1991 (Reg. Sess., 1992), c. 920, s. 6; 1998-95, s. 30; 2002-126, s. 29A.13; 2004-203, s. 25(b); 2005-350, s. 2(c); 2007-402, s. 2(c); 2008-187, s. 7.)

Effect of Amendments. —

Session Laws 2008-187, s. 7 amended subsection (b2) to add the subsection catchline, which was not included in Session Laws 2007-402, s. 2(c).

ARTICLE 10.

Retail Activity.

§ 18B-1002. Special one-time permits.

(a) Kinds of Permits. — In addition to the other permits authorized by this Chapter, the Commission may issue permits for the following activities:

(1) A permit may be issued to a person who acquires ownership or possession of alcoholic beverages through bankruptcy, inheritance, foreclosure, judicial sale, or other special occurrence, and who does not already have a permit authorizing the sale of that kind of alcoholic beverage. The permit may authorize the sale or other disposition of the alcoholic beverages in a manner prescribed by the Commission.

(2) A permit may be issued to a nonprofit organization to allow the retail sale of malt beverages, unfortified wine, fortified wine, or mixed beverages, or to allow brown-bagging, at a single fund-raising event of that organization. A permit for this purpose shall not be issued for the sale of any kind of alcoholic beverage in a jurisdiction where the sale of that alcoholic beverage is not lawful.

(3) A permit may be issued to a permittee who is going out of business to authorize the sale or other disposition of his alcoholic beverages stock in a manner that would not otherwise be authorized under his permit.

(4) A permit may be issued to a collector of wine or decorative decanters of spirituous liquor authorizing that person to bring into the State, transport, or possess as a collector, a greater amount of those alcoholic beverages than is otherwise authorized by this Chapter, or to sell those alcoholic beverages in a manner prescribed by the Commission.

(5) A permit may be issued to a unit of local government, or to a nonprofit organization or a political organization to serve wine, malt beverages, and spirituous liquor at a ticketed event held to allow the unit of local government or organization to raise funds. For purposes of this subdivision "nonprofit organization" means an organization that is exempt from taxation under Section 501(c)(3), 501(c)(4), 501(c)(6), 501(c)(8), 501(c)(10), 501(c)(19), or 501(d) of the Internal Revenue Code or is exempt under similar provisions of the General Statutes as a bona fide nonprofit charitable, civic, religious, fraternal, patriotic, or veterans' organization or as a nonprofit volunteer fire department, or as a nonprofit volunteer rescue squad or a bona fide homeowners' or property owners' association. For purposes of this subdivision "political organization" means an organization covered by the provisions of G.S. 163-96(a)(1) or (2) or a campaign organization established by or for a person who is a candidate who has filed a notice of candidacy, paid the filing fees or filed the required petition, and been certified as

a candidate. The issuance of this permit will also allow the issuance of a purchase-transportation permit under G.S. 18B-403 and 18B-404 and the use for culinary purposes of spirituous liquor lawfully purchased for use in mixed beverages.

(b) Intent. — Permits under this section are to be issued only for the limited circumstances listed in subsection (a) of this section and not as substitutes for other permits required by this Chapter.

(c) Conditions of Permit. — A permit issued under this section shall be valid only for the single transaction or the kind of activity specified in the permit and shall be subject to any conditions the Commission may impose as to the time, place and manner of the authorized activity.

(d) Administrative Procedure. — Denial or revocation of a permit under this section shall not entitle the applicant or permittee to a hearing under Chapter 150B. (1977, c. 854, s. 1; 1981, c. 412, s. 2; 1987, c. 434, s. 2; c. 827, s. 1; 1989, c. 130; c. 800, ss. 13, 14; 2001-262, s. 9; 2008-159, s. 1.)

Effect of Amendments. — Session Laws 2008-159, s. 1, effective August 3, 2008, in the first sentence of subdivision (a)(2), inserted "mixed beverages, or" and made a related grammatical change.

§ 18B-1006.1. Additional requirement for certain permittees to recycle beverage containers.

Holders of on-premises malt beverage permits, on-premises unfortified wine permits, on-premises fortified wine permits, and mixed beverages permits shall separate, store, and provide for the collection for recycling of all recyclable beverage containers of all beverages sold at retail on the premises. A permittee has satisfied the requirements of this section if it implements a recycling program that meets the minimum standards of the model recycling program developed by the Commission pursuant to G.S. 130A-309.14(m). Failure to comply with the requirements of this section shall not be grounds for revocation of a permit. A conviction for violation of this section shall not constitute an alcoholic beverage offense within the meaning of G.S. 18B-900(a)(4). (2005-348, s. 1; 2007-402, s. 2(a); 2008-187, s. 35.5.)

Effect of Amendments. —
Session Laws 2008-187, s. 35.5, effective August 7, 2008, added the last sentence.

Chapter 18C.

North Carolina State Lottery.

Article 8.

Miscellaneous.

Sec.
18C-173. Limits on compensation increases.

Article 1.

General Provisions and Definitions.

§ 18C-101. Citation.

CASE NOTES

North Carolina State Lottery Act, G.S. 18C-101 et seq., was not a revenue bill and, thus, it did not have to be enacted according to the requirements set forth in N.C. Const., Art. II, § 23. The law was not a revenue bill because it was not enacted to: (1) raise money on the credit of the State; (2) pledge the faith of the State directly or indirectly for the payment of any debt; or (3) impose any tax upon the people of the State, but, rather, involved a voluntary activity that incidentally raised revenue. Heatherly v. State, — N.C. App. —, 658 S.E.2d 11, 2008 N.C. App. LEXIS 530 (Mar. 18, 2008).

§ 18C-102. Purpose and intent.

CASE NOTES

Not a Revenue Bill. — While the state-operated lottery according to G.S. 18C-102 was established to generate funds for the public purposes named in the state's lottery law, namely, the education-related projects outlined in the law's provisions, the revenue-raising purpose of the lottery was not a critical factor in determining whether the law imposed a tax and, thus, had to be enacted according to the requirements of N.C. Const., Art. II, § 23. Given the voluntary nature of participation on the lottery, the lottery law did not impose any tax upon people in North Carolina and, thus, was not a revenue bill subject to the N.C. Const., Art. II, § 23 enactment requirements. Heatherly v. State, — N.C. App. —, 658 S.E.2d 11, 2008 N.C. App. LEXIS 530 (Mar. 18, 2008).

Article 2.

North Carolina State Lottery Commission.

§ 18C-110. Establishment of the North Carolina State Lottery Commission to be a self-supporting agency of the State.

CASE NOTES

State's lottery law was not a revenue bill, and, thus, its provisions such as G.S. 18C-110 and G.S. 18C-160 characterizing the state lottery commission as an independent, self-supporting, and revenue-raising agency were not enacted in violation of the requirements set forth in N.C. Const., Art. II, § 23. The law did not: (1) raise money on the credit of the State; (2) pledge the faith of the State directly or indirectly for the payment of any debt; or (3) impose any tax upon the people of the State, but rather, allowed citizens to participate in a voluntary activity that incidentally raised revenue. Heatherly v. State, — N.C. App. —, 658 S.E.2d 11, 2008 N.C. App. LEXIS 530 (Mar. 18, 2008).

ARTICLE 7.

North Carolina State Lottery Fund.

§ 18C-160. North Carolina State Lottery Fund.

CASE NOTES

State's lottery law was not a revenue bill, and, thus, its provisions such as G.S. 18C-110 and G.S. 18C-160 characterizing the state lottery commission as an independent, self-supporting, and revenue-raising agency were not enacted in violation of the requirements set forth in N.C. Const., Art. II, § 23. The law did not: (1) raise money on the credit of the State; (2) pledge the faith of the State directly or indirectly for the payment of any debt; or (3) impose any tax upon the people of the State, but rather, allowed citizens to participate in a voluntary activity that incidentally raised revenue. Heatherly v. State, — N.C. App. —, 658 S.E.2d 11, 2008 N.C. App. LEXIS 530 (Mar. 18, 2008).

§ 18C-161. Types of income to the North Carolina State Lottery Fund.

CASE NOTES

Cited in Heatherly v. State, — N.C. App. —, 658 S.E.2d 11, 2008 N.C. App. LEXIS 530 (Mar. 18, 2008).

§ 18C-162. Allocation of revenues.

CASE NOTES

State's lottery law was not a revenue bill and, thus, its provisions such as G.S. 18-162(a) allowing for allocation of total annual revenues were not enacted in violation of the requirements set forth in N.C. Const., Art. II, § 23. The law did not: (1) raise money on the credit of the State; (2) pledge the faith of the State directly or indirectly for the payment of any debt; or (3) impose any tax upon the people of the State, but, rather, allowed citizens to participate in a voluntary activity that incidentally raised revenue. Heatherly v. State, — N.C. App. —, 658 S.E.2d 11, 2008 N.C. App. LEXIS 530 (Mar. 18, 2008).

§ 18C-164. Transfer of net revenues.

Editor's Note. —

Session Laws 2008-107, s. 5.2(a), provides: "Pursuant to G.S. 18C-164, the revenue used to support appropriations made in this act is transferred from the State Lottery Fund in the amount of three hundred eighty-five million five hundred thousand dollars ($385,500,000) for the 2008-2009 fiscal year."

Session Laws 2008-107, s. 5.2(a1), as amended by Session Laws 2008-118, s. 2.1(a), provides: "Notwithstanding G.S. 18C-164(f), if (i) the actual net lottery revenues for the 2007-2008 fiscal year exceed the amounts appropriated in the 2007-2008 fiscal year, (ii) the actual net lottery revenues for the 2008-2009 fiscal year exceed the amounts appropriated in the 2008-2009 fiscal year, or (iii) both, the excess net revenue is also transferred from the State Lottery Fund to support appropriations made in this act for the 2008-2009 fiscal year."

Session Laws 2008-107, s. 5.2(c), provides: "Notwithstanding G.S. 18C-164(d), the following amounts are appropriated from the Education Lottery Fund for the 2008-2009 fiscal year:

"(1) Class Size Reduction	$127,864,291
"(2) Prekindergarten Program	84,635,709
"(3) Public School Building Capital Fund	154,200,000
"(4) Scholarships for Needy Students	38,550,000
"Total	$405,250,000"

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

CASE NOTES

State's lottery law was not a revenue bill and, thus, its provisions such as G.S. 18-164(a) allowing for net revenues to be transferred periodically to the Education Lottery Fund, were not enacted in violation of the requirements set forth in N.C. Const., Art. II, § 23. The law did not: (1) raise money on the credit of the State; (2) pledge the faith of the State directly or indirectly for the payment of any debt; or (3) impose any tax upon the people of the State, but, rather, allowed citizens to participate in a voluntary activity that incidentally raised revenue. Heatherly v. State, — N.C. App. —, 658 S.E.2d 11, 2008 N.C. App. LEXIS 530 (Mar. 18, 2008).

Article 8.

Miscellaneous.

§ 18C-173. Limits on compensation increases.

Notwithstanding G.S. 18C-114(a)(11) and G.S. 18C-120(b)(3), the Lottery Commission, during any fiscal year, may not expend funds for merit and performance-based salary increases in excess of the funds that would have been expended had the Lottery Commission employees received the same across-the-board salary increases granted by the General Assembly to State employees subject to the State Personnel Act. These merit and performance-based salary increases may be awarded on an aggregated average basis according to rules adopted by the Lottery Commission. (2008-107, s. 26.12A.)

Editor's Note. — Session Laws 2008-107, s. 26.12A, enacted this section as G.S. 18C-120.173. It has been recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2008-107, s. 30.6, made this section effective July 1, 2008.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Chapter 19A.

Protection of Animals.

Article 3.

Animal Welfare Act.

Sec.
19A-24. Powers of Board of Agriculture.

Article 5.

Spay/Neuter Program.

Sec.
19A-62. Spay/Neuter Account established.

ARTICLE 3.

Animal Welfare Act.

§ 19A-24. Powers of Board of Agriculture.

(a) The Board of Agriculture shall:

(1) Establish standards for the care of animals at animal shelters, boarding kennels, pet shops, and public auctions. A boarding kennel that offers dog day care services and has a ratio of dogs to employees or supervisors, or both employees and supervisors, of not more than 10 to one, shall not as to such services be subject to any regulations that restrict the number of dogs that are permitted within any primary enclosure.

(2) Prescribe the manner in which animals may be transported to and from registered or licensed premises.

(3) Require licensees and holders of certificates to keep records of the purchase and sale of animals and to identify animals at their establishments.

(4) Adopt rules to implement this Article, including federal regulations promulgated under Title 7, Chapter 54, of the United States Code.

(5) Adopt rules on the euthanasia of animals in the possession or custody of any person required to obtain a certificate of registration under this Article. An animal shall only be put to death by a method and delivery of method approved by the American Veterinary Medical Association, the Humane Society of the United States, or the American Humane Association. The Department shall establish rules for the euthanasia process using any one or combination of methods and standards prescribed by the three aforementioned organizations. The rules shall address the equipment, the process, and the separation of animals, in addition to the animals' age and condition. If the gas method of euthanasia is approved, rules shall require (i) that only commercially compressed carbon monoxide gas is approved for use, and (ii) that the gas must be delivered in a commercially manufactured chamber that allows for the individual separation of animals. Rules shall also mandate training for any person who participates in the euthanasia process.

(b) In addition to rules on the euthanasia of animals adopted pursuant to subdivision (5) of subsection (a) of this section, the Board of Agriculture may adopt rules on the euthanasia of animals for:

(1) Written and practical examinations for persons who perform euthanasia.

(2) Issuance of certification to persons who have successfully completed both training and examinations to become a euthanasia technician.

(3) Recertification of euthanasia technicians on a periodic basis.

(4) Standards and procedures for the approval of persons who conduct training of euthanasia technicians.
(5) Approval of materials for use in euthanasia technician training.
(6) Minimum certification criteria for persons seeking to become euthanasia technicians including, but not limited to: age; previous related experience; criminal record; and other qualifications that are related to an applicant's fitness to perform euthanasia.
(7) Denial, suspension, or revocation of certification of euthanasia technicians who either violate any provision of the Animal Welfare Act pursuant to Article 3 of Chapter 19A of the General Statutes or otherwise become ineligible for certification.
(8) Provision of the names of persons who perform euthanasia at animal shelters and for the animal shelter to notify the Department when those persons are no longer affiliated, employed, or serving as a volunteer with the shelter.
(9) Certified euthanasia technicians to notify the Department when they are no longer employed by or are serving as a volunteer at an animal shelter.
(10) The duties, responsibilities, and standards of conduct for certified euthanasia technicians. (1977, 2nd Sess., c. 1217, s. 5; 1987, c. 827, s. 62; 2004-199, s. 12; 2005-276, s. 11.5(b); 2005-345, s. 22; 2008-198, s. 2(a).)

Editor's Note. — Session Laws 2008-198, s. 2(b), provides: "It is the intention of the General Assembly that the authorization to adopt rules governing euthanasia of animals set out in subsection (b) of G.S. 19A-24, as enacted by subsection (a) of this section, constitute sufficient statutory authority to support the adoption of 02 NCAC 52J.0401 through 02 NCAC 52J.0420, 02 NCAC 52J.0501 and 02 NCAC 52J.0502, 02 NCAC 52J.0602 through 02 NCAC 52J.0610, 02 NCAC 52J.0701 through 02 NCAC 52J.0705, and 02 NCAC 52J.0801 through 02 NCAC 52J.0803, as adopted by the Board of Agriculture on 13 February 2008."

Session Laws 2008-198, s. 12 provides, in part: "Section 2 of this act is retroactive to 1 November 2007."

Effect of Amendments. — Session Laws 2008-198, s. 2(a), effective November 1, 2007, designated the previously existing provisions as subsection (a); and added subsection (b).

ARTICLE 5.

Spay/Neuter Program.

§ 19A-62. Spay/Neuter Account established.

(a) Creation. — The Spay/Neuter Account is established as a nonreverting special revenue account in the Department of Health and Human Services. The Account consists of the following:
(1) The portion of the fee imposed under G.S. 130A-190(b)(4) for obtaining a rabies vaccination tag from the Department of Health and Human Services.
(2) Ten dollars ($10.00) of the additional fee imposed by G.S. 20-79.7 for an Animal Lovers special license plate.
(3) Any other funds available from appropriations by the General Assembly or from contributions and grants from public or private sources.

(b) Use. — The revenue in the Account shall be used by the Department of Health and Human Services as follows:
(1) If the revenue generated by the portion of the fee imposed under G.S. 130A-190(b)(3) is less than forty-seven thousand five hundred dollars ($47,500) for the fiscal year, then funds up to the difference between forty-seven thousand five hundred dollars ($47,500) and the amount

of revenue generated may be used from this Account to fund rabies education and prevention programs.

(2) Twenty percent (20%) shall be used to develop and implement the statewide education program component of the Spay/Neuter Program established in G.S. 19A-61(a).

(3) Up to twenty percent (20%) of the money in the Account may be used to defray the costs of administering the Spay/Neuter Program established in this Article.

(4) Funds remaining after deductions for the education program and administrative expenses shall be distributed quarterly to eligible counties and cities seeking reimbursement for reduced-cost spay/neuter surgeries performed during the previous year. A county or city is ineligible to receive funds under this subdivision unless it requires the owner to show proof of rabies vaccination at the time of the procedure or, if none, require vaccination at the time of the procedure.

(c) Report. — In February of each year, the Department must report to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division. The report must contain information regarding all revenues and expenditures of the Spay/Neuter Account. (2000-163, s. 1; 2007-487, ss. 2, 3; 2008-187, s. 8.)

Effect of Amendments. — Session Laws 2008-187, s. 8, effective August 7, 2008, added "Report. —" at the beginning of subsection (c).

Chapter 20.

Motor Vehicles.

Article 1.

Division of Motor Vehicles.

Sec.
20-4.01. Definitions.

Article 2.

Uniform Driver's License Act.

20-7. Issuance and renewal of drivers licenses.
20-17.1. Revocation of license of mental incompetents, alcoholics and habitual users of narcotic drugs.
20-17.4. Disqualification to drive a commercial motor vehicle.
20-19. Period of suspension or revocation; conditions of restoration.
20-20.1. Limited driving privilege for certain revocations.

Article 2C.

Commercial Driver License.

20-37.20A. Driving record notation for testing positive in a drug or alcohol test.
20-38.7. Appeal to superior court.

Article 3.

Motor Vehicle Act of 1937.

Part 3. Registration and Certificates of Titles of Motor Vehicles.

20-52. Application for registration and certificate of title.
20-54. Authority for refusing registration or certificate of title.
20-63. Registration plates furnished by Division; requirements; replacement of regular plates with First in Flight plates; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.
20-66. Renewal of vehicle registration.

Part 7. Title and Registration Fees.

20-88. Property-hauling vehicles.

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

20-115.1. Limitations on tandem trailers and semitrailers on certain North Carolina highways.
20-116. Size of vehicles and loads.
20-118. Weight of vehicles and load.
Sec.
20-119. Special permits for vehicles of excessive size or weight; fees.
20-135.2B. Transporting children under 16 years of age in open bed or open cargo area of a vehicle prohibited; exceptions.
20-137.5. Child passenger safety technician; limitation of liability.

Part 10. Operation of Vehicles and Rules of the Road.

20-138.2A. Operating a commercial vehicle after consuming alcohol.
20-138.2B. Operating a school bus, school activity bus, or child care vehicle after consuming alcohol.
20-166. Duty to stop in event of a crash; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.

Part 10C. Operation of All-Terrain Vehicles.

20-171.21. Penalties.
20-171.22. Exceptions.
20-171.24. Motorized all-terrain vehicle use by employees of listed municipalities and counties permitted on certain highways.
20-171.25. Motorized all-terrain vehicle use by certain employees of natural gas utilities permitted on public highways and rights-of-way.

Part 11. Pedestrians' Rights and Duties.

20-175. Pedestrians soliciting rides, employment, business or funds upon highways or streets.

Part 12. Sentencing; Penalties.

20-179.3. Limited driving privilege.

Article 3A.

Safety and Emissions Inspection Program.

Part 2. Safety and Emissions Inspections of Certain Vehicles.

20-183.2. Description of vehicles subject to safety or emissions inspection; definitions.
20-183.4. License required to perform safety inspection; qualifications for license.
20-183.4C. When a vehicle must be inspected; three-day trip permit.

Article 7.

Miscellaneous Provisions Relating to Motor Vehicles.

Sec.
20-219.2. Removal of unauthorized vehicles from private lots.

Article 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

20-279.21. "Motor vehicle liability policy" defined.

Article 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

Sec.
20-305. Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession.

Article 16.

Professional Housemoving.

20-356. Definitions.
20-358. Qualifications to become licensed.
20-363. Removal and replacement of obstructions.
20-371. Penalties.
20-374. Unsafe practices.

ARTICLE 1.

Division of Motor Vehicles.

§ 20-4.01. Definitions.

Unless the context requires otherwise, the following definitions apply throughout this Chapter to the defined words and phrases and their cognates:

(1a) Alcohol. — Any substance containing any form of alcohol, including ethanol, methanol, propanol, and isopropanol.

(1b) Alcohol Concentration. — The concentration of alcohol in a person, expressed either as:
  a. Grams of alcohol per 100 milliliters of blood; or
  b. Grams of alcohol per 210 liters of breath.

  The results of a defendant's alcohol concentration determined by a chemical analysis of the defendant's breath or blood shall be reported to the hundredths. Any result between hundredths shall be reported to the next lower hundredth.

(1c) All-Terrain Vehicle or ATV. — A motorized off-highway vehicle designed to travel on three or four low-pressure tires, having a seat designed to be straddled by the operator and handlebars for steering control.

(1d) Business District. — The territory prescribed as such by ordinance of the Board of Transportation.

(2) Canceled. — As applied to drivers' licenses and permits, a declaration that a license or permit which was issued through error or fraud, or to which G.S. 20-15(a)(3) applies, is void and terminated.

(2a) Class A Motor Vehicle. — A combination of motor vehicles that meets either of the following descriptions:
  a. Has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
  b. Has a combined GVWR of less than 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.

(2b) Class B Motor Vehicle. — Any of the following:

a. A single motor vehicle that has a GVWR of at least 26,001 pounds.
b. A combination of motor vehicles that includes as part of the combination a towing unit that has a GVWR of at least 26,001 pounds and a towed unit that has a GVWR of less than 10,001 pounds.

(2c) Class C Motor Vehicle. — Any of the following:
a. A single motor vehicle not included in Class B.
b. A combination of motor vehicles not included in Class A or Class B.

(3) Repealed by Session Laws 1979, c. 667, s. 1.

(3a) Chemical Analysis. — A test or tests of the breath, blood, or other bodily fluid or substance of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in accordance with G.S. 20-139.1, including duplicate or sequential analyses.

(3b) Chemical Analyst. — A person granted a permit by the Department of Health and Human Services under G.S. 20-139.1 to perform chemical analyses.

(3c) Commercial Drivers License (CDL). — A license issued by a state to an individual who resides in the state that authorizes the individual to drive a class of commercial motor vehicle. A "nonresident commercial drivers license (NRCDL)" is issued by a state to an individual who resides in a foreign jurisdiction.

(3d) Commercial Motor Vehicle. — Any of the following motor vehicles that are designed or used to transport passengers or property:
a. A Class A motor vehicle that has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
b. A Class B motor vehicle.
c. A Class C motor vehicle that meets either of the following descriptions:
    1. Is designed to transport 16 or more passengers, including the driver.
    2. Is transporting hazardous materials and is required to be placarded in accordance with 49 C.F.R. Part 172, Subpart F.
d. Repealed by Session Laws 1999, c. 330, s. 9, effective December 1, 1999.

(4) Commissioner. — The Commissioner of Motor Vehicles.

(4a) Conviction. — A conviction for an offense committed in North Carolina or another state:
a. In-State. When referring to an offense committed in North Carolina, the term means any of the following:
    1. A final conviction of a criminal offense, including a no contest plea.
    2. A determination that a person is responsible for an infraction, including a no contest plea.
    3. An unvacated forfeiture of cash in the full amount of a bond required by Article 26 of Chapter 15A of the General Statutes.
    4. A third or subsequent prayer for judgment continued within any five-year period.
    5. Any prayer for judgment continued if the offender holds a commercial drivers license or if the offense occurs in a commercial motor vehicle.
b. Out-of-State. When referring to an offense committed outside North Carolina, the term means any of the following:
    1. An unvacated adjudication of guilt.

2. A determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal.
3. An unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court.
4. A violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.
5. A final conviction of a criminal offense, including a no contest plea.

(4b) Crash. — Any event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load. The terms collision, accident, and crash and their cognates are synonymous.

(5) Dealer. — Every person engaged in the business of buying, selling, distributing, or exchanging motor vehicles, trailers, or semitrailers in this State, and having an established place of business in this State.

The terms "motor vehicle dealer," "new motor vehicle dealer," and "used motor vehicle dealer" as used in Article 12 of this Chapter have the meaning set forth in G.S. 20-286.

(5a) Disqualification. — A withdrawal of the privilege to drive a commercial motor vehicle.

(6) Division. — The Division of Motor Vehicles acting directly or through its duly authorized officers and agents.

(7) Driver. — The operator of a vehicle, as defined in subdivision (25). The terms "driver" and "operator" and their cognates are synonymous.

(7a) Electric Personal Assistive Mobility Device. — A self-balancing nontandem two-wheeled device, designed to transport one person, with a propulsion system that limits the maximum speed of the device to 15 miles per hour or less.

(7b) Employer. — Any person who owns or leases a commercial motor vehicle or assigns a person to drive a commercial motor vehicle.

(8) Essential Parts. — All integral and body parts of a vehicle of any type required to be registered hereunder, the removal, alteration, or substitution of which would tend to conceal the identity of the vehicle or substantially alter its appearance, model, type, or mode of operation.

(9) Established Place of Business. — Except as provided in G.S. 20-286, the place actually occupied by a dealer or manufacturer at which a permanent business of bargaining, trading, and selling motor vehicles is or will be carried on and at which the books, records, and files necessary and incident to the conduct of the business of automobile dealers or manufacturers shall be kept and maintained.

(10) Explosives. — Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructible effects on contiguous objects or of destroying life or limb.

(11) Farm Tractor. — Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

(11a) For-Hire Motor Carrier. — A person who transports passengers or property by motor vehicle for compensation.

(12) Foreign Vehicle. — Every vehicle of a type required to be registered hereunder brought into this State from another state, territory, or country, other than in the ordinary course of business, by or through a manufacturer or dealer and not registered in this State.

(12a) Golf Cart. — A vehicle designed and manufactured for operation on a golf course for sporting or recreational purposes and that is not capable of exceeding speeds of 20 miles per hour.

(12b) Gross Vehicle Weight Rating (GVWR). — The value specified by the manufacturer as the maximum loaded weight a vehicle is capable of safely hauling. The GVWR of a combination vehicle is the GVWR of the power unit plus the GVWR of the towed unit or units. When a vehicle is determined by an enforcement officer to be structurally altered in any way from the manufacturer's original design in an attempt to increase the hauling capacity of the vehicle, the GVWR of that vehicle shall be deemed to be the greater of the license weight or the total weight of the vehicle or combination of vehicles for the purpose of enforcing this Chapter. For the purpose of classification of commercial drivers license and skills testing, the manufacturer's GVWR shall be used.

(12c) Hazardous Materials. — Any material that has been designated as hazardous under 49 U.S.C. § 5103 and is required to be placarded under Subpart F of Part 172 of Title 49 of the Code of Federal Regulations (1 October 2007 Edition), or any quantity of a material listed as a select agent or toxin under Part 73 of Title 42 of the Code of Federal Regulations (1 October 2007 Edition).

(13) Highway. — The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms "highway" and "street" and their cognates are synonymous.

(14) House Trailer. — Any trailer or semitrailer designed and equipped to provide living or sleeping facilities and drawn by a motor vehicle.

(14a) Impairing Substance. — Alcohol, controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances.

(15) Implement of Husbandry. — Every vehicle which is designed for agricultural purposes and used exclusively in the conduct of agricultural operations.

(16) Intersection. — The area embraced within the prolongation of the lateral curblines or, if none, then the lateral edge of roadway lines of two or more highways which join one another at any angle whether or not one such highway crosses the other.

Where a highway includes two roadways 30 feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event that such intersecting highway also includes two roadways 30 feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection.

(17) License. — Any driver's license or any other license or permit to operate a motor vehicle issued under or granted by the laws of this State including:

a. Any temporary license or learner's permit;

b. The privilege of any person to drive a motor vehicle whether or not such person holds a valid license; and

c. Any nonresident's operating privilege.

(18) Local Authorities. — Every county, municipality, or other territorial district with a local board or body having authority to adopt local police regulations under the Constitution and laws of this State.

(19) Manufacturer. — Every person, resident, or nonresident of this State, who manufactures or assembles motor vehicles.

(20) Manufacturer's Certificate. — A certification on a form approved by the Division, signed by the manufacturer, indicating the name of the person or dealer to whom the therein-described vehicle is transferred, the date of transfer and that such vehicle is the first transfer of such vehicle in ordinary trade and commerce. The description of the vehicle shall include the make, model, year, type of body, identification number or numbers, and such other information as the Division may require.

(21) Metal Tire. — Every tire the surface of which in contact with the highway is wholly or partly of metal or other hard, nonresilient material.

(21a) Moped. — A type of passenger vehicle as defined in G.S. 105-164.3.

(21b) Motor Carrier. — A for-hire motor carrier or a private motor carrier.

(22) Motorcycle. — A type of passenger vehicle as defined in G.S. 20-4.01(27).

(23) Motor Vehicle. — Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in G.S. 20-4.01(27)d1.

(24) Nonresident. — Any person whose legal residence is in some state, territory, or jurisdiction other than North Carolina or in a foreign country.

(24a) Offense Involving Impaired Driving. — Any of the following offenses:

a. Impaired driving under G.S. 20-138.1.
b. Any offense set forth under G.S. 20-141.4 when conviction is based upon impaired driving or a substantially similar offense under previous law.
c. First or second degree murder under G.S. 14-17 or involuntary manslaughter under G.S. 14-18 when conviction is based upon impaired driving or a substantially similar offense under previous law.
d. An offense committed in another jurisdiction which prohibits substantially similar conduct prohibited by the offenses in this subsection.
e. A repealed or superseded offense substantially similar to impaired driving, including offenses under former G.S. 20-138 or G.S. 20-139.
f. Impaired driving in a commercial motor vehicle under G.S. 20-138.2, except that convictions of impaired driving under G.S. 20-138.1 and G.S. 20-138.2 arising out of the same transaction shall be considered a single conviction of an offense involving impaired driving for any purpose under this Chapter.
g. Habitual impaired driving under G.S. 20-138.5.

A conviction under former G.S. 20-140(c) is not an offense involving impaired driving.

(25) Operator. — A person in actual physical control of a vehicle which is in motion or which has the engine running. The terms "operator" and "driver" and their cognates are synonymous.

(25a) Out of Service Order. — A declaration that a driver, a commercial motor vehicle, or a motor carrier operation is out-of-service.

(26) Owner. — A person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this Chapter. For the purposes of this Chapter, the lessee of a vehicle owned by the government of the United States shall be considered the owner of said vehicle.

(27) Passenger Vehicles. —

a. Excursion passenger vehicles. — Vehicles transporting persons on sight-seeing or travel tours.

b. For hire passenger vehicles. — Vehicles transporting persons for compensation. This classification shall not include vehicles operated as ambulances; vehicles operated by the owner where the costs of operation are shared by the passengers; vehicles operated pursuant to a ridesharing arrangement as defined in G.S. 136-44.21; vehicles transporting students for the public school system under contract with the State Board of Education or vehicles leased to the United States of America or any of its agencies on a nonprofit basis; or vehicles used for human service or volunteer transportation.

c. Common carriers of passengers. — Vehicles operated under a certificate of authority issued by the Utilities Commission for operation on the highways of this State between fixed termini or over a regular route for the transportation of persons for compensation.

c1. Child care vehicles. — Vehicles under the direction and control of a child care facility, as defined in G.S. 110-86(3), and driven by an owner, employee, or agent of the child care facility for the primary purpose of transporting children to and from the child care facility, or to and from a place for participation in an event or activity in connection with the child care facility.

d. Motorcycles. — Vehicles having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, including motor scooters and motor-driven bicycles, but excluding tractors and utility vehicles equipped with an additional form of device designed to transport property, three-wheeled vehicles while being used by law-enforcement agencies and mopeds as defined in subdivision d1 of this subsection.

d1. Moped. — Defined in G.S. 105-164.3.

d2. Motor home or house car. — A vehicular unit, designed to provide temporary living quarters, built into as an integral part, or permanently attached to, a self-propelled motor vehicle chassis or van. The vehicle must provide at least four of the following facilities: cooking, refrigeration or icebox, self-contained toilet, heating or air conditioning, a portable water supply system including a faucet and sink, separate 110-125 volt electrical power supply, or an LP gas supply.

d3. School activity bus. — A vehicle, generally painted a different color from a school bus, whose primary purpose is to transport school students and others to or from a place for participation in an event other than regular classroom work. The term includes a public, private, or parochial vehicle that meets this description.

  - d4. School bus. — A vehicle whose primary purpose is to transport school students over an established route to and from school for the regularly scheduled school day, that is equipped with alternately flashing red lights on the front and rear and a mechanical stop signal, that is painted primarily yellow below the roofline, and that bears the plainly visible words "School Bus" on the front and rear. The term includes a public, private, or parochial vehicle that meets this description.
  - e. U-drive-it passenger vehicles. — Passenger vehicles included in the definition of U-drive-it vehicles set forth in this section.
  - f. Ambulances. — Vehicles equipped for transporting wounded, injured, or sick persons.
  - g. Private passenger vehicles. — All other passenger vehicles not included in the above definitions.
  - h. Low-speed vehicle. A four-wheeled electric vehicle whose top speed is greater than 20 miles per hour but less than 25 miles per hour.

(28) Person. — Every individual, firm, partnership, association, corporation, governmental agency, or combination thereof of whatsoever form or character.

(29) Pneumatic Tire. — Every tire in which compressed air is designed to support the load.

(29a) Private Motor Carrier. — A person who transports passengers or property by motor vehicle in interstate commerce and is not a for-hire motor carrier.

(30) Private Road or Driveway. — Every road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic.

(31) Property-Hauling Vehicles. —
  - a. Vehicles used for the transportation of property.
  - b., c. Repealed by Session Laws 1995 (Regular Session, 1996), c. 756, s. 4.
  - d. Semitrailers. — Vehicles without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of their weight or their load rests upon or is carried by the pulling vehicle.
  - e. Trailers. — Vehicles without motive power designed for carrying property or persons wholly on their own structure and to be drawn by a motor vehicle, including "pole trailers" or a pair of wheels used primarily to balance a load rather than for purposes of transportation.
  - f. Repealed by Session Laws 1995 (Regular Session, 1996), c. 756, s. 4.

(31a) Provisional Licensee. — A person under the age of 18 years.

(32) Public Vehicular Area. — Any area within the State of North Carolina that meets one or more of the following requirements:
  - a. The area is used by the public for vehicular traffic at any time, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of any of the following:
    1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.
    2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed.

3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina. (The inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law when applicable under the provisions of Title 18, United States Code, section 13).

b. The area is a beach area used by the public for vehicular traffic.

c. The area is a road used by vehicular traffic within or leading to a gated or non-gated subdivision or community, whether or not the subdivision or community roads have been offered for dedication to the public.

d. The area is a portion of private property used by vehicular traffic and designated by the private property owner as a public vehicular area in accordance with G.S. 20-219.4.

(32a) Recreational Vehicle. — A vehicular type unit primarily designed as temporary living quarters for recreational, camping, or travel use that either has its own motive power or is mounted on, or towed by, another vehicle. The basic entities are camping trailer, fifth-wheel travel trailer, motor home, travel trailer, and truck camper.

a. Motor home. — As defined in G.S. 20-4.01(27)d2.

b. Travel trailer. — A vehicular unit mounted on wheels, designed to provide temporary living quarters for recreational, camping, or travel use, and of a size or weight that does not require a special highway movement permit when towed by a motorized vehicle.

c. Fifth-wheel trailer. — A vehicular unit mounted on wheels designed to provide temporary living quarters for recreational, camping, or travel use, of a size and weight that does not require a special highway movement permit and designed to be towed by a motorized vehicle that contains a towing mechanism that is mounted above or forward of the tow vehicle's rear axle.

d. Camping trailer. — A vehicular portable unit mounted on wheels and constructed with collapsible partial side walls that fold for towing by another vehicle and unfold at the campsite to provide temporary living quarters for recreational, camping, or travel use.

e. Truck camper. — A portable unit that is constructed to provide temporary living quarters for recreational, camping, or travel use, consisting of a roof, floor, and sides and is designed to be loaded onto and unloaded from the bed of a pickup truck.

(32b) Regular Drivers License. — A license to drive a commercial motor vehicle that is exempt from the commercial drivers license requirements or a noncommercial motor vehicle.

(33)a. Flood Vehicle. — A motor vehicle that has been submerged or partially submerged in water to the extent that damage to the body, engine, transmission, or differential has occurred.

b. Non-U.S.A. Vehicle. — A motor vehicle manufactured outside of the United States and not intended by the manufacturer for sale in the United States.

c. Reconstructed Vehicle. — A motor vehicle of a type required to be registered hereunder that has been materially altered from original construction due to removal, addition or substitution of new or used essential parts; and includes glider kits and custom assembled vehicles.

d. Salvage Motor Vehicle. — Any motor vehicle damaged by collision or other occurrence to the extent that the cost of repairs to the vehicle and rendering the vehicle safe for use on the public streets and highways would exceed seventy-five percent (75%) of its fair retail market value, whether or not the motor vehicle has been declared a total loss by an insurer. Repairs shall include the cost of parts and labor. Fair market retail values shall be as found in the NADA Pricing Guide Book or other publications approved by the Commissioner.

e. Salvage Rebuilt Vehicle. — A salvage vehicle that has been rebuilt for title and registration.

f. Junk Vehicle. — A motor vehicle which is incapable of operation or use upon the highways and has no resale value except as a source of parts or scrap, and shall not be titled or registered.

(33a) Relevant Time after the Driving. — Any time after the driving in which the driver still has in his body alcohol consumed before or during the driving.

(33b) Reportable Crash. — A crash involving a motor vehicle that results in one or more of the following:

a. Death or injury of a human being.

b. Total property damage of one thousand dollars ($1,000) or more, or property damage of any amount to a vehicle seized pursuant to G. S. 20-28.3.

(34) Resident. — Any person who resides within this State for other than a temporary or transitory purpose for more than six months shall be presumed to be a resident of this State; but absence from the State for more than six months shall raise no presumption that the person is not a resident of this State.

(35) Residential District. — The territory prescribed as such by ordinance of the Department of Transportation.

(36) Revocation or Suspension. — Termination of a licensee's or permittee's privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms "revocation" or "suspension" or a combination of both terms shall be used synonymously.

(37) Road Tractors. — Vehicles designed and used for drawing other vehicles upon the highway and not so constructed as to carry any part of the load, either independently or as a part of the weight of the vehicle so drawn.

(38) Roadway. — That portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the shoulder. In the event a highway includes two or more separate roadways the term "roadway" as used herein shall refer to any such roadway separately but not to all such roadways collectively.

(39) Safety Zone. — Traffic island or other space officially set aside within a highway for the exclusive use of pedestrians and which is so plainly marked or indicated by proper signs as to be plainly visible at all times while set apart as a safety zone.

(40) Security Agreement. — Written agreement which reserves or creates a security interest.

(41) Security Interest. — An interest in a vehicle reserved or created by agreement and which secures payments or performance of an obligation. The term includes but is not limited to the interest of a chattel mortgagee, the interest of a vendor under a conditional sales contract, the interest of a trustee under a chattel deed of trust, and the interest of a lessor under a lease intended as security. A security interest is "perfected" when it is valid against third parties generally.

(41a) Serious Traffic Violation. — A conviction of one of the following offenses when operating a commercial or other motor vehicle:

a. Excessive speeding, involving a single charge of any speed 15 miles per hour or more above the posted speed limit.
b. Careless and reckless driving.
c. A violation of any State or local law relating to motor vehicle traffic control, other than a parking violation, arising in connection with a fatal accident.
d. Improper or erratic lane changes.
e. Following the vehicle ahead too closely.
f. Driving a commercial motor vehicle without obtaining a commercial drivers license.
g. Driving a commercial motor vehicle without a commercial drivers license in the driver's possession.
h. Driving a commercial motor vehicle without the proper class of commercial drivers license or endorsements for the specific vehicle group being operated or for the passenger or type of cargo being transported.

(42) Solid Tire. — Every tire of rubber or other resilient material which does not depend upon compressed air for the support of the load.

(43) Specially Constructed Vehicles. — Vehicles of a type required to be registered hereunder not originally constructed under a distinctive name, make, model, or type by a generally recognized manufacturer of vehicles and not materially altered from their original construction.

(44) Special Mobile Equipment. — Defined in G.S. 105-164.3.

(44a) Specialty Vehicles. — Vehicles of a type required to be registered under this Chapter that are modified from their original construction for an educational, emergency services, or public safety use.

(45) State. — A state, territory, or possession of the United States, District of Columbia, Commonwealth of Puerto Rico, a province of Canada, or the Sovereign Nation of the Eastern Band of the Cherokee Indians with tribal lands, as defined in 18 U.S.C. § 1151, located within the boundaries of the State of North Carolina. For provisions in this Chapter that apply to commercial drivers licenses, "state" means a state of the United States and the District of Columbia.

(46) Street. — A highway, as defined in subdivision (13). The terms "highway" and "street" and their cognates are synonymous.

(47) Suspension. — Termination of a licensee's or permittee's privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms "revocation" or "suspension" or a combination of both terms shall be used synonymously.

(48) Truck Tractors. — Vehicles designed and used primarily for drawing other vehicles and not so constructed as to carry any load independent of the vehicle so drawn.

(48a) U-drive-it vehicles. — The following vehicles that are rented to a person, to be operated by that person:
a. A private passenger vehicle other than the following:
   1. A private passenger vehicle of nine-passenger capacity or less that is rented for a term of one year or more.
   2. A private passenger vehicle that is rented to public school authorities for driver-training instruction.
b. A property-hauling vehicle under 7,000 pounds that does not haul products for hire and that is rented for a term of less than one year.
c. Motorcycles.

(48b) Under the Influence of an Impairing Substance. — The state of a person having his physical or mental faculties, or both, appreciably impaired by an impairing substance.

(48c) Utility Vehicle. — Vehicle designed and manufactured for general maintenance, security, recreational, and landscaping purposes, but does not include vehicles designed and used primarily for the transportation of persons or property on a street or highway.

(49) Vehicle. — Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this Chapter bicycles shall be deemed vehicles and every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application. This term shall not include a device which is designed for and intended to be used as a means of transportation for a person with a mobility impairment, or who uses the device for mobility enhancement, is suitable for use both inside and outside a building, including on sidewalks, and is limited by design to 15 miles per hour when the device is being operated by a person with a mobility impairment, or who uses the device for mobility enhancement. This term shall not include an electric personal assistive mobility device as defined in G.S. 20-4.01(7a).

(50) Wreckers. — Vehicles with permanently attached cranes used to move other vehicles; provided, that said wreckers shall be equipped with adequate brakes for units being towed. (1973, c. 1330, s. 1; 1975, cc. 94, 208; c. 716, s. 5; c. 743; c. 859, s. 1; 1977, c. 313; c. 464, s. 34; 1979, c. 39; c. 423, s. 1; c. 574, ss. 1-4; c. 667, s. 1; c. 680; 1981, c. 606, s. 3; c. 792, s. 2; 1983, c. 435, s. 8; 1983 (Reg. Sess., 1984), c. 1101, ss. 1-3; 1985, c. 509, s. 6; 1987, c. 607, s. 2; c. 658, s. 1; 1987 (Reg. Sess., 1988), c. 1069; c. 1105, s. 1; c. 1112, ss. 1-3; 1989, c. 455, ss. 1, 2; c. 727, s. 219(1); c. 771, ss. 1, 18; 1991, c. 449, s. 2; c. 726, ss. 1-4; 1991 (Reg. Sess., 1992), c. 1015, s. 1; 1993 (Reg. Sess., 1994), c. 761, s. 22; 1995, c. 191, s. 1; 1995 (Reg. Sess., 1996), c. 756, ss. 2-4; 1997-379, s. 5.1; 1997-443, s. 11A.8; 1997-456, s. 27; 1998-149, s. 1; 1998-182, ss. 1, 1.1, 26; 1998-217, s. 62(e); 1999-330, s. 9; 1999-337, s. 28(c)-(e); 1999-406, s. 14; 1999-452, ss. 1-5; 2000-155, s. 9; 2000-173, s. 10(c); 2001-212, s. 2; 2001-341, ss. 1, 2; 2001-356, ss. 1, 2; 2001-441, s. 1; 2001-487, ss. 50(a), 51; 2002-72, s. 19(b); 2002-98, ss. 1-3; 2003-397, s. 1; 2005-282, s. 1; 2005-349, ss. 1-3; 2006-253, s. 8; 2007-56, s. 4; 2007-382, ss. 2, 3; 2007-455, s. 1; 2007-493, s. 1; 2008-156, s. 1.)

Effect of Amendments. —
Session Laws 2008-156, s. 1, effective August 3, 2008, rewrote subdivision (12c); and added the last sentence in subdivision (45).

CASE NOTES

"Reportable Crash." — Defendant was properly convicted of giving false information for a motor vehicle crash report in violation of G.S. 20-279.31(b) because, inter alia, an accident in which defendant was involved was a "reportable crash," under the provisions of G.S. 20-4.01(33b). State v. Hernandez, — N.C. App. —, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008).

Revocation. —
As the terms "revoked" and "suspended" with respect to defendant's driver's license were used interchangeably in statutes pursuant to G.S. 20-4.01(47), defendant's claim that there was a fatal variance between the indictment, which indicated that defendant's license was revoked, and the proof offered at trial that defendant's license was suspended, lacked merit. State v. Lloyd, — N.C. App. —, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

Applied in Batts v. Lumbermen's Mut. Cas. Ins. Co., — N.C. App. —, 665 S.E.2d 578, 2008 N.C. App. LEXIS 1613 (2008).

Cited in State v. Jones, 186 N.C. App. 405, 651 S.E.2d 589, 2007 N.C. App. LEXIS 2200 (2007); Great American Ins. Co. v. Freeman, — N.C. App. —, 665 S.E.2d 536, 2008 N.C. App. LEXIS 1612 (2008).

ARTICLE 2.

Uniform Driver's License Act.

§ 20-7. Issuance and renewal of drivers licenses.

(a) License Required. — To drive a motor vehicle on a highway, a person must be licensed by the Division under this Article or Article 2C of this Chapter to drive the vehicle and must carry the license while driving the vehicle. The Division issues regular drivers licenses under this Article and issues commercial drivers licenses under Article 2C.

A license authorizes the holder of the license to drive any vehicle included in the class of the license and any vehicle included in a lesser class of license, except a vehicle for which an endorsement is required. To drive a vehicle for which an endorsement is required, a person must obtain both a license and an endorsement for the vehicle. A regular drivers license is considered a lesser class of license than its commercial counterpart.

The classes of regular drivers licenses and the motor vehicles that can be driven with each class of license are:

(1) Class A. — A Class A license authorizes the holder to drive any of the following:
  a. A Class A motor vehicle that is exempt under G.S. 20-37.16 from the commercial drivers license requirements.
  b. A Class A motor vehicle that has a combined GVWR of less than 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
(2) Class B. — A Class B license authorizes the holder to drive any Class B motor vehicle that is exempt under G.S. 20-37.16 from the commercial drivers license requirements.
(3) Class C. — A Class C license authorizes the holder to drive any of the following:
  a. A Class C motor vehicle that is not a commercial motor vehicle.
  b. When operated by a volunteer member of a fire department, a rescue squad, or an emergency medical service (EMS) in the performance of duty, a Class A or Class B fire-fighting, rescue, or EMS motor vehicle or a combination of these vehicles.
  c. A combination of noncommercial motor vehicles that have a GVWR of more than 10,000 pounds but less than 26,001 pounds. This sub-subdivision does not apply to a Class C license holder less than 18 years of age.

The Commissioner may assign a unique motor vehicle to a class that is different from the class in which it would otherwise belong.

A person holding a commercial drivers license issued by another jurisdiction must apply for a transfer and obtain a North Carolina issued commercial drivers license within 30 days of becoming a resident. Any other new resident of North Carolina who has a drivers license issued by another jurisdiction must obtain a license from the Division within 60 days after becoming a resident.

(a1) Motorcycles and Mopeds. — To drive a motorcycle, a person shall have:

(1) A full provisional license with a motorcycle learner's permit;
(2) A regular drivers license with a motorcycle learner's permit; or
(3) Either:
  a. A full provisional license; or
  b. A regular drivers license, with a motorcycle endorsement.

Subsection (a2) of this section sets forth the requirements for a motorcycle learner's permit.

To obtain a motorcycle endorsement, a person shall demonstrate competence to drive a motorcycle by:

(1) Passing a road test;
(2) Passing a written or oral test concerning motorcycles; and
(3) Paying the fee for a motorcycle endorsement.

Neither a drivers license nor a motorcycle endorsement is required to drive a moped.

(a2) Motorcycle Learner's Permit. — The following persons are eligible for a motorcycle learner's permit:

(1) A person who is at least 16 years old but less than 18 years old and has a full provisional license issued by the Division.
(2) A person who is at least 18 years old and has a license issued by the Division.

To obtain a motorcycle learner's permit, an applicant shall pass a vision test, a road sign test, and a written test specified by the Division. A motorcycle learner's permit expires 18 months after it is issued. The holder of a motorcycle learner's permit may not drive a motorcycle with a passenger. The fee for a motorcycle learner's permit is the amount set in G.S. 20-7(l) for a learner's permit.

(b) Repealed by Session Laws 1993, c. 368, s. 1, c. 533, s. 12.

(b1) Application. — To obtain an identification card, learners permit, or drivers license from the Division, a person shall complete an application form provided by the Division, present at least two forms of identification approved by the Commissioner, be a resident of this State, and, except for an identification card, demonstrate his or her physical and mental ability to drive safely a motor vehicle included in the class of license for which the person has applied. At least one of the forms of identification shall indicate the applicant's residence address. The Division may copy the identification presented or hold it for a brief period of time to verify its authenticity. To obtain an endorsement, a person shall demonstrate his or her physical and mental ability to drive safely the type of motor vehicle for which the endorsement is required.

The application form shall request all of the following information, and it shall contain the disclosures concerning the request for an applicant's social security number required by section 7 of the federal Privacy Act of 1974, Pub. L. No. 93-579:

(1) The applicant's full name.
(2) The applicant's mailing address and residence address.
(3) A physical description of the applicant, including the applicant's sex, height, eye color, and hair color.
(4) The applicant's date of birth.
(5) The applicant's valid social security number.
(6) The applicant's signature.

The Division shall not issue an identification card, learners permit, or drivers license to an applicant who fails to provide the applicant's valid social security number.

(b2) Disclosure of Social Security Number. — The social security number of an applicant is not a public record. The Division may not disclose an applicant's social security number except as allowed under federal law. A violation of the disclosure restrictions is punishable as provided in 42 U.S.C. § 408, and amendments to that law.

In accordance with 42 U.S.C. 405 and 42 U.S.C. 666, and amendments thereto, the Division may disclose a social security number obtained under subsection (b1) of this section only as follows:

(1) For the purpose of administering the drivers license laws.
(2) To the Department of Health and Human Services, Child Support Enforcement Program for the purpose of establishing paternity or child support or enforcing a child support order.

(3) To the Department of Revenue for the purpose of verifying taxpayer identity.
(4) To the Office of Indigent Defense Services of the Judicial Department for the purpose of verifying the identity of a represented client and enforcing a court order to pay for the legal services rendered.
(5) To each county jury commission for the purpose of verifying the identity of deceased persons whose names should be removed from jury lists.

(b3) The Division shall adopt rules implementing the provisions of subsection (b1) of this section with respect to proof of residency in this State. Those rules shall ensure that applicants submit verified or verifiable residency and address information that can be reasonably considered to be valid and that is provided on any of the following:

(1) A document issued by an agency of the United States or by the government of another nation.
(2) A document issued by another state.
(3) A document issued by the State of North Carolina, or a political subdivision of this State. This includes an agency or instrumentality of this State.
(4) A preprinted bank or other corporate statement.
(5) A preprinted business letterhead.
(6) Any other document deemed reliable by the Division.

(b4) Examples of documents that are reasonably reliable indicators of residency include, but are not limited to, any of the following:

(1) A pay stub with the payee's address.
(2) A utility bill showing the address of the applicant-payor.
(3) A contract for an apartment, house, modular unit, or manufactured home with a North Carolina address signed by the applicant.
(4) A receipt for personal property taxes paid.
(5) A receipt for real property taxes paid to a North Carolina locality.
(6) A current automobile insurance policy issued to the applicant and showing the applicant's address.
(7) A monthly or quarterly financial statement from a North Carolina regulated financial institution.
(8) A matricula consular or substantially similar document issued by the Mexican Consulate for North Carolina.
(9) A document similar to that described in subsection (8) of this section, issued by the consulate or embassy of another country. This subdivision only applies if the Division has consulted with the United State Department of State and is satisfied with the reliability of such document.

(b5) The Division rules adopted pursuant to subsection (b3) of this section shall also provide that if an applicant cannot produce any documentation specified in subsection (b3) or (b4) of this section, the applicant, or in the case of a minor applicant a parent or legal guardian of the applicant, may complete an affidavit, on a form provided by the Division and sworn to before an official of the Division, indicating the applicant's current residence address. The affidavit shall contain the provisions of G.S. 20-15(a) and G.S. 20-17(a)(5) and shall indicate the civil and criminal penalties for completing a false affidavit.

(c) Tests. — To demonstrate physical and mental ability, a person must pass an examination. The examination may include road tests, vision tests, oral tests, and, in the case of literate applicants, written tests, as the Division may require. The tests must ensure that an applicant recognizes the handicapped international symbol of access, as defined in G.S. 20-37.5. The Division may not require a person who applies to renew a license that has not expired to take a written test or a road test unless one or more of the following applies:

(1) The person has been convicted of a traffic violation since the person's license was last issued.

(2) The applicant suffers from a mental or physical condition that impairs the person's ability to drive a motor vehicle.

The Division may not require a person who is at least 60 years old to parallel park a motor vehicle as part of a road test.

(c1) Insurance. — The Division may not issue a drivers license to a person until the person has furnished proof of financial responsibility. Proof of financial responsibility shall be in one of the following forms:

(1) A written certificate or electronically-transmitted facsimile thereof from any insurance carrier duly authorized to do business in this State certifying that there is in effect a nonfleet private passenger motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. The certificate or facsimile shall state the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy and shall state the date that the certificate or facsimile is issued. The certificate or facsimile shall remain effective proof of financial responsibility for a period of 30 consecutive days following the date the certificate or facsimile is issued but shall not in and of itself constitute a binder or policy of insurance.

(2) A binder for or policy of nonfleet private passenger motor vehicle liability insurance under which the applicant is insured, provided that the binder or policy states the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy.

The preceding provisions of this subsection do not apply to applicants who do not own currently registered motor vehicles and who do not operate nonfleet private passenger motor vehicles that are owned by other persons and that are not insured under commercial motor vehicle liability insurance policies. In such cases, the applicant shall sign a written certificate to that effect. Such certificate shall be furnished by the Division and may be incorporated into the license application form. Any material misrepresentation made by such person on such certificate shall be grounds for suspension of that person's license for a period of 90 days.

For the purpose of this subsection, the term "nonfleet private passenger motor vehicle" has the definition ascribed to it in Article 40 of General Statute Chapter 58.

The Commissioner may require that certificates required by this subsection be on a form approved by the Commissioner.

The requirement of furnishing proof of financial responsibility does not apply to a person who applies for a renewal of his or her drivers license.

Nothing in this subsection precludes any person from showing proof of financial responsibility in any other manner authorized by Articles 9A and 13 of this Chapter.

(d) Repealed by Session Laws 1993, c. 368, s. 1.

(e) Restrictions. — The Division may impose any restriction it finds advisable on a drivers license. It is unlawful for the holder of a restricted license to operate a motor vehicle without complying with the restriction and is the equivalent of operating a motor vehicle without a license. If any applicant shall suffer from any physical defect or disease which affects his or her operation of a motor vehicle, the Division may require to be filed with it a certificate of such applicant's condition signed by some medical authority of the applicant's community designated by the Division. This certificate shall in all cases be treated as confidential. Nothing in this subsection shall be construed to prevent the Division from refusing to issue a license, either restricted or unrestricted, to any person deemed to be incapable of safely operating a motor vehicle. This subsection does not prohibit deaf persons from operating motor vehicles who in every other way meet the requirements of this section.

(f) Duration and Renewal of Licenses. — Drivers licenses shall be issued and renewed pursuant to the provisions of this subsection:

(1) Duration of license for persons under age 18. — A full provisional license issued to a person under the age of 18 expires on the person's twenty-first birthday.

(2) Duration of original license for persons at least 18 years of age or older. — A drivers license issued to a person at least 18 years old but less than 54 years old expires on the birthday of the licensee in the eighth year after issuance. A drivers license issued to a person at least 54 years old expires on the birthday of the licensee in the fifth year after issuance. A commercial drivers license that has a vehicles carrying passengers (P) and school bus (S) endorsement issued pursuant to G.S. 20-37.16 shall expire on the birth date of the licensee three years after the date of issuance, if the licensee is certified to drive a school bus in North Carolina.

(2a) Duration of renewed licenses. — A renewed drivers license that was issued by the Division to a person at least 18 years old but less than 54 years old expires eight years after the expiration date of the license that is renewed. A renewed drivers license that was issued by the Division to a person at least 54 years old expires five years after the expiration date of the license that is renewed.

(3) Duration of license for certain other drivers. — The durations listed in subdivisions (1), (2) and (2a) of this subsection are valid unless the Division determines that a license of shorter duration should be issued when the applicant holds valid documentation issued by, or under the authority of, the United States government that demonstrates the applicant's legal presence of limited duration in the United States. In no event shall a license of limited duration expire later than the expiration of the authorization for the applicant's legal presence in the United States.

(3a) When to renew. — A person may apply to the Division to renew a license during the 180-day period before the license expires. The Division may not accept an application for renewal made before the 180-day period begins.

(4) Renewal by mail. — The Division may renew by mail a drivers license issued by the Division to a person who meets any of the following descriptions:

a. Is serving on active duty in the armed forces of the United States and is stationed outside this State.

b. Is a resident of this State and has been residing outside the State for at least 30 continuous days.

When renewing a license by mail, the Division may waive the examination that would otherwise be required for the renewal and may impose any conditions it finds advisable. A license renewed by mail is a temporary license that expires 60 days after the person to whom it is issued returns to this State.

(5) License to be sent by mail. — The Division shall issue to the applicant a temporary driving certificate valid for 20 days, unless the applicant is applying for renewal by mail under subdivision (4) of this subsection. The temporary driving certificate shall be valid for driving purposes only and shall not be valid for identification purposes. The Division shall produce the applicant's drivers license at a central location and send it to the applicant by first-class mail at the residence address provided by the applicant, unless the applicant is

ineligible for mail delivery by the United States Postal Service at the applicant's residence. If the United States Postal Service documents that it does not deliver to the residential address provided by the applicant, and the Division has verified the applicant's residential address by other means, the Division may mail the drivers license to the post office box provided by the applicant. Applicants whose only mailing address prior to July 1, 2008, was a post office box in this State may continue to receive their license at that post office box, provided the applicant's residential address has been verified by the Division.

(g) Repealed by Session Laws 1979, c. 667, s. 6.

(h) Repealed by Session Laws 1979, c. 113, s. 1.

(i) Fees. — The fee for a regular drivers license is the amount set in the following table multiplied by the number of years in the period for which the license is issued:

Class of Regular License	Fee for Each Year
Class A	$4.00
Class B	$4.00
Class C	$4.00

The fee for a motorcycle endorsement is one dollar and seventy-five cents ($1.75) for each year of the period for which the endorsement is issued. The appropriate fee shall be paid before a person receives a regular drivers license or an endorsement.

(i1) Restoration Fee. — Any person whose drivers license has been revoked pursuant to the provisions of this Chapter, other than G.S. 20-17(2), shall pay a restoration fee of fifty dollars ($50.00). A person whose drivers license has been revoked under G.S. 20-17(2) shall pay a restoration fee of seventy-five dollars ($75.00) until the end of the fiscal year in which the cumulative total amount of fees deposited under this subsection in the General Fund exceeds ten million dollars ($10,000,000), and shall pay a restoration fee of fifty dollars ($50.00) thereafter. The fee shall be paid to the Division prior to the issuance to such person of a new drivers license or the restoration of the drivers license. The restoration fee shall be paid to the Division in addition to any and all fees which may be provided by law. This restoration fee shall not be required from any licensee whose license was revoked or voluntarily surrendered for medical or health reasons whether or not a medical evaluation was conducted pursuant to this Chapter. The fifty-dollar ($50.00) fee, and the first fifty dollars ($50.00) of the seventy-five-dollar ($75.00) fee, shall be deposited in the Highway Fund. The remaining twenty-five dollars ($25.00) of the seventy-five-dollar ($75.00) fee shall be deposited in the General Fund of the State. The Office of State Budget and Management shall certify to the Department of Transportation and the General Assembly when the cumulative total amount of fees deposited in the General Fund under this subsection exceeds ten million dollars ($10,000,000), and shall annually report to the General Assembly the amount of fees deposited in the General Fund under this subsection.

It is the intent of the General Assembly to annually appropriate the funds deposited in the General Fund under this subsection to the Board of Governors of The University of North Carolina to be used for the Center for Alcohol Studies Endowment at The University of North Carolina at Chapel Hill, but not to exceed this cumulative total of ten million dollars ($10,000,000).

(j) Highway Fund. — The fees collected under this section and G.S. 20-14 shall be placed in the Highway Fund.

(k) Repealed by Session Laws 1991, c. 726, s. 5.

(*l*) Learner's Permit. — A person who is at least 18 years old may obtain a learner's permit. A learner's permit authorizes the permit holder to drive a specified type or class of motor vehicle while in possession of the permit. A learner's permit is valid for a period of 18 months after it is issued. The fee for a learner's permit is fifteen dollars ($15.00). A learner's permit may be renewed, or a second learner's permit may be issued, for an additional period of 18 months. The permit holder must, while operating a motor vehicle over the highways, be accompanied by a person who is licensed to operate the motor vehicle being driven and is seated beside the permit holder.

(*l*-1) Repealed by Session Laws 1991, c. 726, s. 5.

(m) Instruction Permit. — The Division upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or a lesser period to any of the following applicants:

(1) An applicant who is less than 18 years old and is enrolled in a drivers education program that is approved by the State Superintendent of Public Instruction and is offered at a public high school, a nonpublic secondary school, or a licensed drivers training school.
(2) An applicant for certification under G.S. 20-218 as a school bus driver.

A restricted instruction permit authorizes the holder of the permit to drive a specified type or class of motor vehicle when in possession of the permit, subject to any restrictions imposed by the Division. The restrictions the Division may impose on a permit include restrictions to designated areas and highways and restrictions prohibiting operation except when an approved instructor is occupying a seat beside the permittee. A restricted instruction permit is not required to have a distinguishing number or a picture of the person to whom the permit is issued.

(n) Format. — A drivers license issued by the Division must be tamperproof and must contain all of the following information:

(1) An identification of this State as the issuer of the license.
(2) The license holder's full name.
(3) The license holder's residence address.
(4) A color photograph, or a properly applied laser engraved picture on polycarbonate material, of the license holder, taken by the Division.
(5) A physical description of the license holder, including sex, height, eye color, and hair color.
(6) The license holder's date of birth.
(7) An identifying number for the license holder assigned by the Division. The identifying number may not be the license holder's social security number.
(8) Each class of motor vehicle the license holder is authorized to drive and any endorsements or restrictions that apply.
(9) The license holder's signature.
(10) The date the license was issued and the date the license expires.

In taking photographs of license holders, the Division must distinguish between license holders who are less than 21 years old and license holders who are at least 21 years old by using different color backgrounds or borders for each group. The Division shall determine the different colors to be used. The Commissioner shall ensure that applicants 21 years old or older are issued drivers licenses and special identification cards that are printed in a horizontal format. The Commissioner shall ensure that applicants under the age of 21 are issued drivers licenses and special identification cards that are printed in a vertical format, that distinguishes them from the horizontal format, for ease of identification of individuals under age 21 by members of industries that regulate controlled products that are sale restricted by age and law enforcement officers enforcing these laws.

At the request of an applicant for a drivers license, a license issued to the applicant must contain the applicant's race.

(o) Repealed by Session Laws 1991, c. 726, s. 5.

(p) The Division must give the clerk of superior court in each county at least 50 copies of the driver license handbook free of charge. The clerk must give a copy to a person who requests it.

(q) Military Designation. — The Division shall develop a military designation for drivers licenses that may, upon request, be granted to North Carolina residents on active duty and to their spouses and dependent children. A drivers license with a military designation on it may be renewed by mail no more than two times during the license holder's lifetime. A license renewed by mail under this subsection is a permanent license and does not expire when the license holder returns to the State. A drivers license with a military designation on it issued to a person on active duty may be renewed up to one year prior to its expiration upon presentation of military or Department of Defense credentials.

(r) Waiver of Vision Test. — The following license holders shall be exempt from any required eye exam when renewing a drivers license by mail under either subsection (f) of this section or subsection (q) of this section if, at the time of renewal, the license holder is serving in a combat zone or a qualified hazardous duty zone:

(1) A member of the armed forces of the United States.

(2) A member of the national guard or of a reserve component of the armed forces of the United States.

(s) Notwithstanding the requirements of subsection (b1) of this section that an applicant present a valid social security number, the Division shall issue a drivers license of limited duration, under subsection (f) of this section, to an applicant present in the United States who holds valid documentation issued by, or under the authority of, the United States government that demonstrates the applicant's legal presence of limited duration in the United States if the applicant presents that valid documentation and meets all other requirements for a license of limited duration. (1935, c. 52, s. 2; 1943, c. 649, s. 1; c. 787, s. 1; 1947, c. 1067, s. 10; 1949, c. 583, ss. 9, 10; c. 826, ss. 1, 2; 1951, c. 542, ss. 1, 2; c. 1196, ss. 1-3; 1953, cc. 839, 1284, 1311; 1955, c. 1187, ss. 2-6; 1957, c. 1225; 1963, cc. 754, 1007, 1022; 1965, c. 410, s. 5; 1967, c. 509; 1969, c. 183; c. 783, s. 1; c. 865; 1971, c. 158; 1973, cc. 73, 705; c. 1057, ss. 1, 3; 1975, c. 162, s. 1; c. 295; c. 296, ss. 1, 2; c. 684; c. 716, s. 5; c. 841; c. 875, s. 4; c. 879, s. 46; 1977, c. 6; c. 340, s. 3; c. 865, ss. 1, 3; 1979, c. 37, s. 1; c. 113; c. 178, s. 2; c. 667, ss. 3-11, 41; c. 678, ss. 1-3; c. 801, ss. 5, 6; 1981, c. 42; c. 690, ss. 8-10; c. 792, s. 3; 1981 (Reg. Sess., 1982), c. 1257, s. 1; 1983, c. 443, s. 1; 1985, c. 141, s. 4; c. 682, ss. 1, 2; 1987, c. 869, ss. 10, 11; 1989, c. 436, ss. 1, 2; c. 771, s. 5; c. 786, s. 4; 1991, c. 478, s. 1; c. 689, s. 325; c. 726, s. 5; 1991 (Reg. Sess., 1992), c. 1007, s. 27; c. 1030, s. 10; 1993, c. 368, s. 1; c. 533, ss. 2, 3, 12; 1993 (Reg. Sess., 1994), c. 595, ss. 1, 2; c. 750, s. 1; c. 761, s. 1.1; 1995 (Reg. Sess., 1996), c. 675, s. 1; 1997-16, ss. 5, 8, 9; 1997-122, ss. 2, 3; 1997-377, s. 1; 1997-433, s. 4; 1997-443, ss. 11A.122, 32.20; 1997-456, s. 32, 33; 1998-17, s. 1; 1998-149, s. 2; 2000-120, ss. 14, 15; 2000-140, s. 93.1(a); 2001-424, ss. 12.2(b), 27.10A(a)-(d); 2001-513, s. 32(a); 2003-152, ss. 1, 2; 2003-284, s. 36.1; 2004-189, s. 5(a); 2004-203, s. 2; 2005-276, s. 44.1(a); 2005-349, s. 4; 2006-257, ss. 1, 2; 2006-264, s. 35.2; 2007-56, ss. 1-3; 2007-249, s. 1; 2007-350, s. 1; 2007-512, s. 5; 2008-202, ss. 2, 3; 2008-217, s. 1; 2008-221, s. 1.)

Cross References. — As to criminal record checks of applicants and of current employees who are involved in the manufacture or production of drivers licenses and identification cards, see G.S. 114-19.24.

Editor's Note. —

Session Laws 2008-107, s. 25.13 reads: "Provided that the Commissioner of the Department of Motor Vehicles is not required to reissue a drivers license in the horizontal format to drivers when the drivers turn 21, up to fifty thousand dollars ($50,000) of any funding received by the Division of Motor Vehicles to help fund the drivers license format change from horizontal to vertical, for drivers less than 21 years of age, shall be appropriated to the Department of Transportation, System Preservation Account, to replace funds previously expended by the Division for this initiative."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008 2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008 2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Session Laws 2008-217, s. 2 provides: "The Office of State Controller, with the support of the Office of State Budget and Management, shall identify and make all efforts to secure any matching funds or other resources to assist in funding this initiative."

Effect of Amendments. —

Session Laws 2008-202, ss. 2 and 3, effective August 8, 2008, in subdivision (f)(5), added the language beginning "unless the applicant is ineligible for mail delivery" to the end of the subdivision; in subdivision (n)(4), inserted "or a properly applied laser engraved picture on polycarbonate material"; in the second full paragraph in subsection (n), deleted the former first sentence, which read: "The Commissioner may waive the requirement of a color photograph on a license if the license holder proves to the satisfaction of the Commissioner that taking the photograph would violate the license holder's religious convictions"; and made minor grammatical changes.

Session Laws 2008-217, s. 1, effective October 1, 2008, and applicable to drivers licenses and special identification cards issued or renewed on or after that date, added the last two sentences in the second full paragraph of subsection (n).

Session Laws 2008-221, s. 1, effective September 1, 2008, added subdivisions (a)(3)c.

CASE NOTES

Applied in Hinson v. Jarvis, — N.C. App. —, 660 S.E.2d 604, 2008 N.C. App. LEXIS 990 (2008).

Cited in State v. Hernandez, — N.C. App. —, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008); State v. Veazey, — N.C. App. —, 662 S.E.2d 683, 2008 N.C. App. LEXIS 1228 (July 1, 2008).

§ 20-16.2. Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis.

CASE NOTES

II. Administration of Test.

II. ADMINISTRATION OF TEST.

Right to Have a Witness to Breathalyzer Test. —

Although a witness who arrived to observe intoxilyzer testing failed to specifically tell the front desk why she was at the police station, defendant's G.S. 20-16.2(a) right to have the witness present during the test was violated as the arresting officer knew the witness was en route, the witness timely arrived at the police station, and the witness made a reasonable effort to make her presence known. State v. Hatley, — N.C. App. —, 661 S.E.2d 43, 2008 N.C. App. LEXIS 1013 (2008).

Right to Counsel. —

Officer was not required to wait for the full 30 minutes under G.S. 20-16.2(a)(6) before administering a breathalyzer test as a driver gave no clear indication that the driver wanted to call an attorney; the officer had reasonable grounds to believe that the driver had committed an implied consent offense based on the combination of the driver's evasion of a checkpoint, the odor of alcohol surrounding the driver, and a brief conversation with the driver. White v. Tippett, — N.C. App. —, 652 S.E.2d 728, 2007 N.C. App. LEXIS 2359 (2007).

§ 20-16.5. Immediate civil license revocation for certain persons charged with implied-consent offenses.

Editor's Note. —

Session Laws 2007-323, s. 30.10(h), as amended by Session Laws 2008-193, s. 2, provides: "The remainder of this section becomes effective August 1, 2007, and applies to all costs assessed or collected on or after that date."

§ 20-17.1. Revocation of license of mental incompetents, alcoholics and habitual users of narcotic drugs.

(a) The Commissioner, upon receipt of notice that any person has been legally adjudicated incompetent or has been involuntarily committed to an institution for the treatment of alcoholism or drug addiction, shall forthwith make inquiry into the facts for the purpose of determining whether such person is competent to operate a motor vehicle. If a person has been adjudicated incompetent under Chapter 35A of the General Statutes, in making an inquiry into the facts, the Commissioner shall consider the clerk of court's recommendation regarding whether the incompetent person should be allowed to retain his or her driving privilege. Unless the Commissioner is satisfied that such person is competent to operate a motor vehicle with safety to persons and property, he shall revoke such person's driving privilege. Provided that if such person requests, in writing, a hearing, he shall retain his license until after the hearing, and if the revocation is sustained after such hearing, the person whose driving privilege has been revoked under the provisions of this section, shall have the right to a review by the review board as provided in G.S. 20-9(g)(4) upon written request filed with the Division.

(b) If any person shall be adjudicated as incompetent or is involuntarily committed for the treatment of alcoholism or drug addiction, the clerk of the court in which any such adjudication is made shall forthwith send a certified copy of abstract thereof to the Commissioner.

(c) Repealed by Session Laws 1973, c. 475, s. 31/2.

(d) It is the intent of this section that the provisions herein shall be carried out by the Commissioner of Motor Vehicles for the safety of the motoring public. The Commissioner shall have authority to make such agreements as are necessary with the persons in charge of every institution of any nature for the care and treatment of alcoholics or habitual users of narcotic drugs, to effectively carry out the duty hereby imposed and the person in charge of the institutions described above shall cooperate with and assist the Commissioner of Motor Vehicles.

(e) Notwithstanding the provisions of G.S. 8-53, 8-53.2, and Article 3 of Chapter 122C of the General Statutes, the person or persons in charge of any institution as set out in subsection (a) hereinabove shall furnish such information as may be required for the effective enforcement of this section. Information furnished to the Division of Motor Vehicles as provided herein shall be confidential and the Commissioner of Motor Vehicles shall be subject to the same penalties and is granted the same protection as is the department, institution or individual furnishing such information. No criminal or civil action may be brought against any person or agency who shall provide or submit to the Commissioner of Motor Vehicles or his authorized agents the information as required herein.

(f) Revocations under this section may be reviewed as provided in G.S. 20-9(g)(4). (1947, c. 1006, s. 9; 1953, c. 1300, s. 36; 1955, c. 1187, s. 16; 1969, c. 186, s. 1; c. 1125; 1971, c. 208, ss. 1, 11/2; c. 401, s. 1; c. 767; 1973, c. 475, s. 31/2; c. 1362; 1975, c. 716, s. 5; 1983, c. 768, s. 3; 1987, c. 720, s. 1; 2008-182, s. 1.)

Effect of Amendments. — Session Laws 2008-182, s. 1, effective October 1, 2008, and applicable to persons adjudicated incompetent under Chapter 35A of the General Statutes on or after that date, added the second sentence of subsection (a).

§ 20-17.4. Disqualification to drive a commercial motor vehicle.

(a) One Year. — Any of the following disqualifies a person from driving a commercial motor vehicle for one year if committed by a person holding a commercial drivers license, or, when applicable, committed while operating a commercial motor vehicle by a person who does not hold a commercial drivers license:

(1) A first conviction of G.S. 20-138.1, driving while impaired, for a holder of a commercial drivers license that occurred while the person was driving a motor vehicle that is not a commercial motor vehicle.
(2) A first conviction of G.S. 20-138.2, driving a commercial motor vehicle while impaired.
(3) A first conviction of G.S. 20-166, hit and run.
(4) A first conviction of a felony in the commission of which a commercial motor vehicle was used or the first conviction of a felony in which any motor vehicle is used by a holder of a commercial drivers license.
(5) Refusal to submit to a chemical test when charged with an implied-consent offense, as defined in G.S. 20-16.2.
(6) A second or subsequent conviction, as defined in G.S. 20-138.2A(d), of driving a commercial motor vehicle after consuming alcohol under G.S. 20-138.2A.
(7) A civil license revocation under G.S. 20-16.5, or a substantially similar revocation obtained in another jurisdiction, arising out of a charge that occurred while the person was either operating a commercial motor vehicle or while the person was holding a commercial drivers license.
(8) A first conviction of vehicular homicide under G.S. 20-141.4 or vehicular manslaughter under G.S. 14-18 occurring while the person was operating a commercial motor vehicle.
(9) Driving a commercial motor vehicle during a period when the person's commercial drivers license is revoked, suspended, cancelled, or the driver is otherwise disqualified from operating a commercial motor vehicle.

(a1) Ten-Day Disqualification. — A person who is convicted for a first offense of driving a commercial motor vehicle after consuming alcohol under G.S. 20-138.2A is disqualified from driving a commercial motor vehicle for 10 days.

(b) Modified Life. — A person who has been disqualified from driving a commercial motor vehicle for a conviction or refusal described in subsection (a) who, as the result of a separate incident, is subsequently convicted of an offense or commits an act requiring disqualification under subsection (a) is disqualified for life. The Division may adopt guidelines, including conditions, under which a disqualification for life under this subsection may be reduced to 10 years.

(b1) Life Without Reduction. — A person is disqualified from driving a commercial motor vehicle for life, without the possibility of reinstatement after 10 years, if that person is convicted of a third or subsequent violation of G.S. 20-138.2, a fourth or subsequent violation of G.S. 20-138.2A, or if the person refuses to submit to a chemical test a third time when charged with an implied-consent offense, as defined in G.S. 20-16.2, that occurred while the person was driving a commercial motor vehicle.

(c) Life. — A person is disqualified from driving a commercial motor vehicle for life if that person either uses a commercial motor vehicle in the commission of any felony involving the manufacture, distribution, or dispensing of a controlled substance, or possession with intent to manufacture, distribute, or dispense a controlled substance or is the holder of a commercial drivers license at the time of the commission of any such felony.

(d) Less Than a Year. — A person is disqualified from driving a commercial motor vehicle for 60 days if that person is convicted of two serious traffic violations, or 120 days if convicted of three or more serious traffic violations, arising from separate incidents occurring within a three-year period, committed in a commercial motor vehicle or while holding a commercial drivers license. This disqualification shall be in addition to, and shall be served at the end of, any other prior disqualification. For purposes of this subsection, a "serious violation" includes violations of G.S. 20-140(f) and G.S. 20-141(j3).

(e) Three Years. — A person is disqualified from driving a commercial motor vehicle for three years if that person is convicted of an offense or commits an act requiring disqualification under subsection (a) and the offense or act occurred while the person was transporting a hazardous material that required the motor vehicle driven to be placarded.

(f) Revocation Period. — A person is disqualified from driving a commercial motor vehicle for the period during which the person's regular or commercial drivers license is revoked, suspended, or cancelled.

(g) Violation of Out-of-Service Order. — Any person convicted for violating an out-of-service order, except as described in subsection (h) of this section, shall be disqualified as follows:

(1) A person is disqualified from driving a commercial vehicle for a period of 90 days if convicted of a first violation of an out-of-service order.

(2) A person is disqualified for a period of one year if convicted of a second violation of an out-of-service order during any 10-year period, arising from separate incidents.

(3) A person is disqualified for a period of three years if convicted of a third or subsequent violation of an out-of-service order during any 10-year period, arising from separate incidents.

(h) Violation of Out-of-Service Order; Special Rule for Hazardous Materials and Passenger Offenses. — Any person convicted for violating an out-of-service order while transporting hazardous materials or while operating a commercial vehicle designed or used to transport more than 15 passengers, including the driver, shall be disqualified as follows:

(1) A person is disqualified for a period of 180 days if convicted of a first violation of an out-of-service order.

(2) A person is disqualified for a period of three years if convicted of a second or subsequent violation of an out-of-service order during any 10-year period, arising from separate incidents.

(i) Disqualification for Out-of-State Violations. — The Division shall withdraw the privilege to operate a commercial vehicle of any resident of this State or person transferring to this State upon receiving notice of the person's conviction or Administrative Per Se Notice in another state for an offense that, if committed in this State, would be grounds for disqualification, even if the offense occurred in another jurisdiction prior to being licensed in this State where no action had been taken at that time in the other jurisdiction. The period of disqualification shall be the same as if the offense occurred in this State.

(j) Disqualification of Persons Without Commercial Drivers Licenses. — Any person convicted of an offense that requires disqualification under this section, but who does not hold a commercial drivers license, shall be disqualified from operating a commercial vehicle in the same manner as if the person held a valid commercial drivers license.

(k) Disqualification for Railroad Grade Crossing Offenses. — Any person convicted of a violation of G.S. 20-142.1 through G.S. 20-142.5, when the driver is operating a commercial motor vehicle, shall be disqualified from driving a commercial motor vehicle as follows:

(1) A person is disqualified for a period of 60 days if convicted of a first violation of a railroad grade crossing offense listed in this subsection.
(2) A person is disqualified for a period of 120 days if convicted during any three-year period of a second violation of any combination of railroad grade crossing offenses listed in this subsection.
(3) A person is disqualified for a period of one year if convicted during any three-year period of a third or subsequent violation of any combination of railroad grade crossing offenses listed in this subsection.

(*l*) Disqualification for Testing Positive in a Drug or Alcohol Test. — Upon receipt of notice of a positive drug or alcohol test, or of refusal to participate in a drug or alcohol test, pursuant to G.S. 20-37.19(c), the Division must disqualify a CDL holder from operating a commercial motor vehicle for a minimum of 30 days and until receipt of proof of successful completion of assessment and treatment by a substance abuse professional in accordance with 49 C.F.R. § 382.503.

(m) Disqualifications of Drivers Who Are Determined to Constitute an Imminent Hazard. — The Division shall withdraw the privilege to operate a commercial motor vehicle for any resident of this State for a period of 30 days in accordance with 49 C.F.R. § 383.52. (1989, c. 771, s. 3; 1991, c. 726, s. 8; 1993, c. 533, s. 5; 1998-149, s. 3; 1998-182, s. 19; 2000-109, s. 7(e); 2002-72, s. 7; 2003-397, s. 2; 2005-156, s. 2; 2005-349, s. 6; 2007-492, s. 1; 2008-175, s. 1.)

Effect of Amendments. —
Session Laws 2008-175, s. 1, effective December 1, 2008, and applicable to offenses committed on or after that date, in subdivision (a)(7), substituted "either operating a commercial motor vehicle or while the person was holding a commercial drivers license" for "operating a commercial motor vehicle"; in subsection (c), inserted "either" and added "or is the holder of a commercial drivers license at the time of the commission of any such felony"; in subsection (d), substituted "arising from separate incidents occurring within a three-year period, committed in a commercial motor vehicle or while holding a commercial drivers license" for "committed in a commercial motor vehicle arising from separate incidents occurring within a three-year period"; and, in subsection (*l*), substituted "for Testing Positive in a" for "Based on" and inserted "for a minimum of 30 days and."

§ 20-17.6. Restoration of a license after a conviction of driving while impaired or driving while less than 21 years old after consuming alcohol or drugs.

CASE NOTES

Indefinite Revocation. — Although the trial court should have submitted the aggravating factor in G.S. 20-179(c)(2), providing that at the time of the offense, defendant was driving while defendant's license was revoked, as defined by G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a), the error was harmless beyond a reasonable doubt. Defendant's driving record, admitted by the State, showed that defendant's driver's license was indefinitely revoked due to an impaired driving conviction and that the license had not been reinstated, which meant that evidence of the aggravating factor was overwhelming and uncontroverted such that a sentence beyond the statutory maximum could be imposed. State v. Coffey, — N.C. App. —, 658 S.E.2d 73, 2008 N.C. App. LEXIS 536 (Mar. 18, 2008).

§ 20-19. Period of suspension or revocation; conditions of restoration.

(a) When a license is suspended under subdivision (8) or (9) of G.S. 20-16(a), the period of suspension shall be in the discretion of the Division and for such time as it deems best for public safety but shall not exceed six months.

(b) When a license is suspended under subdivision (10) of G.S. 20-16(a), the period of suspension shall be in the discretion of the Division and for such time as it deems best for public safety but shall not exceed a period of 12 months.

(c) When a license is suspended under any other provision of this Article which does not specifically provide a period of suspension, the period of suspension shall be not more than one year.

(c1) When a license is revoked under subdivision (2) of G.S. 20-17, and the period of revocation is not determined by subsection (d) or (e) of this section, the period of revocation is one year.

(c2) When a license is suspended under G.S. 20-17(a)(14), the period of revocation for a first conviction shall be for 10 days. For a second or subsequent conviction as defined in G.S. 20-138.2B(d), the period of revocation shall be one year.

(c3) Restriction; Revocations. — When the Division restores a person's drivers license which was revoked pursuant to G.S. 20-13.2 (a), G.S. 20-23 when the offense involved impaired driving, G.S. 20-23.2, subdivision (2) of G.S. 20-17(a), subdivision (1) or (9) of G.S. 20-17(a) when the offense involved impaired driving, or this subsection, in addition to any other restriction or condition, it shall place the applicable restriction on the person's drivers license as follows:

(1) For the first restoration of a drivers license for a person convicted of driving while impaired, G.S. 20-138.1, or a drivers license revoked pursuant to G.S. 20-23 or G.S. 20-23.2 when the offense for which the person's license was revoked prohibits substantially similar conduct which if committed in this State would result in a conviction of driving while impaired under G.S. 20-138.1, that the person not operate a vehicle with an alcohol concentration of 0.04 or more at any relevant time after the driving;

(2) For the second or subsequent restoration of a drivers license for a person convicted of driving while impaired, G.S. 20-138.1, or a drivers license revoked pursuant to G.S. 20-23 or G.S. 20-23.2 when the offense for which the person's license was revoked prohibits substantially similar conduct which if committed in this State would result in a conviction of driving while impaired under G.S. 20-138.1, that the person not operate a vehicle with an alcohol concentration greater than 0.00 at any relevant time after the driving;

(3) For any restoration of a drivers license for a person convicted of driving while impaired in a commercial motor vehicle, G.S. 20-138.2, driving while less than 21 years old after consuming alcohol or drugs, G.S. 20-138.3, felony death by vehicle, G.S. 20-141.4(a1), manslaughter or negligent homicide resulting from the operation of a motor vehicle when the offense involved impaired driving, or a revocation under this subsection, that the person not operate a vehicle with an alcohol concentration of greater than 0.00 at any relevant time after the driving;

(4) For any restoration of a drivers license revoked pursuant to G.S. 20-23 or G.S. 20-23.2 when the offense for which the person's license was revoked prohibits substantially similar conduct which if committed in this State would result in a conviction of driving while impaired in a commercial motor vehicle, G.S. 20-138.2, driving while less than 21 years old after consuming alcohol or drugs, G.S. 20-138.3, a violation of G.S. 20-141.4, or manslaughter or negligent homicide resulting from the operation of a motor vehicle when the offense involved impaired driving, that the person not operate vehicle with an alcohol concentration of greater than 0.00 at any relevant time after the driving.

In addition, the person seeking restoration of a license must agree to submit to a chemical analysis in accordance with G.S. 20-16.2 at the request of a law enforcement officer who has reasonable grounds to believe the person is operating a motor vehicle on a highway or public vehicular area in violation of the restriction specified in this subsection. The person must also agree that, when requested by a law enforcement officer, the person will agree to be transported by the law enforcement officer to the place where chemical analysis is to be administered.

The restrictions placed on a license under this subsection shall be in effect (i) seven years from the date of restoration if the person's license was permanently revoked, (ii) until the person's twenty-first birthday if the revocation was for a conviction under G.S. 20-138.3, and (iii) three years in all other cases.

A law enforcement officer who has reasonable grounds to believe that a person has violated a restriction placed on the person's drivers license shall complete an affidavit pursuant to G.S. 20-16.2(c1). On the basis of information reported pursuant to G.S. 20-16.2, the Division shall revoke the drivers license of any person who violates a condition of reinstatement imposed under this subsection. An alcohol concentration report from an ignition interlock system shall not be used as the basis for revocation under this subsection. A violation of a restriction imposed under this subsection or the willful refusal to submit to a chemical analysis shall result in a one-year revocation. If the period of revocation was imposed pursuant to subsection (d) or (e), any remaining period of the original revocation, prior to its reduction, shall be reinstated and the one-year revocation begins after all other periods of revocation have terminated.

(c4) Applicable Procedures. — When a person has violated a condition of restoration by refusing a chemical analysis, the notice and hearing procedures of G.S. 20-16.2 apply. When a person has submitted to a chemical analysis and the results show a violation of the alcohol concentration restriction, the notification and hearing procedures of this section apply.

(c5) Right to Hearing Before Division; Issues. — Upon receipt of a properly executed affidavit required by G.S. 20-16.2(c1), the Division must expeditiously notify the person charged that the person's license to drive is revoked for the period of time specified in this section, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests in writing a hearing before the Division. Except for the time referred to in G.S. 20-16.5, if the person shows to the satisfaction of the Division that the person's license was surrendered to the court and remained in the court's possession, then the Division shall credit the amount of time for which the license was in the possession of the court against the revocation period required by this section. If the person properly requests a hearing, the person retains the person's license, unless it is revoked under some other provision of law, until the hearing is held, the person withdraws the request, or the person fails to appear at a scheduled hearing. The hearing officer may subpoena any witnesses or documents that the hearing officer deems necessary. The person may request the hearing officer to subpoena the charging officer, the chemical analyst, or both to appear at the hearing if the person makes the request in writing at least three days before the hearing. The person may subpoena any other witness whom the person deems necessary, and the provisions of G.S. 1A-1, Rule 45, apply to the issuance and service of all subpoenas issued under the authority of this section. The hearing officer is authorized to administer oaths to witnesses appearing at the hearing. The hearing must be conducted in the county where the charge was brought, and must be limited to consideration of whether:

(1) The charging officer had reasonable grounds to believe that the person had violated the alcohol concentration restriction;

(2) The person was notified of the person's rights as required by G.S. 20-16.2(a);

(3) The drivers license of the person had an alcohol concentration restriction; and

(4) The person submitted to a chemical analysis upon the request of the charging officer, and the analysis revealed an alcohol concentration in excess of the restriction on the person's drivers license.

If the Division finds that the conditions specified in this subsection are met, it must order the revocation sustained. If the Division finds that any of the conditions (1), (2), (3), or (4) is not met, it must rescind the revocation. If the revocation is sustained, the person must surrender the person's license immediately upon notification by the Division.

(c6) Appeal to Court. — There is no right to appeal the decision of the Division. However, if the person properly requested a hearing before the Division under subsection (c5) and the Division held such a hearing, the person may within 30 days of the date the Division's decision is mailed to the person, petition the superior court of the county in which the hearing took place for discretionary review on the record of the revocation. The superior court may stay the imposition of the revocation only if the court finds that the person is likely to succeed on the merits of the case and will suffer irreparable harm if such a stay is not granted. The stay shall not exceed 30 days. The reviewing court shall review the record only and shall be limited to determining if the Division hearing officer followed proper procedures and if the hearing officer made sufficient findings of fact to support the revocation. There shall be no further appeal.

(d) When a person's license is revoked under (i) G.S. 20-17(a)(2) and the person has another offense involving impaired driving for which he has been convicted, which offense occurred within three years immediately preceding the date of the offense for which his license is being revoked, or (ii) G.S. 20-17(a)(9) due to a violation of G.S. 20-141.4(a3), the period of revocation is four years, and this period may be reduced only as provided in this section. The Division may conditionally restore the person's license after it has been revoked for at least two years under this subsection if he provides the Division with satisfactory proof that:

(1) He has not in the period of revocation been convicted in North Carolina or any other state or federal jurisdiction of a motor vehicle offense, an alcoholic beverage control law offense, a drug law offense, or any other criminal offense involving the possession or consumption of alcohol or drugs; and

(2) He is not currently an excessive user of alcohol, drugs, or prescription drugs, or unlawfully using any controlled substance.

If the Division restores the person's license, it may place reasonable conditions or restrictions on the person for the duration of the original revocation period.

(e) When a person's license is revoked under (i) G.S. 20-17(a)(2) and the person has two or more previous offenses involving impaired driving for which the person has been convicted, and the most recent offense occurred within the five years immediately preceding the date of the offense for which the person's license is being revoked, or (ii) G.S. 20-17(a)(9) due to a violation of G.S. 20-141.4(a4), the revocation is permanent.

(e1) Notwithstanding subsection (e) of this section, the Division may conditionally restore the license of a person to whom subsection (e) applies after it has been revoked for at least three years under subsection (e) if the person provides the Division with satisfactory proof of all of the following:

(1) In the three years immediately preceding the person's application for a restored license, the person has not been convicted in North Carolina or in any other state or federal court of a motor vehicle

offense, an alcohol beverage control law offense, a drug law offense, or any criminal offense involving the consumption of alcohol or drugs.

(2) The person is not currently an excessive user of alcohol, drugs, or prescription drugs, or unlawfully using any controlled substance.

(e2) Notwithstanding subsection (e) of this section, the Division may conditionally restore the license of a person to whom subsection (e) applies after it has been revoked for at least 24 months under G.S. 20-17(a)(2) if the person provides the Division with satisfactory proof of all of the following:

(1) The person has not consumed any alcohol for the 12 months preceding the restoration while being monitored by a continuous alcohol monitoring device of a type approved by the Department of Correction.

(2) The person has not in the period of revocation been convicted in North Carolina or any other state or federal jurisdiction of a motor vehicle offense, an alcoholic beverage control law offense, a drug law offense, or any other criminal offense involving the possession or consumption of alcohol or drugs.

(3) The person is not currently an excessive user of drugs or prescription drugs.

(4) The person is not unlawfully using any controlled substance.

(e3) If the Division restores a person's license under subsection (e1) or (e2) of this section, it may place reasonable conditions or restrictions on the person for any period up to five years from the date of restoration.

(f) When a license is revoked under any other provision of this Article which does not specifically provide a period of revocation, the period of revocation shall be one year.

(g) When a license is suspended under subdivision (11) of G.S. 20-16(a), the period of suspension shall be for a period of time not in excess of the period of nonoperation imposed by the court as a condition of the suspended sentence; further, in such case, it shall not be necessary to comply with the Motor Vehicle Safety and Financial Responsibility Act in order to have such license returned at the expiration of the suspension period.

(g1) When a license is revoked under subdivision (12) of G.S. 20-17, the period of revocation is six months for conviction of a second offense and one year for conviction of a third or subsequent offense.

(g2) When a license is revoked under G.S. 20-17(a)(16), the period of revocation is 90 days for a second conviction and six months for a third or subsequent conviction. The term "second or subsequent conviction" shall have the same meaning as found in G.S. 20-17(a)(16).

(h) Repealed by Session Laws 1983, c. 435, s. 17.

(i) When a person's license is revoked under G.S. 20-17(a)(1) or G.S. 20-17(a)(9), and the offense is one involving impaired driving and a fatality, the revocation is permanent. The Division may, however, conditionally restore the person's license after it has been revoked for at least five years under this subsection if he provides the Division with satisfactory proof that:

(1) In the five years immediately preceding the person's application for a restored license, he has not been convicted in North Carolina or in any other state or federal court of a motor vehicle offense, an alcohol beverage control law offense, a drug law offense, or any criminal offense involving the consumption of alcohol or drugs; and

(2) He is not currently an excessive user of alcohol or drugs.

If the Division restores the person's license, it may place reasonable conditions or restrictions on the person for any period up to seven years from the date of restoration.

(j) The Division is authorized to issue amended revocation orders issued under subsections (d) and (e), if necessary because convictions do not respectively occur in the same order as offenses for which the license may be revoked under those subsections.

(k) Before the Division restores a driver's license that has been suspended or revoked under any provision of this Article, other than G.S. 20-24.1, the person seeking to have his driver's license restored shall submit to the Division proof that he has notified his insurance agent or company of his seeking the restoration and that he is financially responsible. Proof of financial responsibility shall be in one of the following forms:

(1) A written certificate or electronically-transmitted facsimile thereof from any insurance carrier duly authorized to do business in this State certifying that there is in effect a nonfleet private passenger motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. The certificate or facsimile shall state the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy and shall state the date that the certificate or facsimile is issued. The certificate or facsimile shall remain effective proof of financial responsibility for a period of 30 consecutive days following the date the certificate or facsimile is issued but shall not in and of itself constitute a binder or policy of insurance or

(2) A binder for or policy of nonfleet private passenger motor vehicle liability insurance under which the applicant is insured, provided that the binder or policy states the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy.

The preceding provisions of this subsection do not apply to applicants who do not own currently registered motor vehicles and who do not operate nonfleet private passenger motor vehicles that are owned by other persons and that are not insured under commercial motor vehicle liability insurance policies. In such cases, the applicant shall sign a written certificate to that effect. Such certificate shall be furnished by the Division and may be incorporated into the restoration application form. Any material misrepresentation made by such person on such certificate shall be grounds for suspension of that person's license for a period of 90 days.

For the purposes of this subsection, the term "nonfleet private passenger motor vehicle" has the definition ascribed to it in Article 40 of General Statute Chapter 58.

The Commissioner may require that certificates required by this subsection be on a form approved by the Commissioner. The financial responsibility required by this subsection shall be kept in effect for not less than three years after the date that the license is restored. Failure to maintain financial responsibility as required by this subsection shall be grounds for suspending the restored driver's license for a period of thirty (30) days. Nothing in this subsection precludes any person from showing proof of financial responsibility in any other manner authorized by Articles 9A and 13 of this Chapter. (1935, c. 52, s. 13; 1947, c. 1067, s. 15; 1951, c. 1202, ss. 2-4; 1953, c. 1138; 1955, c. 1187, ss. 13, 17, 18; 1957, c. 499, s. 2; c. 515, s. 1; 1959, c. 1264, s. 11A; 1969, c. 242; 1971, c. 619, ss. 8-10; 1973, c. 1445, ss. 1-4; 1975, c. 716, s. 5; 1979, c. 903, ss. 4-6; 1981, c. 412, s. 4; c. 747, ss. 34, 66; 1983, c. 435, s. 17; 1983 (Reg. Sess., 1984), c. 1101, s. 18; 1987, c. 869, s. 12; 1987 (Reg. Sess., 1988), c. 1112; 1989, c. 436, s. 5; c. 771, s. 18; 1995, c. 506, s. 8; 1998-182, s. 21; 1999-406, s. 2; 1999-452, ss. 11, 12; 2000-140, ss. 3, 4; 2000-155, s. 6; 2001-352, s. 4; 2007-165, ss. 1(a), (b); 2007-493, ss. 11-14; 2008-187, s. 9.)

Editor's Note. —

Subsection (e), as originally amended by Session Laws 2007-165, s. 1(b), had two subdivisions designated (e)(1) and two subdivisions designated (e)(2). Session Laws 2008-187 corrected the subsection (e) designation scheme.

Effect of Amendments. —

Session Laws 2008-187, s. 9, effective August 7, 2008, rewrote subsection (e) as present subsections (e), (e1), (e2), and (e3).

CASE NOTES

Right to Inherit from Life Insurance Policies. — While paternity had to be established for an illegitimate child to inherit from a father who died intestate, North Carolina had no statute requiring that paternity be established for an illegitimate child to benefit from a life insurance policy, and the policy at issue in defendant claimant's case did not exclude illegitimate children unless paternity had been judicially established. Fort Dearborn Life Ins. Co. v. Turner, 521 F. Supp. 2d 499, 2007 U.S. Dist. LEXIS 84333 (E.D.N.C. Oct. 3, 2007).

Cited in State v. Coffey, — N.C. App. —, 658 S.E.2d 73, 2008 N.C. App. LEXIS 536 (Mar. 18, 2008).

§ 20-20.1. Limited driving privilege for certain revocations.

(a) Definitions. — The following definitions apply in this section:

(1) Limited driving privilege. — A judgment issued by a court authorizing a person with a revoked drivers license to drive under specified terms and conditions.

(2) Nonstandard working hours. — Anytime other than 6:00 A.M. until 8:00 P.M. on Monday through Friday.

(3) Standard working hours. — Anytime from 6:00 A.M. until 8:00 P.M. on Monday through Friday.

(4) Underlying offense. — The offense for which a person's drivers license was revoked when the person was charged under G.S. 20-28(a), driving with a revoked license, or under G.S. 20-28.1, committing a motor vehicle moving offense while driving with a revoked license.

(b) Eligibility. — A person is eligible to apply for a limited driving privilege under this section if all of the following conditions apply:

(1) The person's license is currently revoked under G.S. 20-28(a) or G.S. 20-28.1.

(2) The person has complied with the revocation for the period required in subsection (c) of this section immediately preceding the date the person files a petition for a limited driving privilege under this section.

(3) The person's underlying offense is not an offense involving impaired driving and, if the person's license is revoked under G.S. 20-28.1 for committing a motor vehicle moving offense while driving with a revoked license, the moving offense is not an offense involving impaired driving.

(4) The revocation period for the underlying offense has expired.

(5) The revocation under G.S. 20-28(a) or G.S. 20-28.1 is the only revocation in effect.

(6) The person is not eligible to receive a limited driving privilege under any other law.

(7) The person has not held a limited driving privilege issued under this section at anytime during the three years prior to the date the person files the current petition.

(8) The person has no pending charges for any motor vehicle offense in this or in any other state and has no unpaid motor vehicle fines or penalties in this or in any other state.

(9) The person's drivers license issued by another state has not been revoked by that state.

(10) G.S. 20-9(e) or G.S. 20-9(f) does not prohibit the Division from issuing the person a license.

(c) Compliance Period. — The following table sets out the period during which a person must comply with a revocation under G.S. 20-28(a) or G.S. 20-28.1 to be eligible for a limited driving privilege under this section:

Revocation Period	Compliance Period
1 Year	90 Days
2 Years	1 Year
Permanent	2 Years

(d) Petition. — A person may apply for a limited driving privilege under this section by filing a petition. A petition filed under this section is separate from the action that resulted in the initial revocation and is a civil action. A petition must be filed in district court in the county of the person's residence as reflected by the Division's records or, if the Division's records are inaccurate, in the county of the person's actual residence. A person must attach to a petition a copy of the person's motor vehicle record. A petition must include a sworn statement that the person filing the petition is eligible for a limited driving privilege under this section.

A court, for good cause shown, may issue a limited driving privilege to an eligible person in accordance with this section. The costs required under G.S. 7A-305(a) and G.S. 20-20.2 apply to a petition filed under this section. The clerk of court for the court that issues a limited driving privilege under this section must send a copy of the limited driving privilege to the Division.

(e) Scope of Privilege. — A limited driving privilege restricts the person to essential driving related to one or more of the purposes listed in this subsection. Any driving that is not related to the purposes authorized in this subsection is unlawful even though done at times and upon routes that may be authorized by the privilege. Except as otherwise provided, all driving must be for a purpose and done within the restrictions specified in the privilege.

The permissible purposes for a limited driving privilege are:

(1) Travel to and from the person's place of employment and in the course of employment.

(2) Travel necessary for maintenance of the person's household.

(3) Travel to provide emergency medical care for the person or for an immediate family member of the person who resides in the same household with the person. Driving related to emergency medical care is authorized at anytime and without restriction as to routes.

(f) Employment Driving in Standard Working Hours. — The court may authorize driving for employment-related purposes during standard working hours without specifying times and routes for the driving. If the person is required to drive for essential employment-related purposes only during standard working hours, the limited driving privilege must prohibit driving during nonstandard working hours unless the driving is for emergency medical care or for authorized household maintenance. The limited driving privilege must state the name and address of the person's employer and may, in the discretion of the court, include other information and restrictions applicable to employment-related driving.

(g) Employment Driving in Nonstandard Working Hours. — If a person is required to drive during nonstandard working hours for an essential employment-related purpose and the person provides documentation of that fact to the court, the court may authorize the person to drive for that purpose during those hours. If the person is self-employed, the documentation must be attached to or made a part of the limited driving privilege. If the person is employed by another, the limited driving privilege must state the name and address of the person's employer and may, in the discretion of the court, include other information and restrictions applicable to employment-related driving. If the court determines that it is necessary for the person to drive during nonstandard working hours for an employment-related purpose, the court may authorize the person to drive subject to these limitations:

(1) If the person is required to drive to and from a specific place of employment at regular times, the limited driving privilege must specify the general times and routes by which the person may drive to and from work and must restrict driving to those times and routes.

(2) If the person is required to drive to and from work at a specific place but is unable to specify the times during which the driving will occur, the limited driving privilege must specify the general routes by which the person may drive to and from work and must restrict driving to those general routes.

(3) If the person is required to drive to and from work at regular times but is unable to specify the places at which work is to be performed, the limited driving privilege must specify the general times and geographic boundaries within which the person may drive and must restrict driving to those times and boundaries.

(4) If the person can specify neither the times nor places in which the person will be driving to and from work, the limited driving privilege must specify the geographic boundaries within which the person may drive and must restrict driving to those boundaries.

(h) Household Maintenance. — A limited driving privilege may allow driving for maintenance of the household only during standard working hours. The court, at its discretion, may impose additional restrictions on driving for the maintenance of the household.

(i) Restrictions. — A limited driving privilege that is not authorized by this section or that does not contain the restrictions required by law is invalid. A limited driving privilege issued under this section is subject to the following conditions:

(1) Financial responsibility. — A person applying for a limited driving privilege under this section must provide the court proof of financial responsibility acceptable under G.S. 20-16.1(g) and must maintain the financial responsibility during the period of the limited driving privilege.

(2) Alcohol restrictions. — A person who received a limited driving privilege under this section may not consume alcohol while driving or drive at anytime while the person has remaining in the person's body any alcohol or controlled substance previously consumed, unless the controlled substance was lawfully obtained and taken in therapeutically appropriate amounts.

(3) Others. — The court may impose any other reasonable restrictions or conditions necessary to achieve the purposes of this section.

(j) Term and Reinstatement. — The term of a limited driving privilege issued under this section is the shorter of one year or the length of time remaining in the revocation period imposed under G.S. 20-28(a) or G.S. 20-28.1. When the term of the limited driving privilege expires, the Division must reinstate the person's license if the person meets all of the conditions listed in this subsection. The Division may impose restrictions or conditions on the new license in accordance with G.S. 20-7(e). The conditions are:

(1) Payment of the restoration fee as required under G.S. 20-7(i1).

(2) Providing proof of financial responsibility as required under G.S. 20-7(c1).

(3) Providing the proof required for reinstatement of a license under G.S. 20-28(c1).

(k) Modification. — A court may modify or revoke a person's limited driving privilege issued under this section upon a showing that the circumstances have changed sufficiently to justify modification or revocation. If the judge who issued the privilege is not presiding in the court in which the privilege was issued, a presiding judge in that court may modify or revoke the privilege. The judge must indicate in the order of modification or revocation the reasons for the order or make specific findings indicating the reason for the order and enter those findings in the record of the case. When a court issues an order of modification or revocation, the clerk of court must send a copy of the order to the Division.

(*l*) Effect of Violation. — A violation of a limited driving privilege issued under this section constitutes the offense of driving while license revoked under G.S. 20-28. When a person is charged with operating a motor vehicle in violation of the limited driving privilege, the limited driving privilege is suspended pending the final disposition of the charge. (2007-293, s. 1; 2007-323, s. 30.11(d); 2007-345, s. 9.1(c); 2008-118, s. 2.9(b).)

Effect of Amendments. — Session Laws 2008-118, s. 2.9(b), effective July 1, 2008, substituted "and G.S. 20-20.2" for "and (a3)" in the second paragraph of subsection (d).

§ 20-28. Unlawful to drive while license revoked, after notification, or while disqualified.

CASE NOTES

I. In General.
II. Procedure.

I. IN GENERAL.

Cited in Hinson v. Jarvis, — N.C. App. —, 660 S.E.2d 604, 2008 N.C. App. LEXIS 990 (2008).

II. PROCEDURE.

Burden of Proof and Presumption of Knowledge. —

Since defendant chose not to present any evidence at trial, the State met its burden of producing substantial evidence on each element of driving while license revoked in G.S. 20-28(a) by offering evidence that the Department of Motor Vehicles had sent defendant 18 notices of the revocation of defendant's license in compliance with G.S. 20-48(a). State v. Coltrane, — N.C. App. —, 656 S.E.2d 322, 2008 N.C. App. LEXIS 194 (2008).

Harmless Error. — Although the trial court should have submitted the aggravating factor in G.S. 20-179(c)(2), providing that at the time of the offense, defendant was driving while defendant's license was revoked, as defined by G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a), the error was harmless beyond a reasonable doubt. Defendant's driving record, admitted by the State, showed that defendant's driver's license was indefinitely revoked due to an impaired driving conviction and that the license had not been reinstated, which meant that evidence of the aggravating factor was overwhelming and uncontroverted such that a sentence beyond the statutory maximum could be imposed. State v. Coffey, — N.C. App. —, 658 S.E.2d 73, 2008 N.C. App. LEXIS 536 (Mar. 18, 2008).

§ 20-28.2. Forfeiture of motor vehicle for impaired driving after impaired driving license revocation.

CASE NOTES

Harmless Error. — Although the trial court should have submitted the aggravating factor in G.S. 20-179(c)(2), providing that at the time of the offense, defendant was driving while defendant's license was revoked, as defined by G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a), the error was harmless beyond a reasonable doubt. Defendant's driving record, admitted by the State, showed that defendant's driver's license was indefinitely revoked due to an impaired driving conviction and that the license had not been reinstated, which meant that evidence of the aggravating factor was overwhelming and uncontroverted such that a sentence beyond the statutory maximum could be imposed. State v. Coffey, — N.C. App. —, 658 S.E.2d 73, 2008 N.C. App. LEXIS 536 (Mar. 18, 2008).

§ 20-35. Penalties for violating Article; defense to driving without a license.

CASE NOTES

Cited in Hinson v. Jarvis, — N.C. App. —, 660 S.E.2d 604, 2008 N.C. App. LEXIS 990 (2008).

Article 2C.

Commercial Driver License.

§ 20-37.13. Commercial drivers license qualification standards.

CASE NOTES

Cited in State v. Hernandez, — N.C. App. —, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008).

§ 20-37.20A. Driving record notation for testing positive in a drug or alcohol test.

Upon receipt of notice pursuant to G.S. 20-37.19(c) of positive result in an alcohol or drug test of a person holding a commercial drivers license, and subject to any appeal of the disqualification pursuant to G.S. 20-37.20B, the Division shall place a notation on the driving record of the driver. A notation of a disqualification pursuant to G.S. 20-17.4(l) shall be retained on the record of a person for a period of three years following the end of any disqualification of that person. (2005-156, s. 3; 2008-175, s. 2.)

Effect of Amendments. — Session Laws 2008-175, s. 2, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted “three years” for “two years” in the last sentence.

Article 2D.

Implied-Consent Offense Procedures.

§ 20-38.6. Motions and district court procedure.

CASE NOTES

Cited in State v. Morgan, — N.C. App. —, 660 S.E.2d 545, 2008 N.C. App. LEXIS 688 (2008).

§ 20-38.7. Appeal to superior court.

(a) The State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss. If there is a dispute about the findings of fact, the superior court shall not be bound by the findings of the district court but shall determine the matter de novo. Any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes.

(b) The defendant may not appeal a denial of a pretrial motion to suppress or to dismiss but may appeal upon conviction as provided by law.

(c) Notwithstanding the provisions of G.S. 15A-1431, for any implied-consent offense that is first tried in district court and that is appealed to superior court by the defendant for a trial de novo as a result of a conviction, the sentence imposed by the district court is vacated upon giving notice of appeal. The case shall only be remanded back to district court with the consent of the prosecutor and the superior court. When an appeal is withdrawn or a case is remanded back to district court, the district court shall hold a new sentencing hearing and shall consider any new convictions.

(d) Following a new sentencing hearing in district court pursuant to subsection (c) of this section, a defendant has a right of appeal to the superior court only if:

(1) The sentence is based upon additional facts considered by the district court that were not considered in the previously vacated sentence, and

(2) The defendant would be entitled to a jury determination of those facts pursuant to G.S. 20-179.

A defendant who has a right of appeal under this subsection, gives notice of appeal, and subsequently withdraws the appeal shall have the sentence imposed by the district court reinstated by the district court as a final judgment that is not subject to further appeal. (2006-253, s. 5; 2007-493, s. 9; 2008-187, s. 10.)

Effect of Amendments. — Session Laws 2008-187, s. 10, effective August 7, 2008, substituted "sentence" for "judgment" at the end of subdivision (d)(1).

ARTICLE 3.

Motor Vehicle Act of 1937.

Part 2. Authority and Duties of Commissioner and Division.

§ 20-48. Giving of notice.

CASE NOTES

Knowledge of Revocation. — Since defendant chose not to present any evidence at trial, the state met its burden of producing substantial evidence on each element of driving while license revoked in G.S. 20-28(a) by offering evidence that the Department of Motor Vehicles had sent defendant 18 notices of the revocation of defendant's license in compliance with G.S. 20-48(a). State v. Coltrane, — N.C. App. —, 656 S.E.2d 322, 2008 N.C. App. LEXIS 194 (2008).

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-50. Owner to secure registration and certificate of title; temporary registration markers.

Local Modification. — Moore: 1995, c. 13, s. 3, as amended by 2002-82, s. 2, as amended by 2005-11, s. 2; city of Conover: 2003-124, s. 1, as amended by 2004-58, s. 1, as amended by 2007-204, s. 1, as amended by 2007-259, s. 1; town of Beech Mountain: 2003-124, s. 1, as amended by 2007-204, s. 1, as amended by 2007-259, s. 1; town of Benson: 2005-11, s. 1, as amended by 2006-149, s. 1, as amended by 2007-18, s. 1; town of Bladenboro: 2005-11, s. 1, as amended by 2007-18, s. 1; town of Cary: 2005-117, s. 1; town of Caswell Beach: 2006-149, s. 1.1; town of Chadbourn: 2005-11, s. 1, as amended by 2006-149, s. 1, as amended by 2007-18, s. 1; town of Clarkton: 2005-11, s. 1, as amended by 2006-152, s. 1, as amended by 2007-18, s. 1; town of Elizabethtown: 2005-11, s. 1, as amended by 2007-18, s. 1; town of Four Oaks: 2005-11, s. 1, as amended by 2007-18, s. 1; town of Lake Waccamaw: 2001-356, s. 6; town of North Topsail Beach: 2003-124, s. 1, as amended by 2004-59, s. 1, as amended by 2007-204, s. 1, as amended by 2007-259, s. 1; town of Rose Hill: 2005-11, s. 1, as amended by 2007-18, s. 1; town of Seven Devils: 2003-124, s. 1, as amended by 2004-58, s. 1, as amended by 2007-204, s. 1, as amended by 2007-259, s. 1; town of Tabor City: 2005-11, s. 1, as amended by 2006-149, s. 1, 2007-18, s. 1; village of Whispering Pines: 2008-105, s. 1.

§ 20-52. Application for registration and certificate of title.

(a) An owner of a vehicle subject to registration must apply to the Division for a certificate of title, a registration plate, and a registration card for the vehicle. To apply, an owner must complete an application provided by the Division. The application must request all of the following information and may request other information the Division considers necessary:

(1) The owner's name.

(1a) If the owner is an individual, the following information:

a. The owner's mailing address and residence address.

b. One of the following at the option of the applicant:

1. The owner's North Carolina drivers license number or North Carolina special identification card number.

2. The owner's home state drivers license number or home state special identification card number and valid active duty military identification card number or military dependent identification card number if the owner is a person or the spouse or dependent child of a person on active duty in the armed forces of the United States who is stationed in this State or deployed outside this State from a home base in this State. The owner's inability to provide a photocopy or reproduction of a military or military dependent identification card pursuant to any prohibition of the United States government or any agency thereof against the making of such photocopy or reproduction shall not operate to prevent the owner from making an application for registration and certificate of title pursuant to this subdivision.

3. The owner's home state drivers license number or home state special identification card number and proof of enrollment in a school in this State if the owner is a permanent resident of another state but is currently enrolled in a school in this State.

4. The owner's home state drivers license number or home state special identification card number if the owner provides a signed affidavit certifying that the owner intends to principally garage the vehicle in this State and provides the address where the vehicle is or will be principally garaged. For purposes of this section, "principally garage" means the vehicle is garaged for six or more months of the year on property in this State which is owned, leased, or otherwise lawfully occupied by the owner of the vehicle.

5. The owner's home state drivers license number or home state special identification card number, provided that the appli-

cation is made pursuant to a court authorized sale or a sale authorized by G.S. 44A-4 for the purpose of issuing a title to be registered in another state or country.

6. The co-owner's home state drivers license number or home state special identification card number if at least one co-owner provides a North Carolina drivers license number or North Carolina special identification number.
7. The owner's home state drivers license number or special identification card number if the application is for a motor home or house car, as defined in G.S. 20-4.01(27)d2., or for a house trailer, as defined in G.S. 20-4.01(14).

(1b) If the owner is a firm, partnership, a corporation, or another entity, the address of the entity.

(2) A description of the vehicle, including the following:

a. The make, model, type of body, and vehicle identification number of the vehicle.

b. Whether the vehicle is new or used and, if a new vehicle, the date the manufacturer or dealer sold the vehicle to the owner and the date the manufacturer or dealer delivered the vehicle to the owner.

(3) A statement of the owner's title and of all liens upon the vehicle, including the names and addresses of all lienholders in the order of their priority, and the date and nature of each lien.

(4) A statement that the owner is an eligible risk for insurance coverage as defined in G.S. 58-37-1(4a).

(5) For registration and certificate of title for a nonfleet private passenger motor vehicle, a statement that providing incorrect or false and misleading information as to the owner's status as an eligible risk can result in criminal prosecution and the denial of insurance coverage for any loss of the owner under any insurance policies for which application is made if the owner provides false and misleading information as to eligible risk status.

(6) For registration and certificate of title for a nonfleet private passenger motor vehicle, a statement that the owner will inform the insurer before the next policy renewal if the owner ceases to be an eligible risk.

(a1) An owner who would otherwise be capable of attaining a drivers license or special identification card from this State or any other state, except for a medical or physical condition that can be documented to, and verified by, the Division, shall be issued a registration plate and certificate of title if the owner provides a signed affidavit certifying that the owner intends to principally garage the vehicle in this State and provides the address where the vehicle is or will be principally garaged.

(b) When such application refers to a new vehicle purchased from a manufacturer or dealer, such application shall be accompanied with a manufacturer's certificate of origin that is properly assigned to the applicant. If the new vehicle is acquired from a dealer or person located in another jurisdiction other than a manufacturer, the application shall be accompanied with such evidence of ownership as is required by the laws of that jurisdiction duly assigned by the disposer to the purchaser, or, if no such evidence of ownership be required by the laws of such other jurisdiction, a notarized bill of sale from the disposer. (1937, c. 407, s. 17; 1961, c. 835, ss. 2, 3; 1975, c. 716, s. 5; 1991, c. 183, s. 2; 1993 (Reg. Sess., 1994), c. 750, s. 5; 2007-164, s. 4; 2007-209, ss. 1, 2; 2007-443, s. 6; 2007-481, ss. 4-7; 2008-124, s. 4.1.)

Editor's Note. —

Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. —

Session Laws 2008-124, s. 4.1, effective July 28, 2008, substituted "G.S. 58-37-1(4a)" for "G.S. 58-37-1" in subdivision (a)(4).

§ 20-54. Authority for refusing registration or certificate of title.

The Division shall refuse registration or issuance of a certificate of title or any transfer of registration upon any of the following grounds:

(1) The application contains a false or fraudulent statement, the applicant has failed to furnish required information or reasonable additional information requested by the Division, or the applicant is not entitled to the issuance of a certificate of title or registration of the vehicle under this Article.

(2) The vehicle is mechanically unfit or unsafe to be operated or moved upon the highways.

(3) The Division has reasonable ground to believe that the vehicle is a stolen or embezzled vehicle, or that the granting of registration or the issuance of a certificate of title would constitute a fraud against the rightful owner or another person who has a valid lien against the vehicle.

(4) The registration of the vehicle stands suspended or revoked for any reason as provided in the motor vehicle laws of this State, except in such cases to abide by the ignition interlock installation requirements of G.S. 20-17.8.

(5) The required fee has not been paid, including any additional registration fees or taxes due pursuant to G.S. 20-91(c).

(6) The vehicle is not in compliance with the emissions inspection requirements of Part 2 of Article 3A of this Chapter or a civil penalty assessed as a result of the failure of the vehicle to comply with that Part has not been paid.

(7) The Division has been notified that the motor vehicle has been seized by a law enforcement officer and is subject to forfeiture pursuant to G.S. 20-28.2, et seq., or any other statute. However, the Division shall not prevent the renewal of existing registration prior to an order of forfeiture.

(8) The vehicle is a golf cart or utility vehicle.

(9) The applicant motor carrier is subject to an order issued by the Federal Motor Carrier Safety Administration or the Division to cease all operations based on a finding that the continued operations of the motor carrier pose an "imminent hazard" as defined in 49 C.F.R. § 386.72(b)(1).

(10) **(Effective January 1, 2011)** The North Carolina Turnpike Authority has notified the Division that the owner of the vehicle has not paid the amount of tolls, fees, and civil penalties the owner owes the Authority for use of a Turnpike project. (1937, c. 407, s. 19; 1975, c. 716, s. 5; 1993 (Reg. Sess., 1994), c. 754, s. 7; 1998-182, s. 9; 2001-356, s. 3; 2002-152, s. 1; 2007-164, s. 5; 2008-225, s. 7.)

Local Modification. — Moore: 1995, c. 13, s. 3, as amended by 2002-82, s. 2, as amended by 2005-11, s. 2; city of Conover: 2003-124, s. 1, as amended by 2004-58, s. 1, as amended by 2007-204, s. 1, as amended by 2007-259, s. 1; town of Beech Mountain: 2003-124, s. 1, as amended by 2007-204, s. 1, as amended by 2007-259, s. 1; town of Benson: 2005-11, s. 1, as amended by 2006-149, s. 1, as amended by 2007-18, s. 1; town of Bladenboro: 2005-11, s. 1, as amended by 2007-18, s. 1; town of Cary: 2005-117, s. 1; town of Caswell Beach: 2006-

149, s. 1.1; town of Chadbourn: 2005-11, s. 1, as amended by 2006-149, s. 1, as amended by 2007-18, s. 1; town of Clarkton: 2005-11, s. 1, as amended by 2006-152, s. 1, as amended by 2007-18, s. 1; town of Elizabethtown: 2005-11, s. 1, as amended by 2007-18, s. 1; town of Faison: 2006-27, s. 2; town of Four Oaks: 2005-11, s. 1, as amended by 2006-149, 2006-152, 2007-18, s. 1; town of Lake Waccamaw: 2001-356, s. 6; town of North Topsail Beach: 2003-124, s. 1, as amended by 2004-59, as amended by 2007-204, s. 1, as amended by 2007-259, s. 1; town of Rose Hill: 2005-11, s. 1, as amended by 2007-18, s. 1; town of Seven Devils: 2003-124, s. 1, as amended by 2004-58, s. 1, as amended by 2007-204, s. 1, as amended by 2007-259, s. 1; town of Tabor City: 2005-11, s. 1, as amended by 2006-149, s. 1, 2007-18, s. 1; village of Whispering Pines: 2008-105, s. 1.

Effect of Amendments. —

Session Laws 2008-225, s. 7, effective January 1, 2011, added subdivision (10).

§ 20-57. Division to issue certificate of title and registration card.

CASE NOTES

Application. — While G.S. 20-57 is intended to govern a situation in which there is only one owner at issue, the party registering the vehicle, G.S. 20-72(b) is intended to govern a situation in which an ownership interest is being transferred between two parties. Batts v. Lumbermen's Mut. Cas. Ins. Co., — N.C. App. —, 665 S.E.2d 578, 2008 N.C. App. LEXIS 1613 (2008).

Cited in State v. Veazey, — N.C. App. —, 662 S.E.2d 683, 2008 N.C. App. LEXIS 1228 (July 1, 2008).

§ 20-63. Registration plates furnished by Division; requirements; replacement of regular plates with First in Flight plates; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.

(a) The Division upon registering a vehicle shall issue to the owner one registration plate for a motorcycle, trailer or semitrailer and for every other motor vehicle. Registration plates issued by the Division under this Article shall be and remain the property of the State, and it shall be lawful for the Commissioner or his duly authorized agents to summarily take possession of any plate or plates which he has reason to believe is being illegally used, and to keep in his possession such plate or plates pending investigation and legal disposition of the same. Whenever the Commissioner finds that any registration plate issued for any vehicle pursuant to the provisions of this Article has become illegible or is in such a condition that the numbers thereon may not be readily distinguished, he may require that such registration plate, and its companion when there are two registration plates, be surrendered to the Division. When said registration plate or plates are so surrendered to the Division, a new registration plate or plates shall be issued in lieu thereof without charge. The owner of any vehicle who receives notice to surrender illegible plate or plates on which the numbers are not readily distinguishable and who willfully refuses to surrender said plates to the Division shall be guilty of a Class 2 misdemeanor.

(b) Every license plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, the name of the State of North Carolina, which may be abbreviated, and the year number for which it is issued or the date of expiration. A plate issued for a commercial vehicle, as defined in G.S. 20-4.2(1), and weighing 26,001 pounds or more, must bear the word "commercial," unless the plate is a special registration plate authorized in G.S. 20-79.4 or the commercial vehicle is a trailer or is licensed for 6,000 pounds or less. The plate issued for vehicles licensed for 7,000 pounds through 26,000 pounds must bear the word "weighted".

Except as otherwise provided in this subsection, a registration plate issued by the Division for a private passenger vehicle or for a private hauler vehicle licensed for 6,000 pounds or less shall be a "First in Flight" plate. A "First in Flight" plate shall have the words "First in Flight" printed at the top of the plate above all other letters and numerals. The background of the plate shall depict the Wright Brothers biplane flying over Kitty Hawk Beach, with the plane flying slightly upward and to the right. The following special registration plates do not have to be a "First in Flight" plate. The design of the plates that are not "First in Flight" plates must be approved by the Division and the State Highway Patrol for clarity and ease of identification.

(1) Friends of the Great Smoky Mountains National Park.
(2) Rocky Mountain Elk Foundation.
(3) Blue Ridge Parkway Foundation.
(4) Friends of the Appalachian Trail.
(5) NC Coastal Federation.
(6) In God We Trust.
(7) Stock Car Racing Theme.
(8) Buddy Pelletier Surfing Foundation.
(9) Guilford Battleground Company.
(10) National Wild Turkey Federation.
(11) North Carolina Aquarium Society.
(12) First in Forestry.
(13) North Carolina Wildlife Habitat Foundation.
(14) NC Trout Unlimited.
(15) Ducks Unlimited.
(16) Lung Cancer Research.
(17) NC State Parks.
(18) Support Our Troops.
(19) US Equine Rescue League.
(20) Fox Hunting.
(21) Back Country Horsemen of North Carolina.
(22) Hospice Care.
(23) Home Care and Hospice.
(24) NC Tennis Foundation.
(25) AIDS Awareness.

(c) Such registration plate and the required numerals thereon, except the year number for which issued, shall be of sufficient size to be plainly readable from a distance of 100 feet during daylight.

(d) Registration plates issued for a motor vehicle other than a motorcycle, trailer, or semitrailer shall be attached thereto, one in the front and the other in the rear: Provided, that when only one registration plate is issued for a motor vehicle other than a truck-tractor, said registration plate shall be attached to the rear of the motor vehicle. The registration plate issued for a truck-tractor shall be attached to the front thereof. Provided further, that when only one registration plate is issued for a motor vehicle and this motor vehicle is transporting a substance that may adhere to the plate so as to cover or discolor the plate or if the motor vehicle has a mechanical loading device that may damage the plate, the registration plate may be attached to the front of the motor vehicle.

Any motor vehicle of the age of 35 years or more from the date of manufacture may bear the license plates of the year of manufacture instead of the current registration plates, if the current registration plates are maintained within the vehicle and produced upon the request of any person.

The Division shall provide registered owners of motorcycles and motorcycle trailers with suitably reduced size registration plates.

(e) Preservation and Cleaning of Registration Plates. — It shall be the duty of each and every registered owner of a motor vehicle to keep the registration plates assigned to such motor vehicle reasonably clean and free from dust and dirt, and such registered owner, or any person in his employ, or who operates such motor vehicle by his authority, shall, upon the request of any proper officer, immediately clean such registration plates so that the numbers thereon may be readily distinguished, and any person who shall neglect or refuse to so clean a registration plate, after having been requested to do so, shall be guilty of a Class 3 misdemeanor.

(f) Operating with False Numbers. — Any person who shall willfully operate a motor vehicle with a registration plate which has been repainted or altered or forged shall be guilty of a Class 2 misdemeanor.

(g) Alteration, Disguise, or Concealment of Numbers. — Any operator of a motor vehicle who shall willfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a Class 2 misdemeanor. Any operator of a motor vehicle who shall willfully cover or cause to be covered any part or portion of a registration plate or the figures or letters thereon by any device designed or intended to prevent or interfere with the taking of a clear photograph of a registration plate by a traffic control or toll collection system using cameras commits an infraction and shall be fined under G.S. 14-3.1. Any operator of a motor vehicle who shall otherwise intentionally cover any number or registration renewal sticker on a registration plate with any material that makes the number or registration renewal sticker illegible commits an infraction and shall be fined under G.S. 14-3.1. Nothing in this subsection shall prohibit the use of transparent covers that are not designed or intended to prevent or interfere with the taking of a clear photograph of a registration plate by a traffic control or toll collection system using cameras.

(h) Commission Contracts for Issuance of Plates and Certificates. — All registration plates, registration certificates, and certificates of title issued by the Division, outside of those issued from the Charlotte and Raleigh offices of the Division and those issued and handled through the United States mail, shall be issued insofar as practicable and possible through commission contracts entered into by the Division for the issuance of the plates and certificates in localities throughout North Carolina with persons, firms, corporations or governmental subdivisions of the State of North Carolina. The Division shall make a reasonable effort in every locality, except as noted above, to enter into a commission contract for the issuance of the plates and certificates and a record of these efforts shall be maintained in the Division. In the event the Division is unsuccessful in making commission contracts, it shall issue the plates and certificates through the regular employees of the Division. Whenever registration plates, registration certificates, and certificates of title are issued by the Division through commission contract arrangements, the Division shall provide proper supervision of the distribution. Nothing contained in this subsection will allow or permit the operation of fewer outlets in any county in this State than are now being operated.

Commission contracts entered into by the Division under this subsection shall provide for the payment of compensation on a per transaction basis. The collection of the highway use tax shall be considered a separate transaction for which one dollar and twenty-seven cents ($1.27) compensation shall be paid. The performance at the same time of one or more of the remaining transactions listed in this subsection shall be considered a single transaction for which one dollar and forty-three cents ($1.43) compensation shall be paid.

A transaction is any of the following activities:

(1) Issuance of a registration plate, a registration card, a registration renewal sticker, or a certificate of title.

(2) Issuance of a handicapped placard or handicapped identification card.

(3) Acceptance of an application for a personalized registration plate.

(4) Acceptance of a surrendered registration plate, registration card, or registration renewal sticker, or acceptance of an affidavit stating why a person cannot surrender a registration plate, registration card, or registration renewal sticker.

(5) Cancellation of a title because the vehicle has been junked.

(6) Acceptance of an application for, or issuance of, a refund for a fee or a tax, other than the highway use tax.

(7) Receipt of the civil penalty imposed by G.S. 20-311 for a lapse in financial responsibility or receipt of the restoration fee imposed by that statute.

(8) Acceptance of a notice of failure to maintain financial responsibility for a motor vehicle.

(8a) Collection of civil penalties imposed for violations of G.S. 20-183.8A.

(8b) Sale of one or more inspection stickers in a single transaction to a licensed inspection station.

(9) Collection of the highway use tax.

(10) Acceptance of a temporary lien filing.

(h1) Commission contracts entered into by the Division under this subsection shall also provide for the payment of an additional one dollar ($1.00) of compensation to commission contract agents for any transaction assessed a fee under subdivision (a)(1), (a)(2), (a)(3), (a)(7), (a)(8), or (a)(9) of G.S. 20-85.

(h2) Upon the closing of the only contract license plate agency in a county, the Division shall as soon as practicable designate a temporary location for the issuance of all registration plates, registration certificates, and certificates of title issued by the Division for that county. The designation shall be posted at the former agency location for not less than 30 days and shall include the street address and telephone number of the temporary location. A former contract agent shall allow the posting of this required notice at the former location for a period of not less than 30 days. A failure to comply with the posting requirements of this section by a former contract agent shall be a Class 3 misdemeanor.

(i) Electronic Applications and Collections. — The Division shall accept electronic applications for the issuance of registration plates, registration certificates, and certificates of title, and is authorized to electronically collect fees from online motor vehicle registration vendors under contract with the Division.

(j) The Division shall contract with at least two online motor vehicle registration vendors which may enter into contracts with motor vehicle dealers to complete and file Division required documents for the issuance of a certificate of title, registration plate, or registration card or a duplicate certificate of title, registration plate, or registration card for a motor vehicle, upon purchase or sale of a vehicle.

(k) Commission contract agents are authorized to enter into contracts with online motor vehicle registration vendors which are under contract with the Division to complete and file Division required documents for the issuance of a certificate of title, registration plate, or registration card or a duplicate certificate of title, registration plate, or registration card for a motor vehicle.

(1937, c. 407, s. 27; 1943, c. 726; 1951, c. 102, ss. 1-3; 1955, c. 119, s. 1; 1961, c. 360, s. 4; c. 861, s. 2; 1963, c. 552, s. 6; c. 1071; 1965, c. 1088; 1969, c. 1140; 1971, c. 945; 1973, c. 629; 1975, c. 716, s. 5; 1979, c. 470, s. 1; c. 604, s. 1; c. 917, s. 4; 1981, c. 750; c. 859, s. 76; 1983, c. 253, ss. 1-3; 1985, c. 257; 1991 (Reg. Sess., 1992), c. 1007, s. 32; 1993, c. 539, ss. 333-336; 1994, Ex. Sess., c. 24, s. 14(c); 1997-36, s. 1; 1997-443, s. 32.7(a); 1997-461, s. 1; 1998-160, s. 3; 1998-212, ss. 15.4(a), 27.6(a); 1999-452, ss. 13, 14; 2000-182, s. 3; 2001-424, s. 27.21; 2001-487, s. 50(c); 2002-159, s. 31.1; 2003-424, s. 1; 2004-77, s. 1; 2004-79, s. 1; 2004-131, s. 1; 2004-185, s. 1; 2005-216, s. 1; 2006-209, s. 1; 2006-213, s. 4; 2007-243, s. 1; 2007-400, s. 1; 2007-483, s. 1; 2007-488, ss. 2-5; 2008-225, s. 8.)

Editor's Note. —

Session Laws 2008-107, s. 25.3 (a)-(c), provides: "(a) The Department of Transportation, Division of Motor Vehicles, is prohibited from opening drivers license issuance and vehicle registration issuance and renewal One-Stop Shops until the General Assembly has considered and appropriated funds for the purpose of One-Stop Shops.

"(b) The Department of Transportation shall develop a plan that thoroughly outlines the operational plans of combined function centers designated as One-Stop Shops. The plan may contain recommendations regarding making necessary changes to G.S. 20-63(h) to expand Division services. The plan should detail a cost-effectiveness comparison between the current means for delivery of service and the proposed combined function center services. The plan should also include a thorough justification for each proposed One-Stop Shop location, including any assumptions made in the justification process. The plan should clearly highlight the benefits to the State, including customer service enhancements for Division customers obtained by implementation of One-Stop Shops. The Division shall also conduct an analysis of the anticipated number of transactions at the One-Stop Shops and consider the impact on commission contracts for independent license plate agents, as well as any other interested party affected by the change.

"(c) The Division shall report to the Joint Legislative Transportation Oversight Committee, the Joint Appropriations Subcommittee for Transportation, and the Fiscal Research Division no later than October 31, 2008."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008 2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008 2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-225, s. 8, effective December 1, 2008, inserted "or toll collection" following "traffic control" twice in subsection (g).

CASE NOTES

Cited in State v. Veazey, — N.C. App. —, 662 S.E.2d 683, 2008 N.C. App. LEXIS 1228 (July 1, 2008).

§ 20-66. Renewal of vehicle registration.

(a) Annual Renewal. — The registration of a vehicle must be renewed annually. To renew the registration of a vehicle, the owner of the vehicle must file an application with the Division and pay the required registration fee. The Division may receive and grant an application for renewal of registration at any time before the registration expires.

(b) Method of Renewal. — When the Division renews the registration of a vehicle, it must issue a new registration card for the vehicle and either a new registration plate or a registration renewal sticker. The Division may renew a registration plate for any type of vehicle by means of a renewal sticker.

(b1) Repealed by Session Laws 1993, c. 467, s. 2.

(c) Renewal Stickers. — A registration renewal sticker issued by the Division must be displayed on the registration plate that it renews in the place prescribed by the Commissioner and must indicate the period for which it and the registration plate on which it is displayed are valid. Except where physical differences between a registration renewal sticker and a registration plate render a provision of this Chapter inapplicable, the provisions of this Chapter relating to registration plates apply to registration renewal stickers.

(d), (e) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, § 5.

(f) Repealed by Session Laws 1993, c. 467, s. 2.

(g) When Renewal Sticker Expires. — The registration of a vehicle that is renewed by means of a registration renewal sticker expires at midnight on the last day of the month designated on the sticker. It is lawful, however, to operate the vehicle on a highway until midnight on the fifteenth day of the month following the month in which the sticker expired.

The Division may vary the expiration dates of registration renewal stickers issued for a type of vehicle so that an approximately equal number expires at the end of each month, quarter, or other period consisting of one or more months. When the Division implements registration renewal for a type of vehicle by means of a renewal sticker, it may issue a registration renewal sticker that expires at the end of any monthly interval.

(h) Repealed by Session Laws 2004-167, s. 3, as amended by Session Laws 2004-199, s. 59, effective January 1, 2006.

(i) Property Tax Consolidation. — When the Division receives an application under subsection (a) for the renewal of registration before the current registration expires, the Division shall grant the application if it is made for the purpose of consolidating the property taxes payable by the applicant on classified motor vehicles, as defined in G.S. 105-330. The registration fee for a motor vehicle whose registration cycle is changed under this subsection shall be reduced by a prorated amount. The prorated amount is one-twelfth of the registration fee in effect when the motor vehicle's registration was last renewed multiplied by the number of full months remaining in the motor vehicle's current registration cycle, rounded to the nearest multiple of twenty-five cents (25¢).

(j) Inspection Prior to Renewal of Registration. — The Division shall not renew the registration of a vehicle unless it has a current safety or emissions inspection.

(k) Repealed by Session Laws 2008-190, s. 1, effective October 1, 2008. (1937, c. 407, s. 30; 1955, c. 554, s. 3; 1973, c. 1389, s. 1; 1975, c. 716, s. 5; 1977, c. 337; 1979, 2nd Sess., c. 1280, ss. 2, 3; 1981 (Reg. Sess., 1982), c. 1258, s. 1; 1985 (Reg. Sess., 1986), c. 982, s. 24; 1991, c. 624, ss. 6, 7; c. 672, s. 7; c. 726, s. 23; 1993, c. 467, s. 2; 1993 (Reg. Sess., 1994), c. 761, s. 5; 2004-167, ss. 2, 3; 2004-199, s. 59; 2007-503, s. 1; 2008-190, s. 1.)

Effect of Amendments. —
Session Laws 2008-190, s. 1, effective October 1, 2008, deleted subsection (k), which was to become effective on October 1, 2008, and which was to read as follows: "Registration plates that are not renewed shall be surrendered to the Division within 120 days of expiration."

§ 20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.

CASE NOTES

This section merely creates a rule of evidence.
G.S. 20-71.1 was a rule of evidence, not a rule of law, and, contrary to a passenger's assertion, an estate's admission that the decedent owned the motor vehicle involved in a traffic accident

did not suffice to establish a prima facie case of liability against the estate under the legal doctrine of respondeat superior; the dismissal of the passenger's claim against the estate based on the decedent's ownership of the auto was proper because the claim against the driver was a claim against an agent, and, since the driver was named as a party, proper service was required. Because the summons as to the driver was allowed to lapse and the statute of limitations had since run, the driver had no liability to impute to the estate, and neither the driver nor the estate could have been determined judicially to have been negligent. Atkinson v. Lesmeister, 186 N.C. App. 442, 651 S.E.2d 294, 2007 N.C. App. LEXIS 2203 (2007).

Part 4. Transfer of Title or Interest.

§ 20-72. Transfer by owner.

CASE NOTES

Governs Where Ownership Transferred Between Two Parties. — While G.S. 20-57 is intended to govern a situation in which there is only one owner at issue, the party registering the vehicle, G.S. 20-72(b) is intended to govern a situation in which an ownership interest is being transferred between two parties. The first party being the original owner of the vehicle; the second party being the future owner of the vehicle. Batts v. Lumbermen's Mut. Cas. Ins. Co., — N.C. App. —, 665 S.E.2d 578, 2008 N.C. App. LEXIS 1613 (2008).

Passage of Title for Purposes of Tort Law and Insurance Coverage. —

Insureds' newly acquired vehicle was not covered on the date of an accident under the auto insurance policy issued to the insureds by the insurer because the insureds did not timely notify the insurer of the acquisition of the vehicle under the terms of their insurance policy and the issuance of a registration card by the North Carolina Department of Motor Vehicles, under G.S. 20-72(b), was not a necessary requirement for the ownership interest in the vehicle to vest in the insureds. Batts v. Lumbermen's Mut. Cas. Ins. Co., — N.C. App. —, 665 S.E.2d 578, 2008 N.C. App. LEXIS 1613 (2008).

Part 7. Title and Registration Fees.

§ 20-88. Property-hauling vehicles.

(a) Determination of Weight. — For the purpose of licensing, the weight of self-propelled property-carrying vehicles shall be the empty weight and heaviest load to be transported, as declared by the owner or operator; provided, that any determination of weight shall be made only in units of 1,000 pounds or major fraction thereof, weights of over 500 pounds counted as 1,000 and weights of 500 pounds or less disregarded. The declared gross weight of self-propelled property-carrying vehicles operated in conjunction with trailers or semitrailers shall include the empty weight of the vehicles to be operated in the combination and the heaviest load to be transported by such combination at any time during the registration period, except that the gross weight of a trailer or semitrailer is not required to be included when the operation is to be in conjunction with a self-propelled property-carrying vehicle which is licensed for 6,000 pounds or less gross weight and the gross weight of such combination does not exceed 9,000 pounds, except wreckers as defined under G.S. 20-4.01(50). Those property-hauling vehicles registered for 4,000 pounds shall be permitted a tolerance of 500 pounds above the weight permitted under the table of weights and rates appearing in subsection (b) of this section.

(b) The following fees are imposed on the annual registration of self-propelled property-hauling vehicles; the fees are based on the type of vehicle and its weight:

SCHEDULE OF WEIGHTS AND RATES

Rates Per Hundred Pound Gross Weight	Farmer Rate
Not over 4,000 pounds	$0.29
4,001 to 9,000 pounds inclusive	.40
9,001 to 13,000 pounds inclusive	.50
13,001 to 17,000 pounds inclusive	.68
Over 17,000 pounds	.77

Rates Per Hundred Pound Gross Weight	General Rate
Not over 4,000 pounds	$0.59
4,001 to 9,000 pounds inclusive	.81
9,001 to 13,000 pounds inclusive	1.00
13,001 to 17,000 pounds inclusive	1.36
Over 17,000 pounds	1.54

(1) The minimum fee for a vehicle licensed under this subsection is twenty-four dollars ($24.00) at the farmer rate and twenty-eight dollars ($28.00) at the general rate.

(2) The term "farmer" as used in this subsection means any person engaged in the raising and growing of farm products on a farm in North Carolina not less than 10 acres in area, and who does not engage in the business of buying products for resale.

(3) License plates issued at the farmer rate shall be placed upon trucks and truck-tractors that are operated for the primary purpose of carrying or transporting the applicant's farm products, raised or produced on the applicant's farm, and farm supplies. The license plates shall not be used on a vehicle operated in hauling for hire.

(4) "Farm products" means any food crop, livestock, poultry, dairy products, flower bulbs, or other nursery products and other agricultural products designed to be used for food purposes, including in the term "farm products" also cotton, tobacco, logs, bark, pulpwood, tannic acid wood and other forest products grown, produced, or processed by the farmer.

(5) The Division shall issue necessary rules and regulations providing for the recall, transfer, exchange or cancellation of "farmer" plates, when vehicle bearing such plates shall be sold or transferred.

(5a) Notwithstanding any other provision of this Chapter, license plates issued pursuant to this subsection at the farmer rate may be purchased for any three-month period at one fourth of the annual fee.

(6) There shall be paid to the Division annually the following fees for "wreckers" as defined under G.S. 20-4.01(50): a wrecker fully equipped weighing 7,000 pounds or less, seventy-five dollars ($75.00); wreckers weighing in excess of 7,000 pounds shall pay one hundred forty-eight dollars ($148.00). Fees to be prorated monthly. Provided, further, that nothing herein shall prohibit a licensed dealer from using a dealer's license plate to tow a vehicle for a customer.

(c) The fee for a semitrailer or trailer is nineteen dollars ($19.00) for each year or part of a year. The fee is payable each year. Upon the application of the owner of a semitrailer or trailer, the Division may issue a multiyear plate and registration card for the semitrailer or trailer for a fee of seventy-five dollars ($75.00). A multiyear plate and registration card for a semitrailer or trailer are valid until the owner transfers the semitrailer or trailer to another person or surrenders the plate and registration card to the Division. A multiyear plate may not be transferred to another vehicle.

The Division shall issue a multiyear semitrailer or trailer plate in a different color than an annual semitrailer or trailer plate and shall include the word “multiyear” on the plate. The Division may not issue a multiyear plate for a house trailer.

(d) Rates on trucks, trailers and semitrailers wholly or partially equipped with solid tires shall be double the above schedule.

(e) Repealed by Session Laws 1981, c. 976, s. 6.

(f) Repealed by Session Laws 1995, c. 163, s. 6.

(g) Repealed by Session Laws 1969, c. 600, s. 17.

(h) Repealed by Session Laws 1979, c. 419.

(i) Any vehicle fee determined under this section according to the weight of the vehicle shall be increased by the sum of three dollars ($3.00) to arrive at the total fee.

(j) No heavy vehicle subject to the use tax imposed by Section 4481 of the Internal Revenue Code of 1954 (26 U.S.C. 4481) may be registered or licensed pursuant to G.S. 20-88 without proof of payment of the use tax imposed by that law. The proof of payment shall be on a form prescribed by the United States Secretary of Treasury pursuant to the provisions of 23 U.S.C. 141(d).

(k) A person may not drive a vehicle on a highway if the vehicle’s gross weight exceeds its declared gross weight. A vehicle driven in violation of this subsection is subject to the axle-group weight penalties set in G.S. 20-118(e). The penalties apply to the amount by which the vehicle’s gross weight exceeds its declared weight.

(*l*) The Division shall issue permanent truck and truck-tractor plates to Class A and Class B Motor Vehicles and shall include the word “permanent” on the plate. The permanent registration plates issued pursuant to this section shall be subject to annual registration fees set in this section. The Division shall issue the necessary rules providing for the recall, transfer, exchange, or cancellation of permanent plates issued pursuant to this section. (1937, c. 407, s. 52; 1939, c. 275; 1941, cc. 36, 227; 1943, c. 648; 1945, c. 569, s. 1; c. 575, s. 1; c. 576, s. 3; c. 956, ss. 1, 2; 1949, cc. 355, 361; 1951, c. 583; c. 819, ss. 1, 2; 1953, c. 568; c. 694, s. 1; c. 1122; 1955, c. 554, s. 8; 1957, c. 681, s. 2; c. 1215; 1959, c. 571; 1961, c. 685; 1963, c. 501; c. 702, ss. 2, 3; 1967, c. 1095, ss. 1, 2; 1969, c. 600, ss. 12-17; c. 1056, s. 1; 1973, c. 154, ss. 1, 2; c. 291; 1975, c. 716, s. 5; 1977, c. 638; 1979, c. 419; c. 631; 1981, c. 67; c. 690, ss. 29, 30; c. 976, s. 6; 1983, c. 43; c. 190, s. 1; c. 761, s. 144; c. 768, s. 4; 1991 (Reg. Sess., 1992), c. 947, s. 1; 1993, c. 467, s. 4; c. 543, s. 1; 1995, c. 109, s. 1; c. 163, s. 6; 1995 (Reg. Sess., 1996), c. 756, s. 8; 1997-466, s. 1; 2004-167, ss. 6, 7; 2004-199, s. 59; 2005-276, s. 44.1(n); 2008-221, s. 2.)

Effect of Amendments. —
Session Laws 2008-221, s. 2, effective September 1, 2008, rewrote subdivision (b)(3).

§ 20-97. Taxes credited to Highway Fund; municipal vehicle taxes.

Local Modification. — Alleghany: 1993, c. 456, s. 1.1, 1993 (Reg. Sess., 1994), c. 761, s. 9; Cabarrus: 2005-116, s. 1; Caswell: 1977, c. 420; 1987, c. 334; 1989, c. 527, s. 2; Pamlico: 1993 (Reg. Sess., 1994), c. 751, s. 4; city of Charlotte: 1985 (Reg. Sess., 1986), c. 1009; 1991, c. 209;

1993, c. 345, s. 1; city of Durham: 2003-329, s. 1, as amended by 2004-103, s. 1, and 2008-31, s. 1 (expires June 30, 2009); city of Gastonia: 1991, c. 557, s. 1; city of Greensboro: 1991, c. 31; city of Greenville: 1993, c. 200, s. 1; city of Henderson: 1987 (Reg. Sess., 1988), c. 1066; city of Kinston: 1991 (Reg. Sess., 1992), c. 838; city of Oxford: 2008-29, s. 1; city of Raleigh: 1991, c. 229, repealed by Session Laws 2007-333, s. 2(a) (repealed effective upon the date the City of Raleigh acts to levy an additional tax under the act and is effective for taxes imposed for taxable years beginning on or after July 1, 2007); 2007-333, 2(b) (effective upon the date the City of Raleigh acts to levy an additional tax under the act and is effective for taxes imposed for taxable years beginning on or after July 1, 2007); city of Winston-Salem: 2005-278, ss. 2, 3; town of Ahoskie: 1989 (Reg. Sess., 1990), c. 893; town of Apex: 2007-108, s. 2 (as to subsection (b), effective for taxes imposed for taxable years beginning on or after July 1, 2007); town of Black Mountain: 2005-306, s. 2 (as to subsection (c)); town of Carrboro: 1991, c. 392, s. 3; 1995, c. 339, s. 5.1; 2005-306, s. 1 (as to subsection (b)); town of Cary: 1993, c. 325, s. 1; town of Chapel Hill: 2008-16, s. 2; town of Cornelius: 1985 (Reg. Sess., 1986), c. 109; town of Creedmoor: 1987, c. 610, as amended by 2008-29, s. 2; town of Davidson: 1985 (Reg. Sess., 1986), c. 1009; town of Garner: 2007-73, s. 2 (as to subsection (b), effective for taxes imposed for taxable years beginning on or after July 1, 2007); town of Hillsborough: 1991, (Reg. Sess., 1992), c. 822; town of Holly Springs: 2007-73, s. 2 (as to subsection (b), effective for taxes imposed for taxable years beginning on or after July 1, 2007); town of Huntersville: 1985 (Reg. Sess., 1986), c. 1009; town of Knightdale: 2007-73, s. 2 (as to subsection (b), effective for taxes imposed for taxable years beginning on or after July 1, 2007); town of Matthews: 1985 (Reg. Sess., 1986), c. 1009; 1991, c. 209; 1993, c. 345, s. 1; 2007-109, ss. 1, 2 (as to subsections (a) and (b), effective for taxes imposed for taxable years beginning on or after July 1, 2007); town of Mint Hill: 1985 (Reg. Sess., 1986), c. 1009; town of Morrisville: 2007-108, s. 2 (as to subsection (b), effective for taxes imposed for taxable years beginning on or after July 1, 2007); town of Murfreesboro: 1987 (Reg. Sess., 1988), c. 953 (effective retroactively as of July 1, 1987); town of Pineville: 1985 (Reg. Sess., 1986), c. 1009; town of Rolesville: 2007-73, s. 2 (as to subsection (b), effective for taxes imposed for taxable years beginning on or after July 1, 2007).

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-106. Receiving or transferring stolen vehicles.

CASE NOTES

Cited in State v. Marsh, — N.C. App. —, 652 S.E.2d 744, 2007 N.C. App. LEXIS 2357 (2007).

§ 20-107. Injuring or tampering with vehicle.

CASE NOTES

Cited in Kirschbaum v. McLaurin Parking Co., — N.C. App. —, 656 S.E.2d 683, 2008 N.C. App. LEXIS 258 (2008).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-115.1. Limitations on tandem trailers and semitrailers on certain North Carolina highways.

(a) Motor vehicle combinations consisting of a truck tractor and two trailing units may be operated in North Carolina only on highways of the interstate system (except those exempted by the United States Secretary of Transportation pursuant to 49 USC 2311(i)) and on those sections of the federal-aid primary system designated by the United States Secretary of Transportation.

No trailer or semitrailer operated in this combination shall exceed 28 feet in length; Provided, however, a 1982 or older year model trailer or semitrailer of up to 28 1/2 feet in length may operate in a combination permitted by this section for trailers or semitrailers which are 28 feet in length.

(b) Motor vehicle combinations consisting of a semitrailer of not more than 53 feet in length and a truck tractor may be operated on all primary highway routes of North Carolina provided the motor vehicle combination meets the requirements of this subsection. The Department may, at any time, prohibit motor vehicle combinations on portions of any route on the State highway system. If the Department prohibits a motor vehicle combination on any route, it shall submit a written report to the Joint Legislative Transportation Oversight Committee within six months of the prohibition clearly documenting through traffic engineering studies that the operation of a motor vehicle combination on that route cannot be safely accommodated and that the route does not have sufficient capacity to handle the vehicle combination. To operate on a primary highway route, a motor vehicle combination described in this subsection must meet all of the following requirements:

(1) The motor vehicle combination must comply with the weight requirements in G.S. 20-118.

(2) A semitrailer in excess of 48 feet in length must meet one or more of the following conditions:

 (a) The distance between the kingpin of the trailer and the rearmost axle, or a point midway between the two rear axles, if the two rear axles are a tandem axle, does not exceed 41 feet.

 (b) The semitrailer is used exclusively or primarily to transport vehicles in connection with motorsports competition events, and the distance between the kingpin of the trailer and the rearmost axle, or a point midway between the two rear axles, if the two rear axles are a tandem axle, does not exceed 46 feet.

(3) A semitrailer in excess of 48 feet must be equipped with a rear underride guard of substantial construction consisting of a continuous lateral beam extending to within four inches of the lateral extremities of the semitrailer and located not more than 30 inches from the surface as measured with the vehicle empty and on a level surface.

(c) Motor vehicles with a width not exceeding 102 inches may be operated on the interstate highways (except those exempted by the United States Secretary of Transportation pursuant to 49 USC 2316(e)) and other qualifying federal-aid highways designated by the United States Secretary of Transportation, with traffic lanes designed to be a width of 12 feet or more and any other qualifying federal-aid primary system highway designated by the United States Secretary of Transportation if the Secretary has determined that the designation is consistent with highway safety.

(d) Notwithstanding the provisions of subsections (a) and (b) of this section which limit the length of trailers which may be used in motor vehicle combinations in this State on highways of the interstate system (except those exempted by the United States Secretary of Transportation pursuant to 49 USC 2311(i)) and on those sections of the federal-aid primary system designated by the United States Secretary of Transportation, there is no limitation of the length of the truck tractor which may be used in motor vehicle combinations on these highways and therefore, in compliance with Section 411(b) of the Surface Transportation Act of 1982, there is no overall length limitation for motor vehicle combinations regulated by this section.

(e) The length and width limitations in this section are subject to exceptions and exclusions for safety devices and specialized equipment as provided for in 49 USC 2311(d)(h) and Section 416 of the Surface Transportation Act of 1982 as amended (49 USC 2316).

(f) Motor vehicle combinations operating pursuant to this section shall have reasonable access between (i) highways on the interstate system (except those exempted by the United States Secretary of Transportation pursuant to 49 USC 2311(i) and 49 USC 2316(e)) and other qualifying federal-aid highways as designated by the United States Secretary of Transportation and (ii) terminals, facilities for food, fuel, repairs, and rest and points of loading and unloading by household goods carriers and by any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 28 1/2 feet and a width not to exceed 102 inches as provided in subsection (c) of this section and which generally operates as part of a vehicle combination described in subsection (a) of this section. The North Carolina Department of Transportation may, on streets and highways on the State highway system, and any municipality may, on streets and highways on the municipal street system, impose reasonable restrictions based on safety considerations on any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 28 1/2 feet and which generally operates as part of a vehicle combination described in subsection (a) of this section. "Reasonable access" to facilities for food, fuel, repairs and rest shall be deemed to be those facilities which are located within three road miles of the interstate or designated highway. The Department of Transportation is authorized to promulgate rules and regulations providing for "reasonable access." The Department may approve reasonable access routes for one particular type of STAA (Surface Transportation Assistance Act) dimensioned vehicle when significant, substantial differences in their operating characteristics exist.

(g) Under certain conditions, and after consultation with the Joint Legislative Commission on Governmental Operations, the North Carolina Department of Transportation may designate State highway system roads in addition to those highways designated by the United States Secretary of Transportation for use by the vehicle combinations authorized in this section. Such designations by the Department shall only be made under the following conditions:

(1) A determination of the public convenience and need for such designation;

(2) A traffic engineering study which clearly shows the road proposed to be designated can safely accommodate and has sufficient capacity to handle these vehicle combinations; and

(3) A public hearing is held or the opportunity for a public hearing is provided in each county through which the designated highway passes, after two weeks notice posted at the courthouse and published in a newspaper of general circulation in each county through which the designated State highway system road passes, and consideration is given to the comments received prior to the designation.

(4) The Department may designate routes for one particular type of STAA (Surface Transportation Assistance Act) dimensioned vehicle when significant, substantial differences in their operating characteristics exist.

The Department may not designate any portion of the State highway system that has been deleted or exempted by the United States Secretary of Transportation based on safety considerations. For the purpose of this section, any highway designated by the Department shall be deemed to be the same as a federal-aid primary highway designated by the United States Secretary of Transportation pursuant to 49 USC 2311 and 49 USC 2316, and the vehicle combinations authorized in this section shall be permitted to operate on such highway.

(h) Any owner of a semitrailer less than 50 feet in length in violation of subsections (a) or (b) is responsible for an infraction and is subject to a penalty of one hundred dollars ($100.00). Any owner of a semitrailer 50 feet or greater in length in violation of subsection (b) is responsible for an infraction and subject to a penalty of two hundred dollars ($200.00).

(i) Any driver of a vehicle with a semitrailer less than 50 feet in length violating subsections (a) or (b) of this section is guilty of a Class 3 misdemeanor punishable only by a fine of one hundred dollars ($100.00). Any driver of a vehicle with a semitrailer 50 feet or more in length violating subsection (b) of this section is guilty of a Class 3 misdemeanor punishable only by a fine of two hundred dollars ($200.00).

(j) Notwithstanding any other provision of this section, a manufacturer of trailer frames, with a permit issued pursuant to G.S. 20-119, is authorized to transport the trailer frame to another location within three miles of the first place of manufacture to the location of completion on any public street or highway if the width of the trailer frame does not exceed 14 feet and oversize markings and safety flags are used during transport. Trailer frames transported pursuant to this subsection shall not exceed 7,000 pounds, and the vehicle towing the trailer frame shall have a towing capacity greater than 10,000 pounds and necessary towing equipment. The transport of trailer frames under this subsection shall only be done during daylight hours. (1983, c. 898, s. 1; 1985, c. 423, ss. 1-7; 1989, c. 790, ss. 1, 3, 3.1; 1993, c. 533, s. 10; c. 539, s. 354; 1994, Ex. Sess., c. 24, s. 14(c); 1998-149, s. 6; 2007-77, ss. 2, 3; 2008-160, s. 1; 2008-221, ss. 3, 4.)

Effect of Amendments. —

Session Laws 2008-160, s. 1, effective August 3, 2008, added subsection (j).

Session Laws 2008-221, ss. 3 and 4, effective September 1, 2008, rewrote subsection (b); and deleted the first sentence in the concluding paragraph of subsection (g) regarding designating portions of highway within municipal corporate limits and made related changes.

§ 20-116. Size of vehicles and loads.

(a) The total outside width of any vehicle or the load thereon shall not exceed 102 inches, except as otherwise provided in this section. When hogsheads of tobacco are being transported, a tolerance of six inches is allowed. When sheet or bale tobacco is being transported the load must not exceed a width of 114 inches at the top of the load and the bottom of the load at the truck bed must not exceed the width of 102 inches inclusive of allowance for load shifting or settling. Vehicles (other than passenger buses) that do not exceed the overall width of 102 inches and otherwise provided in this section may be operated in accordance with G.S. 20-115.1(c), (f), and (g).

(b) No passenger-type vehicle or recreational vehicle shall be operated on any highway with any load carried thereon extending beyond the line of the fenders on the left side of such vehicle nor extending more than six inches beyond the line of the fenders on the right side thereof.

(c) No vehicle, unladen or with load, shall exceed a height of 13 feet, six inches. Provided, however, that neither the State of North Carolina nor any agency or subdivision thereof, nor any person, firm or corporation, shall be required to raise, alter, construct or reconstruct any underpass, wire, pole, trestle, or other structure to permit the passage of any vehicle having a height, unladen or with load, in excess of 12 feet, six inches. Provided further, that the operator or owner of any vehicle having an overall height, whether unladen or with load, in excess of 12 feet, six inches, shall be liable for damage to any structure caused by such vehicle having a height in excess of 12 feet, six inches.

(d) Maximum Length. — The following maximum lengths apply to vehicles. A truck-tractor and semitrailer shall be regarded as two vehicles for the purpose of determining lawful length and license taxes.

(1) Except as otherwise provided in this subsection, a single vehicle having two or three axles shall not exceed 40 feet in length overall of dimensions inclusive of front and rear bumpers.
(2) Trucks transporting unprocessed cotton from farm to gin shall not exceed 50 feet in length overall of dimensions inclusive of front and rear bumpers.
(3) Recreational vehicles shall not exceed 45 feet in length overall, excluding bumpers and mirrors.

(e) Except as provided by G.S. 20-115.1, no combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of 60 feet inclusive of front and rear bumpers, subject to the following exceptions: Motor vehicle combinations of one semitrailer of not more than 53 feet in length and a truck tractor (power unit) may exceed the 60-foot maximum length. Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at nighttime by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of said projecting load to clearly mark the dimensions of such load: Provided that vehicles designed and used exclusively for the transportation of motor vehicles shall be permitted an overhang tolerance front or rear not to exceed five feet. Provided, that wreckers may tow a truck, combination tractor and trailer, trailer, or any other disabled vehicle or combination of vehicles to a place for repair, parking, or storage within 50 miles of the point where the vehicle was disabled and may tow a truck, tractor, or other replacement vehicle to the site of the disabled vehicle. Provided, however, that a combination of a house trailer used as a mobile home, together with its towing vehicle, shall not exceed a total length of 55 feet exclusive of front and rear bumpers. Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to trailers not exceeding three in number drawn by a motor vehicle used by municipalities for the removal of domestic and commercial refuse and street rubbish, but such combination of vehicles shall not exceed a total length of 50 feet inclusive of front and rear bumpers. Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to a combination of vehicles coupled together by a saddle mount device used to transport motor vehicles in a driveway service when no more than three saddle mounts are used and provided further, that equipment used in said combination is approved by the safety regulations of the Federal Highway Administration and the safety rules of the Department of Crime Control and Public Safety.

(f) The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than three feet beyond the foremost part of the vehicle. Under this subsection “load” shall include the boom on a self-propelled vehicle.

A utility pole carried by a self-propelled pole carrier may extend beyond the front overhang limit set in this subsection if the pole cannot be dismembered, the pole is less than 80 feet in length and does not extend more than 10 feet beyond the front bumper of the vehicle, and either of the following circumstances apply:
(1) It is daytime and the front of the extending load of poles is marked by a flag of the type required by G.S. 20-117 for certain rear overhangs.
(2) It is nighttime, operation of the vehicle is required to make emergency repairs to utility service, and the front of the extending load of poles

is marked by a light of the type required by G.S. 20-117 for certain rear overhangs.

As used in this subsection, a "self-propelled pole carrier" is a vehicle designed to carry a pole on the side of the vehicle at a height of at least five feet when measured from the bottom of the brace used to carry the pole. A self-propelled pole carrier may not tow another vehicle when carrying a pole that extends beyond the front overhang limit set in this subsection.

(g)(1) No vehicle shall be driven or moved on any highway unless the vehicle is constructed and loaded to prevent any of its load from falling, blowing, dropping, sifting, leaking, or otherwise escaping therefrom, and the vehicle shall not contain any holes, cracks, or openings through which any of its load may escape. However, sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled, dumped, or spread on a roadway in cleaning or maintaining the roadway. For purposes of this subsection, load does not include water accumulated from precipitation.

(2) A truck, trailer, or other vehicle licensed for more than 7,500 pounds gross vehicle weight that is loaded with rock, gravel, stone, or any other similar substance, other than sand, that could fall, blow, leak, sift, or drop shall not be driven or moved on any highway unless:

a. The height of the load against all four walls does not extend above a horizontal line six inches below their tops when loaded at the loading point; and

b. The load is securely covered by tarpaulin or some other suitable covering to prevent any of its load from falling, dropping, sifting, leaking, blowing, or otherwise escaping therefrom.

(3) A truck, trailer, or other vehicle:

a. Licensed for any gross vehicle weight and loaded with sand; or

b. Licensed for 7,500 pounds or less gross vehicle weight and loaded with rock, gravel, stone, or any other similar substance that could fall, blow, leak, sift, or drop;

shall not be driven or moved on any highway unless:

a. The height of the load against all four walls does not extend above a horizontal line six inches below the top when loaded at the loading point;

b. The load is securely covered by tarpaulin or some other suitable covering; or

c. The vehicle is constructed to prevent any of its load from falling, dropping, sifting, leaking, blowing, or otherwise escaping therefrom.

(4) This section shall not be applicable to or in any manner restrict the transportation of seed cotton, poultry or livestock, or silage or other feed grain used in the feeding of poultry or livestock.

(h) Whenever there exist two highways of the State highway system of approximately the same distance between two or more points, the Department of Transportation may, when in the opinion of the Department of Transportation, based upon engineering and traffic investigation, safety will be promoted or the public interest will be served, designate one of the highways the "truck route" between those points, and to prohibit the use of the other highway by heavy trucks or other vehicles of a gross vehicle weight or axle load limit in excess of a designated maximum. In such instances the highways selected for heavy vehicle traffic shall be designated as "truck routes" by signs conspicuously posted, and the highways upon which heavy vehicle traffic is prohibited shall likewise be designated by signs conspicuously posted showing the maximum gross vehicle weight or axle load limits authorized for those highways. The operation of any vehicle whose gross vehicle weight or axle load exceeds the maximum limits shown on signs over the posted highway shall constitute a Class 2 misdemeanor: Provided, that nothing in this subsection shall prohibit a truck or other motor vehicle whose gross vehicle weight or axle load exceeds that prescribed for those highways from using them when its destination is located solely upon that highway, road or street: Provided, further, that nothing in this subsection shall prohibit passenger vehicles or other light vehicles from using any highways designated for heavy truck traffic.

(i) Repealed by Session Laws 1973, c. 1330, s. 39.

(j) Nothing in this section shall be construed to prevent the operation of self-propelled grain combines or other farm equipment self-propelled, pulled, or otherwise, not exceeding 25 feet in width on any highway, except a highway or section of highway that is a fully controlled access highway or is a part of the National System of Interstate and Defense Highways. Farm equipment includes a vehicle that is designed exclusively to transport compressed seed cotton from a farm to a gin and has a self-loading bed. Combines or equipment which exceed 10 feet in width may be operated only if they meet all of the conditions listed in this subsection. A violation of one or more of these conditions does not constitute negligence per se.

(1) The equipment may only be operated during daylight hours.

(2) The equipment must display a red flag on front and rear ends. The flags shall not be smaller than three feet wide and four feet long. The flags shall be attached to a stick, pole, staff, etc., not less than four feet long and they shall be attached to the equipment as to be visible from both directions at all times while being operated on the public highway for not less than 300 feet.

(3) Equipment covered by this section, which by necessity must travel more than 10 miles or where by nature of the terrain or obstacles the flags referred to in subdivision (2) of this subsection are not visible from both directions for 300 feet at any point along the proposed route, must be preceded at a distance of 300 feet and followed at a distance of 300 feet by a flagman in a vehicle having mounted thereon an appropriate warning light or flag. No flagman in a vehicle shall be required pursuant to this subdivision if the equipment is being moved under its own power or on a trailer from any field to another field, or from the normal place of storage of the vehicle to any field, for no more than ten miles and if visible from both directions for 300 feet at any point along the proposed route.

(4) Every piece of equipment so operated shall operate to the right of the center line when meeting traffic coming from the opposite direction and at all other times when possible and practical.

(5) Repealed by Session Laws 2008-221, s. 6, effective September 1, 2008.

(6) When the equipment is causing a delay in traffic, the operator of the equipment shall move the equipment off the paved portion of the highway at the nearest practical location until the vehicles following the equipment have passed.

(7) The equipment shall be operated in the designed transport position that minimizes equipment width. No removal of equipment or appurtenances is required under this subdivision.

(k) Nothing in this section shall be construed to prevent the operation of passenger buses having an overall width of 102 inches, exclusive of safety equipment, upon the highways of this State which are 20 feet or wider and that are designated as the State primary system, or as municipal streets, when, and not until, the federal law and regulations thereunder permit the operation of passenger buses having a width of 102 inches or wider on the National System of Interstate and Defense Highways.

(*l*) Nothing in this section shall be construed to prevent the operation of passenger buses that are owned and operated by units of local government, operated as a single vehicle only and having an overall length of 45 feet or less, on public streets or highways. The Department of Transportation may prevent the operation of buses that are authorized under this subsection if the operation of such buses on a street or highway presents a hazard to passengers of the buses or to the motoring public.

(m) Notwithstanding subsection (a) of this section, a boat or boat trailer with an outside width of less than 120 inches may be towed without a permit. The towing of a boat or boat trailer 102 inches to 114 inches in width may take place on any day of the week, including weekends and holidays, and may take place at night. The towing of a boat or boat trailer 114 inches to 120 inches in width may take place on any day of the week, including weekends and holidays from sun up to sun down. A boat or boat trailer in excess of 102 inches but less than 120 inches must be equipped with a minimum of two operable amber lamps on the widest point of the boat and the boat trailer such that the dimensions of the boat and the boat trailer are clearly marked and visible. (1937, c. 246; c. 407, s. 80; 1943, c. 213, s. 1; 1945, c. 242, s. 1; 1947, c. 844; 1951, c. 495, s. 1; c. 733; 1953, cc. 682, 1107; 1955, c. 296, s. 2; c. 729; 1957, c. 65, s. 11; cc. 493, 1183, 1190; 1959, c. 559; 1963, c. 356, s. 1; c. 610, ss. 1, 2; c. 702, s. 4; c. 1027, s. 1; 1965, c. 471; 1967, c. 24, s. 4; c. 710; 1969, cc. 128, 880; 1971, cc. 128, 680, 688, 1079; 1973, c. 507, s. 5; c. 546; c. 1330, s. 39; 1975, c. 148, ss. 1-5; c. 716, s. 5; 1977, c. 464, s. 34; 1979, cc. 21, 218; 1981, c. 169, s. 1; 1983, c. 724, s. 2; 1985, c. 587; 1987, c. 272; 1989, c. 277, s. 1; c. 790, s. 2; 1991, c. 112, s. 1; c. 449, ss. 1, 2.1; 1993, c. 539, s. 355; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 573, s. 1; c. 756, s. 14; 1998-149, s. 7; 1999-438, s. 28; 2000-185, s. 2; 2001-341, ss. 3, 4; 2001-512, s. 2; 2002-72, s. 19(c); 2002-159, s. 31.5(b); 2002-190, s. 2; 2003-383, s. 8; 2005-248, s. 2; 2007-77, s. 1; 2007-194, ss. 2, 3; 2007-484, s. 5; 2007-499, s. 1; 2008-221, ss. 5, 6; 2008-229, s. 1.)

Editor's Note. —

Session Laws 2008-229 was House Bill 2167, which was vetoed by the Governor on August 17, 2008. The General Assembly, in a special session on August 27, 2008, voted to override the Governor's veto. Session Laws 2008-229 became law notwithstanding the Governor's veto on August 27, 2008.

Effect of Amendments. —

Session Laws 2008-221, ss. 5 and 6, effective September 1, 2008, in subsection (e), substituted "53 feet" for "48 feet" in the second sentence; and rewrote subsection (j).

Session Laws 2008-229, s. 1, effective August 27, 2008, added subsection (m).

§ 20-118. Weight of vehicles and load.

(a) For the purposes of this section, the following definitions shall apply:

(1) Single-axle weight. — The gross weight transmitted by all wheels whose centers may be included between two parallel transverse vertical planes 40 inches apart, extending across the full width of the vehicle.

(2) Tandem-axle weight. — The gross weight transmitted to the road by two or more consecutive axles whose centers may be included between parallel vertical planes spaced more than 40 inches and not more than 96 inches apart, extending across the full width of the vehicle.

(3) Axle group. — Any two or more consecutive axles on a vehicle or combination of vehicles.

(4) Gross weight. — The weight of any single axle, tandem axle, or axle group of a vehicle or combination of vehicles plus the weight of any load thereon.

(5) Light-traffic roads. — Any highway on the State Highway System, excepting routes designated I, U.S. or N.C., posted by the Department of Transportation to limit the axle weight below the statutory limits.

(b) The following weight limitations shall apply to vehicles operating on the highways of the State:

(1) The single-axle weight of a vehicle or combination of vehicles shall not exceed 20,000 pounds.

(2) The tandem-axle weight of a vehicle or combination of vehicles shall not exceed 38,000 pounds.

(3) The gross weight imposed upon the highway by any axle group of a vehicle or combination of vehicles shall not exceed the maximum weight given for the respective distance between the first and last axle of the group of axles measured longitudinally to the nearest foot as set forth in the following table:

Distance Between	*Maximum Weight in Pounds for any Group of Two or More Consecutive Axles*					
*Axles**	*2 Axles*	*3 Axles*	*4 Axles*	*5 Axles*	*6 Axles*	*7 Axles*
4	38000					
5	38000					
6	38000					
7	38000					
8 or less	38000	38000				
more than 8	38000	42000				
9	39000	42500				
10	40000	43500				
11		44000				
12		45000	50000			
13		45500	50500			
14		46500	51500			
15		47000	52000			
16		48000	52500	58000		
17		48500	53500	58500		
18		49500	54000	59000		
19		50000	54500	60000		
20		51000	55500	60500	66000	
21		51500	56000	61000	66500	
22		52500	56500	61500	67000	
23		53000	57500	62500	68000	
24		54000	58000	63000	68500	74000
25		54500	58500	63500	69000	74500
26		55500	59500	64000	69500	75000
27		56000	60000	65000	70000	75500
28		57000	60500	65500	71000	76500
29		57500	61500	66000	71500	77000
30		58500	62000	66500	72000	77500
31		59000	62500	67500	72500	78000
32		60000	63500	68000	73000	78500
33			64000	68500	74000	79000
34			64500	69000	74500	80000

Distance Between	*Maximum Weight in Pounds for any Group of Two or More Consecutive Axles*					
*Axles**	*2 Axles*	*3 Axles*	*4 Axles*	*5 Axles*	*6 Axles*	*7 Axles*
35			65500	70000	75000	
36			66000**	70500	75500	
37			66500**	71000	76000	
38			67500**	72000	77000	
39			68000	72500	77500	
40			68500	73000	78000	
41			69500	73500	78500	
42			70000	74000	79000	
43			70500	75000	80000	
44			71500	75500		
45			72000	76000		
46			72500	76500		
47			73500	77500		
48			74000	78000		
49			74500	78500		
50			75500	79000		
51			76000	80000		
52			76500			
53			77500			
54			78000			
55			78500			
56			79500			
57			80000			

*Distance in Feet Between the Extremes of any Group of Two or More Consecutive Axles.

**See exception in G.S. 20-118(c)(1).

(4) The Department of Transportation may establish light-traffic roads and further restrict the axle weight limit on such light-traffic roads lower than the statutory limits. The Department of Transportation shall have authority to designate any highway on the State Highway System, excluding routes designated by I, U.S. and N.C., as a light-traffic road when in the opinion of the Department of Transportation, such road is inadequate to carry and will be injuriously affected by vehicles using the said road carrying the maximum axle weight. All such roads so designated shall be conspicuously posted as light-traffic roads and the maximum axle weight authorized shall be displayed on proper signs erected thereon.

(c) Exceptions. — The following exceptions apply to G.S. 20-118(b) and 20-118(e).

(1) Two consecutive sets of tandem axles may carry a gross weight of 34,000 pounds each without penalty provided the overall distance between the first and last axles of the consecutive sets of tandem axles is 36 feet or more.

(2) When a vehicle is operated in violation of G.S. 20-118(b)(1), 20-118(b)(2), or 20-118(b)(3), but the gross weight of the vehicle or combination of vehicles does not exceed that permitted by G.S. 20-118(b)(3), the owner of the vehicle shall be permitted to shift the load within the vehicle, without penalty, from one axle to another to comply with the weight limits in the following cases:

a. Where the single-axle load exceeds the statutory limits, but does not exceed 21,000 pounds.

b. Where the vehicle or combination of vehicles has tandem axles, but the tandem-axle weight does not exceed 40,000 pounds.

(3) When a vehicle is operated in violation of G.S. 20-118(b)(4) the owner of the vehicle shall be permitted, without penalty, to shift the load within the vehicle from one axle to another to comply with the weight limits where the single-axle weight does not exceed the posted limit by 2,500 pounds.

(4) A truck or other motor vehicle shall be exempt from such light-traffic road limitations provided for pursuant to G.S. 20-118(b)(4), when transporting supplies, material or equipment necessary to carry out a farming operation engaged in the production of meats and agricultural crops and livestock or poultry by-products or a business engaged in the harvest or processing of seafood when the destination of such vehicle and load is located solely upon said light-traffic road.

(5) The light-traffic road limitations provided for pursuant to subdivision (b)(4) of this section do not apply to a vehicle while that vehicle is transporting only the following from its point of origin on a light-traffic road to either one of the two nearest highways that is not a light-traffic road:

a. Processed or unprocessed seafood transported from boats or any other point of origin to a processing plant or a point of further distribution.

b. Meats or agricultural crop products transported from a farm to first market.

c. Forest products originating and transported from a farm or from woodlands to first market without interruption or delay for further packaging or processing after initiating transport.

d. Livestock or poultry transported from their point of origin to first market.

e. Livestock by-products or poultry by-products transported from their point of origin to a rendering plant.

f. Recyclable material transported from its point of origin to a scrap-processing facility for processing. As used in this subpart, the terms "recyclable material" and "processing" have the same meaning as in G.S. 130A-290(a).

g. Garbage collected by the vehicle from residences or garbage dumpsters if the vehicle is fully enclosed and is designed specifically for collecting, compacting, and hauling garbage from residences or from garbage dumpsters. As used in this subpart, the term "garbage" does not include hazardous waste as defined in G.S. 130A-290(a), spent nuclear fuel regulated under G.S. 20-167.1, low-level radioactive waste as defined in G.S. 104E-5, or radioactive material as defined in G.S. 104E-5.

h. Treated sludge collected from a wastewater treatment facility.

i. Apples when transported from the orchard to the first processing or packing point.

j. Trees grown as Christmas trees from the field, farm, stand, or grove to first processing point.

(6) A truck or other motor vehicle shall be exempt from such light-traffic road limitations provided by G.S. 20-118(b)(4) when such motor vehicles are owned, operated by or under contract to a public utility, electric or telephone membership corporation or municipality and such motor vehicles are used in connection with installation, restoration or emergency maintenance of utility services.

(7) A wrecker may tow any disabled truck or other motor vehicle or combination of vehicles to a place for repairs, parking, or storage

within 50 miles from the point that the vehicle was disabled and may tow a truck, tractor, or other replacement vehicle to the site of the disabled vehicle without being in violation of G.S. 20-118 provided that the wrecker and towed vehicle or combination of vehicles otherwise meet all requirements of this section.

(8) A firefighting vehicle operated by any member of a municipal or rural fire department in the performance of his duties, regardless of whether members of that fire department are paid or voluntary and any vehicle of a voluntary lifesaving organization, when operated by a member of that organization while answering an official call shall be exempt from such light-traffic road limitations provided by G.S. 20-118(b)(4).

(9) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 12.

(10) Fully enclosed motor vehicles designed specifically for collecting, compacting and hauling garbage from residences, or from garbage dumpsters shall, when operating for those purposes, be allowed a single axle weight not to exceed 23,500 pounds on the steering axle on vehicles equipped with a boom, or on the rear axle on vehicles loaded from the rear. This exemption shall not apply to vehicles operating on interstate highways, vehicles transporting hazardous waste as defined in G.S. 130A-290(a)(8), spent nuclear fuel regulated under G.S. 20-167.1, low-level radioactive waste as defined in G.S. 104E-5(9a), or radioactive material as defined in G.S. 104E-5(14).

(11) A truck or other motor vehicle shall be exempt for light-traffic road limitations issued under subdivision (b)(4) of this section when transporting heating fuel for on-premises use at a destination located on the light-traffic road.

(12) Subsections (b) and (e) of this section do not apply to a vehicle that meets all of the conditions set out below:

a. Is hauling agricultural crops from the farm where the crop is grown to the closest market.

b. Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 13.

b1. Does not operate on an interstate highway or exceed any posted bridge weight limits during transportation or hauling of agricultural products.

c. Does not exceed a single-axle weight of 22,000 pounds, a tandem-axle weight of 42,000 pounds, or a gross weight of 90,000 pounds.

(13) Vehicles specifically designed for fire fighting that are owned by a municipal or rural fire department. This exception does not apply to vehicles operating on interstate highways.

(14) Subsections (b) and (e) of this section do not apply to a vehicle that meets all of the conditions below, but all other enforcement provisions of this Article remain applicable:

a. Is hauling aggregates from a distribution yard or a State-permitted production site located within a North Carolina county contiguous to the North Carolina State border to a destination in another state adjacent to that county as verified by a weight ticket in the driver's possession and available for inspection by enforcement personnel.

b. Does not operate on an interstate highway or posted bridge.

c. Does not exceed 69,850 pounds gross vehicle weight and 53,850 pounds per axle grouping for tri-axle vehicles. For purposes of this subsection, a tri-axle vehicle is a single power unit vehicle with a three consecutive axle group on which the respective distance between any two consecutive axles of the group, measured longitudinally center to center to the nearest foot, does not exceed eight feet. For purposes of this subsection, the tolerance provisions of subsection (h) of this section do not apply, and vehicles must be licensed in accordance with G.S. 20-88.

d. Repealed by Session Laws 2001-487, s. 10, effective December 16, 2001.

(15) Subsections (b) and (e) of this section do not apply to a vehicle or vehicle combination that meets all of the conditions below, but all other enforcement provisions of this Article remain applicable:

a. Is hauling wood residuals, including wood chips, sawdust, mulch, or tree bark from any site; is hauling raw logs to first market; or is transporting bulk soil, bulk rock, sand, sand rock, or asphalt millings from a site that does not have a certified scale for weighing the vehicle.

b. Does not operate on an interstate highway, a posted light-traffic road, except as provided by subdivision (c)(5) of this section, or a posted bridge.

c. Does not exceed a maximum gross weight 4,000 pounds in excess of what is allowed in subsection (b) of this section.

d. Does not exceed a single-axle weight of more than 22,000 pounds and a tandem-axle weight of more than 42,000 pounds.

(d) The Department of Transportation is authorized to abrogate certain exceptions. The exceptions provided for in G.S. 20-118(c)(4) and 20-118(c)(5) as applied to any light-traffic road may be abrogated by the Department of Transportation upon a determination of the Department of Transportation that undue damage to such light-traffic road is resulting from such vehicles exempted by G.S. 20-118(c)(4) and 20-118(c)(5). In those cases where the exemption to the light-traffic roads are abrogated by the Department of Transportation, the Department shall post the road to indicate no exemptions.

(e) Penalties. —

(1) Except as provided in subdivision (2) of this subsection, for each violation of the single-axle or tandem-axle weight limits set in subdivision (b)(1), (b)(2), or (b)(4) of this section or axle weights authorized by special permit according to G.S. 20-119(a), the Department of Crime Control and Public Safety shall assess a civil penalty against the owner or registrant of the vehicle in accordance with the following schedule: for the first 1,000 pounds or any part thereof, four cents (4¢) per pound; for the next 1,000 pounds or any part thereof, six cents (6¢) per pound; and for each additional pound, ten cents (10¢) per pound. These penalties apply separately to each weight limit violated. In all cases of violation of the weight limitation, the penalty shall be computed and assessed on each pound of weight in excess of the maximum permitted.

(2) The penalty for a violation of the single-axle or tandem-axle weight limits by a vehicle that is transporting an item listed in subdivision (c)(5) of this section is one-half of the amount it would otherwise be under subdivision (1) of this subsection.

(3) If an axle-group weight of a vehicle exceeds the weight limit set in subdivision (b)(3) of this section plus any tolerance allowed in subsection (h) of this section or axle-group weights or gross weights authorized by special permit under G.S. 20-119(a), the Department of Crime Control and Public Safety shall assess a civil penalty against the owner or registrant of the motor vehicle. The penalty shall be assessed on the number of pounds by which the axle-group weight exceeds the limit set in subdivision (b)(3), as follows: for the first 2,000 pounds or any part thereof, two cents (2¢) per pound; for the next 3,000 pounds or any part thereof, four cents (4¢) per pound; for each

pound in excess of 5,000 pounds, ten cents (10¢) per pound. Tolerance pounds in excess of the limit set in subdivision (b)(3) are subject to the penalty if the vehicle exceeds the tolerance allowed in subsection (h) of this section. These penalties apply separately to each axle-group weight limit violated.

(4) The penalty for a violation of an axle-group weight limit by a vehicle that is transporting an item listed in subdivision (c)(5) of this section is one-half of the amount it would otherwise be under subdivision (3) of this subsection.

(5) A violation of a weight limit in this section or of a permitted weight under G.S. 20-119 is not punishable under G.S. 20-176.

(6) The penalty for violating the gross weight or axle-group weight by a dump truck or dump trailer vehicle transporting bulk soil, bulk rock, sand, sand rock, or asphalt millings intrastate from a site that does not have a certified scale for weighing the vehicle is one-half of the amount it otherwise would be under subdivisions (1) and (3) of this subsection.

(7) The clear proceeds of all civil penalties, civil forfeitures, and civil fines that are collected by the Department of Transportation pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(f) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 15.

(g) General Statutes 20-118 shall not be construed to permit the gross weight of any vehicle or combination in excess of the safe load carrying capacity established by the Department of Transportation on any bridge pursuant to G.S. 136-72.

(h) Tolerance. — A vehicle may exceed maximum and the inner axle-group weight limitations set forth in subdivision (b)(3) of this section by a tolerance of ten percent (10%). This exception does not authorize a vehicle to exceed either the single-axle or tandem-axle weight limitations set forth in subdivisions (b)(1) and (b)(2) of this section, or the maximum gross weight limit of 80,000 pounds. This exception does not apply to bridges posted under G.S. 136-72 or to vehicles operating on interstate highways. The tolerance allowed under this subsection does not authorize the weight of a vehicle to exceed the weight for which that vehicle is licensed under G.S. 20-88. No tolerance on the single-axle weight or the tandem-axle weight provided for in subdivisions (b)(1) and (b)(2) of this section shall be granted administratively or otherwise. The Department of Transportation shall report back to the Transportation Oversight Committee and to the General Assembly on the effects of the tolerance granted under this section, any abuses of this tolerance, and any suggested revisions to this section by that Department on or before May 1, 1998.

(i) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 16.

(j) Repealed by Session Laws 1987, c. 392.

(k) From September 1 through March 1 of each year, a vehicle which is equipped with a self-loading bed and which is designed and used exclusively to transport compressed seed cotton from the farm to a cotton gin may operate on the highways of the State, except interstate highways, with a tandem-axle weight not exceeding 50,000 pounds. Such vehicles shall be exempt from light-traffic road limitations only from point of origin on the light-traffic road to the nearest State-maintained road which is not posted to prohibit the transportation of statutory load limits. This exemption does not apply to restricted, posted bridge structures. (1937, c. 407, s. 82; 1943, c. 213, s. 2; cc. 726, 784; 1945, c. 242, s. 2; c. 569, s. 2; c. 576, s. 7; 1947, c. 1079; 1949, c. 1207, s. 2; 1951, c. 495, s. 2; c. 942, s. 1; c. 1013, ss. 5, 6, 8; 1953, cc. 214, 1092; 1959, c. 872; c. 1264, s. 6; 1963, c. 159; c. 610, ss. 3-5; c. 702, s. 5; 1965, cc. 483, 1044;

1969, c. 537; 1973, c. 507, s. 5; c. 1449, ss. 1, 2; 1975, c. 325; c. 373, s. 2; c. 716, s. 5; c. 735; c. 736, ss. 1-3; 1977, c. 461; c. 464, s. 34; 1977, 2nd Sess., c. 1178; 1981, c. 690, ss. 27, 28; c. 726; c. 1127, s. 53.1; 1983, c. 407; c. 724, s. 1; 1983 (Reg. Sess., 1984), c. 1116, ss. 105-109; 1985, c. 54; c. 274; 1987, c. 392; c. 707, ss. 1-4; 1991, c. 202, s. 1; 1991 (Reg. Sess., 1992), c. 905, s. 1; 1993, c. 426, ss. 1, 2; c. 470, s. 1; c. 533, s. 11; 1993 (Reg. Sess., 1994), c. 761, ss. 10-16; 1995, c. 109, s. 3; c. 163, s. 4; c. 332, ss. 1-3 ; c. 509, s. 135.1(b); 1995 (Reg. Sess., 1996), c. 756, s. 29; 1997-354, s. 1; 1997-373, s. 1; 1997-466, s. 2; 1998-149, ss. 8, 9, 9.1; 1998-177, s. 1; 1999-452, s. 23; 2000-57, s. 1; 2001-487, ss. 10, 50(e); 2002-126, s. 26.16(a); 2004-145, ss. 1, 2; 2005-248, s. 1; 2005-276, s. 6.37(o); 2005-361, s. 3; 2006-135, s. 1; 2006-264, s. 37; 2008-221, ss. 7, 8, 9.)

Effect of Amendments. —
Session Laws 2008-221, ss. 7-9, effective September 1, 2008, rewrote subdivision (c)(12); in subdivision (c)(15)a, inserted "is hauling raw logs to first market"; in subdivision (c)(15)b, inserted "except as provided by subdivision (c)(5) of this section"; substituted "50,000" for "44,000" at the end of the first sentence of subsection (k); and made minor grammatical changes.

§ 20-119. Special permits for vehicles of excessive size or weight; fees.

(a) The Department of Transportation may, in its discretion, upon application, for good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move a vehicle of a size or weight exceeding a maximum specified in this Article upon any highway under the jurisdiction and for the maintenance of which the body granting the permit is responsible. However, the Department is not authorized to issue any permit to operate or move over the State highways twin trailers, commonly referred to as double bottom trailers. Every such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any peace officer. The authorities in any incorporated city or town may grant permits in writing and for good cause shown, authorizing the applicant to move a vehicle over the streets of such city or town, the size or weight exceeding the maximum expressed in this Article. The Department of Transportation shall issue rules to implement this section.

(a1) Where permitted by the posted road and bridge limits, the Department may issue a single trip permit for a vehicle or vehicle combination responding to an emergency event that could result in severe damage, injury, or loss of life or property resulting from any natural or man-made emergency as determined by either the Secretary of Crime Control and Public Safety or the Secretary of Transportation or their designees. A permit issued under this subsection may allow for travel from a specific origin to destination and return 24 hours a day, seven days a week, including holidays. Permits issued under this subsection shall include a requirement for banners, flags, and other safety devices, as determined by the Department, and a requirement for a law enforcement escort or a vehicle being operated by a certified escort vehicle operator if traveling between sunset and sunrise. To obtain authorization to travel during restricted times, application shall be made with any required documentation to the proper officials as designated by the Department. If an emergency permit is issued under this subsection, the requestor shall contact the Department of Transportation's central permit office on the next business day to complete any further documentation and pay the applicable fees.

(b) Upon the issuance of a special permit for an oversize or overweight vehicle by the Department of Transportation in accordance with this section, the applicant shall pay to the Department for a single trip permit a fee of twelve dollars ($12.00) for each dimension over lawful dimensions, including height, length, width, and weight up to 132,000 pounds. For overweight vehicles, the applicant shall pay to the Department for a single trip permit in addition to the fee imposed by the previous sentence a fee of three dollars ($3.00) per 1,000 pounds over 132,000 pounds.

Upon the issuance of an annual permit for a single vehicle, the applicant shall pay a fee in accordance with the following schedule:

Commodity:	Annual Fee:
Annual Permit to Move House Trailers or Trailer Frames	$200.00
Annual Permit to Move Other Commodities	$100.00

In addition to the fees set out in this subsection, applications for permits that require an engineering study for pavement or structures or other special conditions or considerations shall be accompanied by a nonrefundable application fee of one hundred dollars ($100.00).

This subsection does not apply to farm equipment or machinery being used at the time for agricultural purposes, nor to the moving of a house as provided for by the license and permit requirements of Article 16 of this Chapter. Fees will not be assessed for permits for oversize and overweight vehicles issued to any agency of the United States Government or the State of North Carolina, its agencies, institutions, subdivisions, or municipalities if the vehicle is registered in the name of the agency.

(b1) Neither the Department nor the Board may require review or renewal of annual permits, with or without fee, more than once per calendar year.

(c) Nothing in this section shall require the Department of Transportation to issue any permit for any load.

(d) For each violation of any of the terms or conditions of a special permit issued or where a permit is required but not obtained under this section the Department of Crime Control and Public Safety may assess a civil penalty for each violation against the registered owner of the vehicle as follows:

(1) A fine of five hundred dollars ($500.00) for any of the following: operating without the issuance of a permit, moving a load off the route specified in the permit, falsifying information to obtain a permit, failing to comply with dimension restrictions of a permit, or failing to comply with the number of properly certified escort vehicles required.

(2) A fine of two hundred fifty dollars ($250.00) for moving loads beyond the distance allowances of an annual permit covering the movement of house trailers from the retailer's premises or for operating in violation of time of travel restrictions.

(3) A fine of one hundred dollars ($100.00) for any other violation of the permit conditions or requirements imposed by applicable regulations.

The Department of Transportation may refuse to issue additional permits or suspend existing permits if there are repeated violations of subdivision (1) or (2) of this subsection. In addition to the penalties provided by this subsection, a civil penalty in accordance with G.S. 20-118(e)(1) and (3) may be assessed if a vehicle is operating without the issuance of a required permit, operating off permitted route of travel, operating without the proper number of certified escorts as determined by the actual loaded weight of the vehicle combination, fails to comply with travel restrictions of the permit, or operating with improper license. Fees assessed for permit violations under this subsection shall not exceed a maximum of twenty-five thousand dollars ($25,000).

(e) It is the intent of the General Assembly that the permit fees provided in G.S. 20-119 shall be adjusted periodically to assure that the revenue generated by the fees is equal to the cost to the Department of administering the Oversize/Overweight Permit Unit Program within the Division of Highways. At least every two years, the Department shall review and compare the revenue generated by the permit fees and the cost of administering the program, and shall report to the Joint Legislative Transportation Oversight Committee created in G.S.120-70.50 its recommendations for adjustments to the permit fees to bring the revenues and the costs into alignment.

(f) The Department of Transportation shall issue rules to establish an escort driver training and certification program for escort vehicles accompanying oversize/overweight loads. Any driver operating a vehicle escorting an oversize/overweight load shall meet any training requirements and obtain certification under the rules issued pursuant to this subsection. These rules may provide for reciprocity with other states having similar escort certification programs. Certification credentials for the driver of an escort vehicle shall be carried in the vehicle and be readily available for inspection by law enforcement personnel. The escort and training certification requirements of this subsection shall not apply to the transportation of agricultural machinery until October 1, 2004. The Department of Transportation shall develop and implement an in-house training program for agricultural machinery escorts by September 1, 2004.

(g) The Department of Transportation shall issue annual overwidth permits for the following:

(1) A vehicle carrying agricultural equipment or machinery from the dealer to the farm or from the farm to the dealer that does not exceed 14 feet in width. A permit issued under this subdivision is valid for unlimited movement without escorts on all State highways where the overwidth vehicle does not exceed posted bridge and load limits.

(2) A boat or boat trailer whose outside width equals or exceeds 120 inches. A permit issued under this subdivision must restrict a vehicle's towing of the boat or boat trailer to daylight hours only.

(h) No law enforcement officer shall issue a citation to a person for a violation of this section if the officer is able to determine by electronic means that the person has a permit valid at the time of the violation but does not have the permit in his or her possession. Any person issued a citation pursuant to this section who does not have the permit in his or her possession at the time of the issuance of the citation shall not be responsible for a violation, and the Department of Crime Control and Public Safety may not impose any fines under this section if the person submits evidence to the Department of the existence of a permit valid at the time of the violation within 30 days of the date of the violation. (1937, c. 407, s. 83; 1957, c. 65, s. 11; 1959, c. 1129; 1973, c. 507, s. 5; 1977, c. 464, s. 34; 1981, c. 690, ss. 31, 32; c. 736, ss. 1, 2; 1989, c. 54; 1991, c. 604, ss. 1, 2; c. 689, s. 334; 1993, c. 539, s. 357; 1994, Ex. Sess., c. 24, s. 14(c); 2000-109, ss. 7(a), 7(f), 7(g); 2001-424, s. 27.10; 2003-383, s. 7; 2004-124, s. 30.3E(a), (b); 2004-145, s. 3; 2005-361, s. 4; 2007-290, s. 2; 2008-160, s. 2; 2008-229, s. 2.)

Editor's Note. —

Session Laws 2008-229 was House Bill 2167, which was vetoed by the Governor on August 17, 2008. The General Assembly, in a special session on August 27, 2008, voted to override the Governor's veto. Session Laws 2008-229 became law notwithstanding the Governor's veto on August 27, 2008.

Effect of Amendments. —

Session Laws 2008-160, s. 2, effective August 3, 2008, inserted "or Trailer Frames" on the list of commodities in subsection (b).

Session Laws 2008-229, s. 2, effective August 27, 2008, redesignated the existing provisions of subsection (g) as the introductory language of subsection (g) and subdivision (g)(1), and inserted "the following" at the end of the introductory language; in subdivision (g)(1), substituted "A vehicle" for "vehicles" at the beginning, substituted "A permit issued under this subdivision is" for "These permits shall be", and made minor grammatical changes; and added subdivision (g)(2).

§ 20-126. Mirrors.

CASE NOTES

Cited in State v. Veazey, — N.C. App. —, 662 S.E.2d 683, 2008 N.C. App. LEXIS 1228 (July 1, 2008).

§ 20-127. Windows and windshield wipers.

CASE NOTES

Cited in State v. Veazey, — N.C. App. —, 662 S.E.2d 683, 2008 N.C. App. LEXIS 1228 (July 1, 2008).

§ 20-129. Required lighting equipment of vehicles.

CASE NOTES

Cited in State v. Veazey, — N.C. App. —, 662 S.E.2d 683, 2008 N.C. App. LEXIS 1228 (July 1, 2008).

§ 20-135.2A. (See Editor's note) Seat belt use mandatory.

CASE NOTES

This section precludes the introduction of any evidence regarding seat belt use, etc. —

In an action arising from an automobile accident, a statutory prohibition in Conn. Gen. Stat. §§ 14-100a(c)(3) and 14-222 regarding evidence of contributory negligence based on failure to use a seat belt also applied to the misuse of a seat belt based on case law in other jurisdictions interpreting similar provisions, such as G.S. 20-135.2A(d) and G.S. 20-137.1(d) and Kan. Stat. Ann. §§ 60-258a and 8-1344. Ferentzy v. Ferentzy, 2008 Conn. Super. LEXIS 1925 (Aug. 4, 2008).

§ 20-135.2B. Transporting children under 16 years of age in open bed or open cargo area of a vehicle prohibited; exceptions.

(a) The operator of a vehicle having an open bed or open cargo area shall ensure that no child under 16 years of age is transported in the bed or cargo area of that vehicle. An open bed or open cargo area is a bed or cargo area without permanent overhead restraining construction.

(b) Subsection (a) of this section does not apply in any of the following circumstances:

(1) An adult is present in the bed or cargo area of the vehicle and is supervising the child.

(2) The child is secured or restrained by a seat belt manufactured in compliance with Federal Motor Vehicle Safety Standard No. 208, installed to support a load strength of not less than 5,000 pounds for each belt, and of a type approved by the Commissioner.

(3) An emergency situation exists.

(4) The vehicle is being operated in a parade.

(5) The vehicle is being operated in an agricultural enterprise, including providing transportation to and from the principal place of the agricultural enterprise.

(6) Repealed by Session Laws 2008-216, s. 1, effective October 1, 2008.

(c) Any person violating this section shall have committed an infraction and shall pay a penalty of not more than twenty-five dollars ($25.00), even if more than one child less than 16 years of age is riding in the open bed or open cargo area of a vehicle. A person found responsible for a violation of this section may not be assessed court costs.

(d) No drivers license points or insurance surcharge shall be assessed on account of violation of this section. A violation of this section shall not constitute negligence per se. (1993 (Reg. Sess., 1994), c. 672, s. 1; 1995, c. 163, s. 7; 1999-183, s. 4; 2008-216, s. 1.)

Effect of Amendments. — Session Laws 2008-216, s. 1, effective October 1, 2008, and applicable to offenses committed on or after that date, substituted "16" for "12" in the section heading; in subsection (a), substituted "ensure" for "insure" and substituted "16" for "12"; deleted "pursuant to a valid permit" following "parade" in subdivision (b)(4); added "including providing transportation to and from the principal place of the agricultural enterprise" in subdivision (b)(5); deleted subdivision (b)(6) which read: "The vehicle is being operated in a county that has no incorporated area with a population in excess of 3,500"; rewrote subsection (c); and added the second sentence in subsection (d).

CASE NOTES

Cited in State v. Veazey, — N.C. App. —, 662 S.E.2d 683, 2008 N.C. App. LEXIS 1228 (July 1, 2008).

§ 20-137.1. Child restraint systems required.

CASE NOTES

Evidence of Contributory Negligence. — In an action arising from an automobile accident, a statutory prohibition in Conn. Gen. Stat. §§ 14-100a(c)(3) and 14-222 regarding evidence of contributory negligence based on failure to use a seat belt also applied to the misuse of a seat belt based on case law in other jurisdictions interpreting similar provisions, such as G.S. 20-135.2A(d) and G.S. 20-137.1(d) and Kan. Stat. Ann. §§ 60-258a and 8-1344. Ferentzy v. Ferentzy, 2008 Conn. Super. LEXIS 1925 (Aug. 4, 2008).

§ 20-137.5. Child passenger safety technician; limitation of liability.

(a) The following definitions apply in this section:

(1) Certified child passenger safety technician. — A certified child passenger safety technician is an individual who has successfully completed the U.S. Department of Transportation National Highway Traffic Safety Administration's (NHTSA) National Standardized Child Passenger Safety Certification Training Program and who maintains a current child passenger safety technician or technician instructor certification through the current certifying body for the National Child Passenger Safety Training Program as designated by the National Highway Traffic Safety Administration.

(2) Sponsoring organization. — A sponsoring organization is a person or organization other than a manufacturer of or employee or agent of a manufacturer of child safety seats that:

a. Offers or arranges for the public a nonprofit child safety seat educational program, checkup event, or checking station program utilizing certified child passenger safety technicians; or

b. Owns property upon which a nonprofit child safety seat educational program, checkup event, or checking station program for the public occurs utilizing certified child passenger safety technicians.

(b) Limitation of Liability. — Except as provided in subsection (c) of this section, a certified child passenger safety technician or sponsoring organization shall not be liable to any person as a result of any act or omission that occurs solely in the inspection, installation, or adjustment of a child safety seat or in providing education regarding the installation or adjustment of a child safety seat if:

(1) The service is provided without fee or charge other than reimbursement for expenses, and

(2) The child passenger safety technician or sponsoring organization acts in good faith and within the scope of training for which the technician is currently certified.

(c) Exceptions. — The limitation on liability shall not apply under any of the following conditions:

(1) The act or omission of the certified child passenger safety technician or sponsoring organization constitutes willful or wanton misconduct or gross negligence.

(2) The inspection, installation, or adjustment of a child safety seat or education provided regarding the installation or adjustment of a child safety seat is in conjunction with the for-profit sale of a child safety seat. (2008-178, s. 1.)

Editor's Note. — Session Laws 2008-178, s. 2, made this section effective October 1, 2008, and applicable to any cause of action arising on or after that date.

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138.1. Impaired driving.

CASE NOTES

I. In General.
II. Driving Under the Influence.
IV. Procedure.

I. IN GENERAL.

Construction with § 20-16.2. — As a trial court erred in failing to suppress the intoxilyzer testing evidence obtained after defendant was arrested for driving while impaired because defendant's right under G.S. 20.16.2(a) to have a witness present during the testing had been violated, the trial court also erred in accepting defendant's plea of guilty to the driving while impaired charge. State v. Hatley, — N.C. App. —, 661 S.E.2d 43, 2008 N.C. App. LEXIS 1013 (2008).

Sufficient Evidence That Defendant Physically Controlled Vehicle. — Trial court committed error by vacating a jury's verdict convicting the defendant of driving while impaired because a rational juror could infer from the physical evidence that the defendant drove the subject vehicle, including: (1) the presence of blood on the driver's side of the air bag; (2) blood on the defendant; (3) a lack of blood on the passenger side; (4) a burn on the other occupant's shoulder consistent with the passenger side safety belt; and (5) the fact that the driver's seat was pushed too far back for the other occupant to drive the vehicle while sitting in that seat, despite the other occupant's claim that she drove the vehicle. State v. Hernandez, — N.C. App. —, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008).

Cited in State v. Haislip, 186 N.C. App. 275, 651 S.E.2d 243, 2007 N.C. App. LEXIS 2108

(2007); Harrell v. Bowen, 362 N.C. 142, 655 S.E.2d 350, 2008 N.C. LEXIS 26 (2008); State v. Barnard, 362 N.C. 244, 658 S.E.2d 643, 2008 N.C. LEXIS 338 (2008).

II. DRIVING UNDER THE INFLUENCE.

Evidence of Impairment Held Sufficient. —

Substantial evidence supported the trial court's denial of defendant's request for dismissal of the charge of driving while impaired under G.S. 20-138.1(a). The evidence showed that: (1) defendant had been drinking at a party shortly before defendant's arrest; (2) defendant had been operating the motor vehicle in question on a road shortly before defendant's arrest; (3) defendant was operating the vehicle well above the speed limit on the road and drove on the shoulder of the road; (4) defendant's eyes were red and glassy; (5) defendant smelled of alcohol; and (6) defendant had trouble maintaining defendant's balance while walking. State v. Coffey, — N.C. App. —, 658 S.E.2d 73, 2008 N.C. App. LEXIS 536 (Mar. 18, 2008).

IV. PROCEDURE.

Defendant Must Show Substantial Statutory Violation and Resulting Prejudice for Dismissal Under Subdivision (a)(2) of This Section. —

Trial court did not err in denying defendant's pretrial motion to dismiss the G.S. 20-138.1 charge of driving while impaired against defendant because even though (1) there was no evidence, pursuant to G.S. 15A-534.2, that defendant was required to be held because the impairment of defendant's physical or mental faculties presented a danger, if defendant were released, of physical injury to defendant or others or damage to property, and (2) there was no evidence, pursuant to G.S. 15A-534(b), that defendant would pose a danger of injury to any person if defendant were released under conditions other than a secured bond, defendant was not irreparably prejudiced in the preparation of defendant's defense by the denial of defendant's G.S. 15A-533 right to timely pretrial release; defendant was not denied access to friends and family, such that defendant lost the opportunity to gather evidence. State v. Labinski, — N.C. App. —, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

§ 20-138.2. Impaired driving in commercial vehicle.

CASE NOTES

Cited in Harrell v. Bowen, 362 N.C. 142, 655 S.E.2d 350, 2008 N.C. LEXIS 26 (2008).

§ 20-138.2A. Operating a commercial vehicle after consuming alcohol.

(a) Offense. — A person commits the offense of operating a commercial motor vehicle after consuming alcohol if the person drives a commercial motor vehicle, as defined in G.S. 20-4.01(3d)a. and b., upon any highway, any street, or any public vehicular area within the State while consuming alcohol or while alcohol remains in the person's body.

(b) Implied-Consent Offense. — An offense under this section is an implied-consent offense subject to the provisions of G.S. 20-16.2. The provisions of G.S. 20-139.1 shall apply to an offense committed under this section.

(b1) Odor Insufficient. — The odor of an alcoholic beverage on the breath of the driver is insufficient evidence by itself to prove beyond a reasonable doubt that alcohol was remaining in the driver's body in violation of this section unless the driver was offered an alcohol screening test or chemical analysis and refused to provide all required samples of breath or blood for analysis.

(b2) Alcohol Screening Test. — Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violation of subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Department of Health and Human Services, and the screening test is conducted in accordance with the applicable regulations of the Department as to its manner and use.

(c) Punishment. — Except as otherwise provided in this subsection, a violation of the offense described in subsection (a) of this section is a Class 3 misdemeanor and, notwithstanding G.S. 15A-1340.23, is punishable by a penalty of one hundred dollars ($100.00). A second or subsequent violation of this section is a misdemeanor punishable under G.S. 20-179. This offense is a lesser included offense of impaired driving of a commercial vehicle under G.S. 20-138.2.

(d) Second or Subsequent Conviction Defined. — A conviction for violating this offense is a second or subsequent conviction if at the time of the current offense the person has a previous conviction under this section, and the previous conviction occurred in the seven years immediately preceding the date of the current offense. This definition of second or subsequent conviction also applies to G.S. 20-17(a)(13) and G.S. 20-17.4(a)(6). (1998-182, s. 23; 1999-406, s. 15; 2000-140, s. 5; 2000-155, s. 16; 2007-182, s. 2; 2008-187, s. 36(a).)

Effect of Amendments. —

Session Laws 2008-187, s. 36(a), effective August 7, 2008, in the last sentence of subsection (b2), substituted "Department of Health and Human Services" for "Commission for Public Health" and substituted "Department" for "Commission."

§ 20-138.2B. Operating a school bus, school activity bus, or child care vehicle after consuming alcohol.

(a) Offense. — A person commits the offense of operating a school bus, school activity bus, or child care vehicle after consuming alcohol if the person drives a school bus, school activity bus, or child care vehicle upon any highway, any street, or any public vehicular area within the State while consuming alcohol or while alcohol remains in the person's body.

(b) Implied-Consent Offense. — An offense under this section is an implied-consent offense subject to the provisions of G.S. 20-16.2. The provisions of G.S. 20-139.1 shall apply to an offense committed under this section.

(b1) Odor Insufficient. — The odor of an alcoholic beverage on the breath of the driver is insufficient evidence by itself to prove beyond a reasonable doubt that alcohol was remaining in the driver's body in violation of this section unless the driver was offered an alcohol screening test or chemical analysis and refused to provide all required samples of breath or blood for analysis.

(b2) Alcohol Screening Test. — Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violation of subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Department of Health and Human Services, and the screening test is conducted in accordance with the applicable regulations of the Department as to its manner and use.

(c) Punishment. — Except as otherwise provided in this subsection, a violation of the offense described in subsection (a) of this section is a Class 3 misdemeanor and, notwithstanding G.S. 15A-1340.23, is punishable by a penalty of one hundred dollars ($100.00). A second or subsequent violation of this section is a misdemeanor punishable under G.S. 20-179. This offense is a lesser included offense of impaired driving of a commercial vehicle under G.S. 20-138.1.

(d) Second or Subsequent Conviction Defined. — A conviction for violating this offense is a second or subsequent conviction if at the time of the current offense the person has a previous conviction under this section, and the previous conviction occurred in the seven years immediately preceding the date of the current offense. This definition of second or subsequent conviction also applies to G.S. 20-19(c2). (1998-182, s. 27; 1999-406, s. 16; 2000-140, s. 6; 2000-155, s. 17; 2007-182, s. 2; 2008-187, s. 36(b).)

Effect of Amendments. —
Session Laws 2008-187, s. 36(b), effective August 7, 2008, in subsection (b2), substituted "Department of Health and Human Services" for "Commission for Public Health" and substituted "Department" for "Commission."

§ 20-138.5. Habitual impaired driving.

CASE NOTES

Constitutionality. —
Defendant's argument, that the habitual driving while impaired statute violated the separation of powers and was an unconstitutional delegation of legislative authority to the executive branch because the district attorney was allowed to exercise discretion in enforcing the law, was rejected because defendant had not argued, nor did any evidence reflect an improper motive by the prosecutor regarding the charges upon which defendant was indicted and tried. State v. Johnson, — N.C. App. —, 651 S.E.2d 907, 2007 N.C. App. LEXIS 2305 (2007).

Cited in Harrell v. Bowen, 362 N.C. 142, 655 S.E.2d 350, 2008 N.C. LEXIS 26 (2008).

§ 20-140. Reckless driving.

CASE NOTES

III. Evidence.

III. EVIDENCE.

Evidence of Reckless Driving Held Sufficient to Survive Motion to Dismiss. —
Substantial evidence existed to support the trial court's denial of defendant's request that the charge against defendant of reckless driving pursuant to G.S. 20-140(b) be dismissed. The State presented evidence that: (1) defendant drove defendant's vehicle while impaired; and (2) defendant was driving the vehicle well above the speed limit. State v. Coffey, — N.C. App. —, 658 S.E.2d 73, 2008 N.C. App. LEXIS 536 (Mar. 18, 2008).

§ 20-140.2. Overloaded or overcrowded vehicle.

CASE NOTES

Cited in State v. Veazey, — N.C. App. —, 662 S.E.2d 683, 2008 N.C. App. LEXIS 1228 (July 1, 2008).

§ 20-141.3. Unlawful racing on streets and highways.

CASE NOTES

Cited in Hinson v. Jarvis, — N.C. App. —, 660 S.E.2d 604, 2008 N.C. App. LEXIS 990 (2008).

§ 20-141.5. Speeding to elude arrest.

CASE NOTES

Jury Instruction Proper. — Trial court's disjunctive instruction on the charge of felony operation of a motor vehicle to elude arrest was not improper; while many of the enumerated aggravating factors are in fact separate crimes under various provisions of the general statutes, they are not separate offenses, but are merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a class H felony. State v. Hazelwood, — N.C. App. —, 652 S.E.2d 63, 2007 N.C. App. LEXIS 2311 (2007).

§ 20-145. When speed limit not applicable.

CASE NOTES

Gross or Wanton Negligence. — G.S. 20-145 provided an exception to the speed limit rules for emergency vehicles. Inclusion of the word "wanton" in police pursuit cases was a shorthand reference to the "reckless disregard" limitation of G.S. 20-145 and did not refer to the definition of the word from a wholly unrelated statute — G.S. 1D-5(7), the punitive damages statute. Villepigue v. City of Danville, — N.C. App. —, 661 S.E.2d 12, 2008 N.C. App. LEXIS 904 (2008).

No Liability of Officer for Death of Innocent Motorist. — Where a police officer initiated the pursuit of a motorist who imposed an imminent threat to public safety, traveled at a high rate of speed, and passed multiple cars while using his blue lights and siren on a narrow two-lane road, the officer's conduct did not rise to the elevated standard of gross negligence that would impose liability on the officer for a citizen's death. The weather was clear; the road relatively straight, with only a slight bend and grade; it was approximately 2:30-3:00 p.m. on a Sunday afternoon; and the officer was unaware of the upcoming intersection's activity, the victim's car, or the stopped line of traffic directly in front of his vehicle. Villepigue v. City of Danville, — N.C. App. —, 661 S.E.2d 12, 2008 N.C. App. LEXIS 904 (2008).

§ 20-154. Signals on starting, stopping or turning.

CASE NOTES

I. In General.

I. IN GENERAL.

Violation Shown. — Trial court's finding that at the time defendant's vehicle changed lanes without a signal, it was being operated by defendant immediately in front of an arresting officer's vehicle indicated that defendant's failure to signal violated G.S. 20-154(a) because it was clear that changing lanes immediately in front of another vehicle might affect the operation of the trailing vehicle. State v. Styles, — N.C. —, 665 S.E.2d 438, 2008 N.C. LEXIS 685 (2008).

Cited in State v. Barnard, 362 N.C. 244, 658 S.E.2d 643, 2008 N.C. LEXIS 338 (2008).

§ 20-158. Vehicle control signs and signals.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in State v. Barnard, 362 N.C. 244, 658 S.E.2d 643, 2008 N.C. LEXIS 338 (2008).

§ 20-166. Duty to stop in event of a crash; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.

(a) The driver of any vehicle who knows or reasonably should know:

(1) That the vehicle which he or she is operating is involved in a crash; and

(2) That the crash has resulted in serious bodily injury, as defined in G.S. 14-32.4, or death to any person;

shall immediately stop his or her vehicle at the scene of the crash. The driver shall remain with the vehicle at the scene of the crash until a law-enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury.

Prior to the completion of the investigation of the crash by a law enforcement officer, or the consent of the officer to leave, the driver may not facilitate, allow, or agree to the removal of the vehicle from the scene for any purpose other than to call for a law enforcement officer, to call for medical assistance or medical treatment as set forth in subsection (b) of this section, or to remove oneself or others from significant risk of injury. If the driver does leave for a reason permitted by this subsection, then the driver must return with the vehicle to the accident scene within a reasonable period of time, unless otherwise instructed by a law enforcement officer. A willful violation of this subsection shall be punished as a Class F felony.

(a1) The driver of any vehicle who knows or reasonably should know:

(1) That the vehicle which he or she is operating is involved in a crash; and

(2) That the crash has resulted in injury;

shall immediately stop his or her vehicle at the scene of the crash. The driver shall remain with the vehicle at the scene of the crash until a law enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury.

Prior to the completion of the investigation of the crash by a law enforcement officer, or the consent of the officer to leave, the driver may not facilitate, allow, or agree to the removal of the vehicle from the scene for any purpose other than to call for a law enforcement officer, to call for medical assistance or medical treatment as set forth in subsection (b) of this section, or to remove oneself or others from significant risk of injury. If the driver does leave for a reason permitted by this subsection, then the driver must return with the vehicle to the crash scene within a reasonable period of time, unless otherwise instructed by a law enforcement officer. A willful violation of this subsection shall be punished as a Class H felony.

(b) In addition to complying with the requirements of subsections (a) and (a1) of this section, the driver as set forth in subsections (a) and (a1) shall give his or her name, address, driver's license number and the license plate number of the vehicle to the person struck or the driver or occupants of any vehicle collided with, provided that the person or persons are physically and mentally capable of receiving such information, and shall render to any person injured in such crash reasonable assistance, including the calling for medical assistance if it is apparent that such assistance is necessary or is requested by the injured person. A violation of this subsection is a Class 1 misdemeanor.

(c) The driver of any vehicle, when the driver knows or reasonably should know that the vehicle which the driver is operating is involved in a crash which results:

(1) Only in damage to property; or

(2) In injury or death to any person, but only if the operator of the vehicle did not know and did not have reason to know of the death or injury;

shall immediately stop the vehicle at the scene of the crash. If the crash is a reportable crash, the driver shall remain with the vehicle at the scene of the crash until a law enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury.

Prior to the completion of the investigation of the crash by a law enforcement officer, or the consent of the officer to leave, the driver may not facilitate, allow, or agree to the removal of the vehicle from the scene, for any purpose other than to call for a law enforcement officer, to call for medical assistance or medical treatment, or to remove oneself or others from significant risk of injury. If the driver does leave for a reason permitted by this subsection, then the driver must return with the vehicle to the accident scene within a reasonable period of time, unless otherwise instructed by a law enforcement officer. A willful violation of this subsection is a Class 1 misdemeanor.

(c1) In addition to complying with the requirement of subsection (c) of this section, the driver as set forth in subsection (c) shall give his or her name, address, driver's license number and the license plate number of his vehicle to the driver or occupants of any other vehicle involved in the crash or to any person whose property is damaged in the crash. If the damaged property is a parked and unattended vehicle and the name and location of the owner is not known to or readily ascertainable by the driver of the responsible vehicle, the driver shall furnish the information required by this subsection to the nearest available peace officer, or, in the alternative, and provided the driver thereafter within 48 hours fully complies with G.S. 20-166.1(c), shall immediately place a paper-writing containing the information in a conspicuous place upon or in the damaged vehicle. If the damaged property is a guardrail, utility pole, or other fixed object owned by the Department of Transportation, a public utility, or other public service corporation to which report cannot readily be made at the scene, it shall be sufficient if the responsible driver shall furnish the information required to the nearest peace officer or make written report thereof containing the information by U.S. certified mail, return receipt requested, to the North Carolina Division of Motor Vehicles within five days following the collision. A violation of this subsection is a Class 1 misdemeanor.

(c2) Notwithstanding subsections (a), (a1), and (c) of this section, if a crash occurs on a main lane, ramp, shoulder, median, or adjacent area of a highway, each vehicle shall be moved as soon as possible out of the travel lane and onto the shoulder or to a designated accident investigation site to complete the requirements of this section and minimize interference with traffic if all of the following apply:

(1) The crash has not resulted in injury or death to any person or the drivers did not know or have reason to know of any injury or death.

(2) Each vehicle can be normally and safely driven. For purposes of this subsection, a vehicle can be normally and safely driven if it does not require towing and can be operated under its own power and in its usual manner, without additional damage or hazard to the vehicle, other traffic, or the roadway.

(d) Any person who renders first aid or emergency assistance at the scene of a motor vehicle crash on any street or highway to any person injured as a result of the accident, shall not be liable in civil damages for any acts or omissions relating to the services rendered, unless the acts or omissions amount to wanton conduct or intentional wrongdoing.

(e) The Division of Motor Vehicles shall revoke the drivers license of a person convicted of violating subsection (a) or (a1) of this section for a period of one year, unless the court makes a finding that a longer period of revocation is appropriate under the circumstances of the case. If the court makes this finding, the Division of Motor Vehicles shall revoke that person's drivers license for two years. Upon a first conviction only for a violation of subsection (a1) of this section, a trial judge may allow limited driving privileges in the manner set forth in G.S. 20-179.3(b)(2) during any period of time during which the drivers license is revoked. (1937, c. 407, s. 128; 1939, c. 10, ss. 1, 11/2; 1943, c. 439; 1951, cc. 309, 794, 823; 1953, cc. 394, 793; c. 1340, s. 1; 1955, c. 913, s. 8; 1965, c. 176; 1967, c. 445; 1971, c. 958, s. 1; 1973, c. 507, s. 5; 1975, c. 716, s. 5; 1977, c. 464, s. 34; 1979, c. 667, s. 32; 1983, c. 912, s. 1; 1985, c. 324, ss. 1-4; 1993, c. 539, ss. 373-375, 1260; 1994, Ex. Sess., c. 24, s. 14(c); 2003-310, s. 2; 2003-394, s. 1; 2005-460, s. 1; 2008-128, s. 1.)

Effect of Amendments. — Session Laws 2008-128, s. 1, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "crash" for "accident or collision" or "accident," and made related changes throughout the section; in subdivision (a)(2), substituted "serious bodily injury, as defined in G.S. 14-32.4" for "injury"; in the last paragraph of subsection (a), substituted "Class F" for "Class H"; added subsection (a1), and added references to subsection (a1) throughout the section; and made stylistic changes.

CASE NOTES

I. In General.

I. IN GENERAL.

Elements of Offense. —
Defendant was properly convicted of giving false information for a motor vehicle crash report in violation of G.S. 20-279.31(b) when defendant falsely stated that defendant drove a vehicle involved in a crash, because, inter alia, while G.S. 20-166.1(h) did not list "driver's identity" with the information that "shall be included," the remaining portions of the statute preceding and following that section imposed an explicit duty on drivers to provide the drivers' name, address, and other information in the event of a reportable accident, G.S. 20-166(b), (c1), G.S. 20-166.1(a) — (c), so it could be inferred that the term "persons and vehicles involved" necessarily included the identity of the driver. State v. Hernandez, — N.C. App. —, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008).

Part 10C. Operation of All-Terrain Vehicles.

§ 20-171.21. Penalties.

Any person violating any of the provisions of this Part shall be responsible for an infraction and may be subject to a penalty of not more than two hundred dollars ($200.00). (2005-282, s. 2; 2008-187, s. 11.)

Effect of Amendments. — Session Laws 2008-187, s. 11, effective August 7, 2008, substituted "penalty" for "fine."

§ 20-171.22. Exceptions.

(a) The provisions of this Part do not apply to any owner, operator, lessor, or renter of a farm or ranch, or that person's employees or immediate family or household members, when operating an all-terrain vehicle while engaged in farming operations.

(b) The provisions of this Part do not apply to any person using an all-terrain vehicle for hunting or trapping purposes if the person is otherwise lawfully engaged in those activities.

(c) The provisions of G.S. 20-171.19(a) do not apply to any person 16 years of age or older if the person is otherwise lawfully using the all-terrain vehicle on any ocean beach area where such vehicles are allowed by law. As used in this subsection, "ocean beach area" means the area adjacent to the ocean and ocean inlets that is subject to public trust rights. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line. (2005-282, s. 2; 2008-91, s. 1.)

Effect of Amendments. — Session Laws 2008-91, s. 1, effective July 11, 2008, added subsection (c).

§ 20-171.24. Motorized all-terrain vehicle use by employees of listed municipalities and counties permitted on certain highways.

(a) Municipal and county employees may operate motorized all-terrain vehicles, as defined in G.S. 14-159.3(b) and owned or leased by the agency, on: (i) public highways where the speed limit is 35 miles per hour or less; and (ii) nonfully controlled access highways with higher speeds for the purpose of traveling from a speed zone to an adjacent speed zone where the speed limit is 35 miles per hour or less.

(b) This Part and all other State laws governing the operation of all-terrain vehicles apply to the operation of all-terrain vehicles authorized by this section.

(c) An all-terrain vehicle operated pursuant to this section shall be equipped with operable front and rear lights and a horn.

(d) A person operating an all-terrain vehicle pursuant to this section shall observe posted speed limits and shall not exceed the manufacturer's recommended speed for the vehicle.

(e) A person operating an all-terrain vehicle pursuant to this section shall carry an official identification card or badge.

(f) This section applies to the Towns of Ansonville, Atlantic Beach, Burgaw, Carolina Beach, Cramerton, Dallas, Davidson, Duck, Emerald Isle, Franklin, Indian Beach, Kill Devil Hills, Kitty Hawk, Kure Beach, Lowell, Manteo, Murphy, Nags Head, North Topsail Beach, Oakboro, Ocean Isle Beach, Pine Knoll Shores, Stanley, Surf City, Sylva, Topsail Beach, and Wrightsville Beach, the Cities of Albemarle, Belmont, Cherryville, Gastonia, Kings Mountain, Mount Holly, and Rockingham and the Counties of Cleveland, Currituck, Gaston, Surry, and Wilkes only. (2007-433, s. 2; 2008-99, s. 1.)

Effect of Amendments. — Session Laws 2008-99, s. 1, effective July 15, 2008, inserted "Lowell, Manteo" in subsection (f).

§ 20-171.25. Motorized all-terrain vehicle use by certain employees of natural gas utilities permitted on public highways and rights-of-way.

(a) Natural gas utility employees and contractors engaged in pipeline safety, leak survey, and patrolling activities, acting in the course and scope of their employment, may operate motorized all-terrain vehicles owned or leased by the utility on public highways and rights-of-way only to the extent necessary to perform those activities.

(b) This Part and all other State laws governing the operation of all-terrain vehicles apply to the operation of all-terrain vehicles authorized by this section.

(c) An all-terrain vehicle operated pursuant to this section shall be equipped with operable front and rear lights and a horn.

(d) A person operating an all-terrain vehicle pursuant to this section shall observe posted speed limits and shall not exceed the manufacturer's recommended speed for the vehicle.

(e) A person operating an all-terrain vehicle pursuant to this section shall carry an official company identification card or badge. (2008-156, s. 2.)

Editor's Note. — Session Laws 2008-156, s. 4, made this section effective August 3, 2008.

Part 11. Pedestrians' Rights and Duties.

§ 20-174.1. Standing, sitting or lying upon highways or streets prohibited.

Local Modification. — Ashe: 2008-78, s. 2.

§ 20-175. Pedestrians soliciting rides, employment, business or funds upon highways or streets.

(a) No person shall stand in any portion of the State highways, except upon the shoulders thereof, for the purpose of soliciting a ride from the driver of any motor vehicle.

(b) No person shall stand or loiter in the main traveled portion, including the shoulders and median, of any State highway or street, excluding sidewalks, or stop any motor vehicle for the purpose of soliciting employment, business or contributions from the driver or occupant of any motor vehicle that impedes the normal movement of traffic on the public highways or streets: Provided that the provisions of this subsection shall not apply to licensees, employees or contractors of the Department of Transportation or of any municipality engaged in construction or maintenance or in making traffic or engineering surveys.

(c) Repealed by Session Laws 1973, c. 1330, s. 39.

(d) Local governments may enact ordinances restricting or prohibiting a person from standing on any street, highway, or right-of-way excluding sidewalks while soliciting, or attempting to solicit, any employment, business, or contributions from the driver or occupants of any vehicle. No local government may enact or enforce any ordinance that prohibits engaging in the distribution of newspapers on the non-traveled portion of any street or highway except when those distribution activities impede the normal movement of traffic on the street or highway. This subsection does not permit additional restrictions or prohibitions on the activities of licensees, employees, or contractors of the Department of Transportation or of any municipality engaged in construction or maintenance or in making traffic or engineering surveys except as provided in subsection (e) of this section.

(e) A local government shall have the authority to grant authorization for a person to stand in, on, or near a street or State roadway, within the local government's municipal corporate limits, to solicit a charitable contribution if the requirements of this subsection are met.

A person seeking authorization under this subsection to solicit charitable contributions shall file a written application with the local government. This application shall be filed not later than seven days before the date the solicitation event is to occur. If there are multiple events or one event occurring on more than one day, each event shall be subject to the application and permit requirements of this subsection for each day the event is to be held, to include the application fee.

The application must include:

(1) The date and time when the solicitation is to occur;
(2) Each location at which the solicitation is to occur; and
(3) The number of solicitors to be involved in the solicitation at each location.

This subsection does not prohibit a local government from charging a fee for a permit, but in no case shall the fee be greater than twenty-five dollars ($25.00) per day per event.

The applicant shall also furnish to the local government advance proof of liability insurance in the amount of at least two million dollars ($2,000,000) to cover damages that may arise from the solicitation. The insurance coverage must provide coverage for claims against any solicitor and agree to hold the local government harmless.

A local government, by acting under this section, does not waive, or limit, any immunity or create any new liability for the local government. The issuance of an authorization under this section and the conducting of the solicitation authorized are not considered governmental functions of the local government.

In the event the solicitation event or the solicitors shall create a nuisance, delay traffic, create threatening or hostile situations, any law enforcement officer with proper jurisdiction may order the solicitations to cease. Any individual failing to follow a law enforcement officer's lawful order to cease solicitation shall be guilty of a Class 2 misdemeanor. (1937, c. 407, s. 136; 1965, c. 673; 1973, c. 507, s. 5; c. 1330, s. 39; 1977, c. 464, s. 34; 2005-310, s. 1; 2006-250, ss. 7(a), 7(b); 2008-223, s. 1.)

Local Modification. — City of Burlington: 2005-30, s. 1; city of Durham: 2007-113, ss. 1, 2.

Effect of Amendments. —

Session Laws 2008-223, s. 1, effective August 17, 2008, added the second sentence in subsection (d).

CASE NOTES

Municipal Ordinance Not In Conflict With Section. — City produced evidence that soliciting in the roadways and on the rights-of-way amongst traffic was a dangerous activity; the city's expert opinion evidence was uncontradicted. That Burlington, N.C., Ordinance 08-19 was designed to protect the public interest was also evidenced by the fact the ordinance tracked G.S. 20-175(d) which authorized local governments to pass such ordinances to restrict solicitations on public roadways. Times-News Publ'g Co. v. City of Burlington, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 56451 (M.D.N.C. June 30, 2008).

Part 12. Sentencing; Penalties.

§ 20-179. Sentencing hearing after conviction for impaired driving; determination of grossly aggravating and aggravating and mitigating factors; punishments.

CASE NOTES

Harmless Error. —

Although the trial court should have submitted the aggravating factor in G.S. 20-179(c)(2), providing that at the time of the offense, defendant was driving while defendant's license was revoked, as defined by G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a), the error was harmless beyond a reasonable doubt. Defendant's driving record, admitted by the State, showed that defendant's driver's license was indefinitely revoked due to an impaired driving conviction and that the license had not been reinstated, which meant that evidence of the aggravating factor was overwhelming and uncontroverted such that a sentence beyond the statutory maximum could be imposed. State v. Coffey, — N.C. App. —, 658 S.E.2d 73, 2008 N.C. App. LEXIS 536 (Mar. 18, 2008).

§ 20-179.3. Limited driving privilege.

(a) Definition of Limited Driving Privilege. — A limited driving privilege is a judgment issued in the discretion of a court for good cause shown authorizing a person with a revoked driver's license to drive for essential purposes related to any of the following:

(1) His employment.
(2) The maintenance of his household.
(3) His education.
(4) His court-ordered treatment or assessment.
(5) Community service ordered as a condition of the person's probation.
(6) Emergency medical care.

(b) Eligibility. —

(1) A person convicted of the offense of impaired driving under G.S. 20-138.1 is eligible for a limited driving privilege if:

a. At the time of the offense he held either a valid driver's license or a license that had been expired for less than one year;
b. At the time of the offense he had not within the preceding seven years been convicted of an offense involving impaired driving;
c. Punishment Level Three, Four, or Five was imposed for the offense of impaired driving;
d. Subsequent to the offense he has not been convicted of, or had an unresolved charge lodged against him for, an offense involving impaired driving; and
e. The person has obtained and filed with the court a substance abuse assessment of the type required by G.S. 20-17.6 for the restoration of a drivers license.

A person whose North Carolina driver's license is revoked because of a conviction in another jurisdiction substantially similar to impaired driving under G.S. 20-138.1 is eligible for a limited driving privilege if he would be eligible for it had the conviction occurred in North Carolina. Eligibility for a limited driving privilege following a revocation under G.S. 20-16.2(d) is governed by G.S. 20-16.2(e1).

(2) Any person whose licensing privileges are forfeited pursuant to G.S. 15A-1331A is eligible for a limited driving privilege if the court finds that at the time of the forfeiture, the person held either a valid drivers license or a drivers license that had been expired for less than one year and

a. The person is supporting existing dependents or must have a drivers license to be gainfully employed; or
b. The person has an existing dependent who requires serious medical treatment and the defendant is the only person able to provide transportation to the dependent to the health care facility where the dependent can receive the needed medical treatment.

The limited driving privilege granted under this subdivision must restrict the person to essential driving related to the purposes listed above, and any driving that is not related to those purposes is unlawful even though done at times and upon routes that may be authorized by the privilege.

(c) Privilege Not Effective until after Compliance with Court-Ordered Revocation. — A person convicted of an impaired driving offense may apply for a limited driving privilege at the time the judgment is entered. A person whose license is revoked because of a conviction in another jurisdiction substantially similar to impaired driving under G.S. 20-138.1 may apply for a limited driving privilege only after having completed at least 60 days of a court-imposed term of nonoperation of a motor vehicle, if the court in the other jurisdiction imposed such a term of nonoperation.

(c1) Privilege Restrictions for High-Risk Drivers. — Notwithstanding any other provision of this section, any limited driving privilege issued to a person convicted of an impaired driving offense with an alcohol concentration of 0.15 or more at the time of the offense shall:

(1) Not become effective until at least 45 days after the final conviction under G.S. 20-138.1;
(2) Require the applicant to comply with the ignition interlock requirements of subsection (g5) of this section; and
(3) Restrict the applicant to driving only to and from the applicant's place of employment, the place the applicant is enrolled in school, any court ordered treatment or substance abuse education, and any ignition interlock service facility.

For purposes of this subsection, the results of a chemical analysis presented at trial or sentencing shall be sufficient to prove a person's alcohol concentration, shall be conclusive, and shall not be subject to modification by any party, with or without approval by the court.

(d) Application for and Scheduling of Subsequent Hearing. — The application for a limited driving privilege made at any time after the day of sentencing must be filed with the clerk in duplicate, and no hearing scheduled may be held until a reasonable time after the clerk files a copy of the application with the district attorney's office. The hearing must be scheduled before:

(1) The presiding judge at the applicant's trial if that judge is assigned to a court in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, in which the conviction for impaired driving was imposed.
(2) The senior regular resident superior court judge of the superior court district or set of districts as defined in G.S. 7A-41.1 in which the conviction for impaired driving was imposed, if the presiding judge is not available within the district and the conviction was imposed in superior court.
(3) The chief district court judge of the district court district as defined in G.S. 7A-133 in which the conviction for impaired driving was imposed, if the presiding judge is not available within the district and the conviction was imposed in district court.

If the applicant was convicted of an offense in another jurisdiction, the hearing must be scheduled before the chief district court judge of the district court district as defined in G.S. 7A-133 in which he resides. G.S. 20-16.2(e1) governs the judge before whom a hearing is scheduled if the revocation was under G.S. 20-16.2(d). The hearing may be scheduled in any county within the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be.

(e) Limited Basis for and Effect of Privilege. — A limited driving privilege issued under this section authorizes a person to drive if his license is revoked solely under G.S. 20-17(a)(2) or as a result of a conviction in another jurisdiction substantially similar to impaired driving under G.S. 20-138.1; if the person's license is revoked under any other statute, the limited driving privilege is invalid.

(f) Overall Provisions on Use of Privilege. — Every limited driving privilege must restrict the applicant to essential driving related to the purposes listed in subsection (a), and any driving that is not related to those purposes is unlawful even though done at times and upon routes that may be authorized by the privilege. If the privilege is granted, driving related to emergency medical care is authorized at any time and without restriction as to routes, but all other driving must be for a purpose and done within the restrictions specified in the privilege.

(f1) Definition of "Standard Working Hours". — Under this section, "standard working hours" are 6:00 A.M. to 8:00 P.M. on Monday through Friday.

(g) Driving for Work-Related Purposes in Standard Working Hours. — In a limited driving privilege, the court may authorize driving for work-related purposes during standard working hours without specifying the times and routes in which the driving must occur. If the applicant is not required to drive for essential work-related purposes except during standard working hours, the limited driving privilege must prohibit driving during nonstandard working hours unless the driving is for emergency medical care or is authorized by subsection (g2). The limited driving privilege must state the name and address of the applicant's place of work or employer, and may include other information and restrictions applicable to work-related driving in the discretion of the court.

(g1) Driving for Work-Related Purposes in Nonstandard Hours. — If the applicant is required to drive during nonstandard working hours for an essential work-related purpose, he must present documentation of that fact before the judge may authorize him to drive for this purpose during those hours. If the applicant is self-employed, the documentation must be attached to or made a part of the limited driving privilege. If the judge determines that it is necessary for the applicant to drive during nonstandard hours for a work-related purpose, he may authorize the applicant to drive subject to these limitations:

(1) If the applicant is required to drive to and from a specific place of work at regular times, the limited driving privilege must specify the general times and routes in which the applicant will be driving to and from work, and restrict driving to those times and routes.

(2) If the applicant is required to drive to and from work at a specific place, but is unable to specify the times at which that driving will occur, the limited driving privilege must specify the general routes in which the applicant will be driving to and from work, and restrict the driving to those general routes.

(3) If the applicant is required to drive to and from work at regular times but is unable to specify the places at which work is to be performed, the limited driving privilege must specify the general times and geographic boundaries in which the applicant will be driving, and restrict driving to those times and within those boundaries.

(4) If the applicant can specify neither the times nor places in which he will be driving to and from work, or if he is required to drive during these nonstandard working hours as a condition of employment, the limited driving privilege must specify the geographic boundaries in which he will drive and restrict driving to that within those boundaries.

The limited driving privilege must state the name and address of the applicant's place of work or employer, and may include other information and restrictions applicable to work-related driving, in the discretion of the court.

(g2) Driving for Other than Work-Related Purposes. — A limited driving privilege may not allow driving for maintenance of the household except during standard working hours, and the limited driving privilege may contain any additional restrictions on that driving, in the discretion of the court. The limited driving privilege must authorize driving essential to the completion of any community work assignments, course of instruction at an Alcohol and Drug Education Traffic School, or substance abuse assessment or treatment, to which the applicant is ordered by the court as a condition of probation for the impaired driving conviction. If this driving will occur during nonstandard working hours, the limited driving privilege must specify the same limitations required by subsection (g1) for work-related driving during those hours, and it must include or have attached to it the name and address of the Alcohol and Drug Education Traffic School, the community service coordinator, or mental health treatment facility to which the applicant is assigned. Driving for educational purposes other than the course of instruction at an Alcohol and Drug Education Traffic School is subject to the same limitations applicable to work related driving under subsections (g) and (g1).

(g3) Ignition Interlock Allowed. — A judge may include all of the following in a limited driving privilege order:

(1) A restriction that the applicant may operate only a designated motor vehicle.

(2) A requirement that the designated motor vehicle be equipped with a functioning ignition interlock system of a type approved by the Commissioner. The Commissioner shall not unreasonably withhold approval of an ignition interlock system and shall consult with the Division of Purchase and Contract in the Department of Administration to ensure that potential vendors are not discriminated against.

(3) A requirement that the applicant personally activate the ignition interlock system before driving the motor vehicle.

(g4) The restrictions set forth in subsection (g3) and (g5) of this section do not apply to a motor vehicle that meets all of the following requirements:

(1) Is owned by the applicant's employer.

(2) Is operated by the applicant solely for work-related purposes.

(3) Its owner has filed with the court a written document authorizing the applicant to drive the vehicle, for work-related purposes, under the authority of a limited driving privilege.

(g5) Ignition Interlock Required. — If a person's drivers license is revoked for a conviction of G.S. 20-138.1, and the person had an alcohol concentration of 0.15 or more, a judge shall include all of the following in a limited driving privilege order:

(1) A restriction that the applicant may operate only a designated motor vehicle.

(2) A requirement that the designated motor vehicle be equipped with a functioning ignition interlock system of a type approved by the Commissioner, which is set to prohibit driving with an alcohol concentration of greater than 0.00. The Commissioner shall not unreasonably withhold approval of an ignition interlock system and shall consult with the Division of Purchase and Contract in the Department of Administration to ensure that potential vendors are not discriminated against.

(3) A requirement that the applicant personally activate the ignition interlock system before driving the motor vehicle.

For purposes of this subsection, the results of a chemical analysis presented at trial or sentencing shall be sufficient to prove a person's alcohol concentration, shall be conclusive, and shall not be subject to modification by any party, with or without approval by the court.

(h) Other Mandatory and Permissive Conditions or Restrictions. — In all limited driving privileges the judge shall also include a restriction that the applicant not consume alcohol while driving or drive at any time while he has remaining in his body any alcohol or controlled substance previously consumed, unless the controlled substance was lawfully obtained and taken in therapeutically appropriate amounts. The judge may impose any other reasonable restrictions or conditions necessary to achieve the purposes of this section.

(i) Modification or Revocation of Privilege. — A judge who issues a limited driving privilege is authorized to modify or revoke the limited driving privilege upon a showing that the circumstances have changed sufficiently to justify modification or revocation. If the judge who issued the privilege is not presiding in the court in which the privilege was issued, a presiding judge in that court may modify or revoke a privilege in accordance with this subsection. The judge must indicate in the order of modification or revocation the reasons for the order, or he must make specific findings indicating the reason for the order and those findings must be entered in the record of the case.

(j) Effect of Violation of Restriction. — A holder of a limited driving privilege who violates any of its restrictions commits the offense of driving while his license is revoked under G.S. 20-28(a) and is subject to punishment and license revocation as provided in that section. If a law-enforcement officer has reasonable grounds to believe that the holder of a limited driving privilege has consumed alcohol while driving or has driven while he has remaining in his body any alcohol previously consumed, the suspected offense of driving while license is revoked is an alcohol-related offense subject to the implied-consent provisions of G.S. 20-16.2. If a holder of a limited driving privilege is charged with driving while license revoked by violating a restriction contained in his limited driving privilege, and a judicial official determines that there is probable cause for the charge, the limited driving privilege is suspended pending the resolution of the case, and the judicial official must require the holder to surrender the limited driving privilege. The judicial official must also notify the holder that he is not entitled to drive until his case is resolved.

Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violating this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Department of Health and Human Services, and the screening test is conducted in accordance with the applicable regulations of the Department as to the manner of its use.

(k) Copy of Limited Driving Privilege to Division; Action Taken if Privilege Invalid. — The clerk of court or the child support enforcement agency must send a copy of any limited driving privilege issued in the county to the Division. A limited driving privilege that is not authorized by this section, G.S. 20-16.2(e1), 20-16.1, 50-13.12, or 110-142.2, or that does not contain the limitations required by law, is invalid. If the limited driving privilege is invalid on its face, the Division must immediately notify the court and the holder of the privilege that it considers the privilege void and that the Division records will not indicate that the holder has a limited driving privilege.

(*l*) Any judge granting limited driving privileges under this section shall, prior to granting such privileges, be furnished proof and be satisfied that the person being granted such privileges is financially responsible. Proof of financial responsibility shall be in one of the following forms:

(1) A written certificate or electronically-transmitted facsimile thereof from any insurance carrier duly authorized to do business in this State certifying that there is in effect a nonfleet private passenger motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. The certificate or facsimile

shall state the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy and shall state the date that the certificate or facsimile is issued. The certificate or facsimile shall remain effective proof of financial responsibility for a period of 30 consecutive days following the date the certificate or facsimile is issued but shall not in and of itself constitute a binder or policy of insurance or

(2) A binder for or policy of nonfleet private passenger motor vehicle liability insurance under which the applicant is insured, provided that the binder or policy states the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy.

The preceding provisions of this subsection do not apply to applicants who do not own currently registered motor vehicles and who do not operate nonfleet private passenger motor vehicles that are owned by other persons and that are not insured under commercial motor vehicle liability insurance policies. In such cases, the applicant shall sign a written certificate to that effect. Such certificate shall be furnished by the Division. Any material misrepresentation made by such person on such certificate shall be grounds for suspension of that person's license for a period of 90 days.

For the purpose of this subsection "nonfleet private passenger motor vehicle" has the definition ascribed to it in Article 40 of General Statute Chapter 58.

The Commissioner may require that certificates required by this subsection be on a form approved by the Commissioner. Such granting of limited driving privileges shall be conditioned upon the maintenance of such financial responsibility during the period of the limited driving privilege. Nothing in this subsection precludes any person from showing proof of financial responsibility in any other manner authorized by Articles 9A and 13 of this Chapter. (1983, c. 435, s. 31; 1983 (Reg. Sess., 1984), c. 1101, ss. 30-33; 1985, c. 706, s. 2; 1987, c. 869, s. 13; 1987 (Reg. Sess., 1988), c. 1037, s. 78; 1989, c. 436, s. 6; 1994, Ex. Sess., c. 20, s. 3; 1995, c. 506, ss. 1, 2; c. 538, s. 2(h); 1995 (Reg. Sess., 1996), c. 756, s. 31; 1997-379, s. 5.6; 1999-406, ss. 4-6; 2000-155, ss. 7, 11-13; 2001-487, s. 55; 2007-182, s. 2; 2007-493, ss. 24, 29, 30; 2008-187, s. 36(c).)

Effect of Amendments. — Session Laws 2008-187, s. 36(c), effective August 7, 2008, in the second paragraph of subsection (j), substituted "Department of Health and Human Services" for "Commission for Public Health" and substituted "Department" for "Commission."

Article 3A.

Safety and Emissions Inspection Program.

Part 2. Safety and Emissions Inspections of Certain Vehicles.

§ 20-183.2. Description of vehicles subject to safety or emissions inspection; definitions.

(a) Safety. — A motor vehicle is subject to a safety inspection in accordance with this Part if it meets all of the following requirements:

(1) It is subject to registration with the Division under Article 3 of this Chapter.

(2) It is not subject to inspection under 49 C.F.R. Part 396, the federal Motor Carrier Safety Regulations.

(3) It is not a trailer whose gross weight is less than 4,000 pounds or a house trailer.

(a1) Safety Inspection Exceptions. — The following vehicles shall not be subject to a safety inspection pursuant to this Article:

(1) Historic vehicles, as defined in G.S. 20-79.4(b)(55).

(2) Buses titled to a local board of education and subject to the school bus inspection requirements specified by the State Board of Education and G.S. 115C-248(a).

(b) Emissions. — A motor vehicle is subject to an emissions inspection in accordance with this Part if it meets all of the following requirements:

(1) It is subject to registration with the Division under Article 3 of this Chapter, except for motor vehicles operated on a federal installation as provided in sub-subdivision e. of subdivision (5) of this subsection.

(2) It is not a trailer whose gross weight is less than 4,000 pounds, a house trailer, or a motorcycle.

(3) It is a 1996 or later model.

(4) Repealed by Session Laws 1999-328, s. 3.11, effective July 21, 1999.

(5) It meets any of the following descriptions:

a. It is required to be registered in an emissions county.

b. It is part of a fleet that is operated primarily in an emissions county.

c. It is offered for rent in an emissions county.

d. It is a used vehicle offered for sale by a dealer in an emissions county.

e. It is operated on a federal installation located in an emissions county and it is not a tactical military vehicle. Vehicles operated on a federal installation include those that are owned or leased by employees of the installation and are used to commute to the installation and those owned or operated by the federal agency that conducts business at the installation.

f. It is otherwise required by 40 C.F.R. Part 51 to be subject to an emissions inspection.

(6) It is not licensed at the farmer rate under G.S. 20-88(b).

(7) It is not a new motor vehicle, as defined in G.S. 20-286(10)a. and has been a used motor vehicle, as defined in G.S. 20-286(10)b., for 12 months or more. However, a motor vehicle that has been leased or rented, or offered for lease or rent, is subject to an emissions inspection when it either:

a. Has been leased or rented, or offered for lease or rent, for 12 months or more.

b. Is sold to a consumer-purchaser.

(8) It is not a privately owned, nonfleet motor home or house car, as defined in G.S. 20-4.01(27)d2., that is built on a single chassis, has a gross vehicle weight of more than 10,000 pounds, and is designed primarily for recreational use.

(c) Definitions. — The following definitions apply in this Part:

(1) Electronic inspection authorization. — An inspection authorization that is generated electronically through the electronic accounting system that creates a unique nonduplicating authorization number assigned to the vehicle's inspection receipt upon successful passage of an inspection. The term "electronic inspection authorization" shall include the term "inspection sticker" during the transition period to use of electronic inspection authorizations.

(2) Emissions county. — A county listed in G.S. 143-215.107A(c) or designated by the Environmental Management Commission pursuant to G.S. 143-215.107A(d) and certified to the Commissioner of Motor Vehicles as a county in which the implementation of a motor vehicle emissions inspection program will improve ambient air quality.

(3) Federal installation. — An installation that is owned by, leased to, or otherwise regularly used as the place of business of a federal agency. (1965, c. 734, s. 1; 1967, c. 692, s. 1; 1969, c. 179, s. 2; cc. 219, 386; 1973, c. 679, s. 2; 1975, c. 683; c. 716, s. 5; 1979, c. 77; 1989, c. 467; 1991, c. 394, s. 1; c. 761, s. 7; 1993 (Reg. Sess., 1994), c. 754, s. 1; 1995, c. 163, s. 10; 1997-29, s. 12; 1999-328, s. 3.11; 2000-134, ss. 7, 7.1, 9, 11; 2001-504, ss. 4, 5, 6, 10; 2004-167, s. 10; 2004-199, s. 59; 2006-255, s. 1; 2007-503, s. 2; 2008-172, s. 1.)

Effect of Amendments. —

Session Laws 2008-172, s. 1, effective August 4, 2008, rewrote subsection (a1).

§ 20-183.4. License required to perform safety inspection; qualifications for license.

(a) License Required. — A safety inspection must be performed by one of the following methods:

(1) At a station that has a safety inspection station license issued by the Division and by a mechanic who is employed by the station and has a safety inspection mechanic license issued by the Division.

(2) At a place of business of a person who has a safety self-inspector license issued by the Division and by an individual who has a safety inspection mechanic license issued by the Division.

(b) Station Qualifications. — An applicant for a license as a safety inspection station must meet all of the following requirements:

(1) Have a place of business that has adequate facilities, space, and equipment to conduct a safety inspection. A place of business designated in a station license that has been suspended or revoked cannot be the designated place for any other license applicant during the period of the suspension or revocation, unless the Division finds that operation of the place of business as an inspection station during this period by the license applicant would not defeat the purpose of the suspension or revocation because the license applicant has no connection with the person whose license was suspended or revoked or because of another reason. A finding made by the Division under this subdivision must be set out in a written statement that includes the finding and the reason for the finding.

(2) Regularly employ at least one mechanic who has a safety inspection mechanic license.

(3) Designate the individual who will be responsible for the day-to-day operation of the station. The individual designated must be of good character and have a reputation for honesty.

(4) Have equipment and software approved by the Division to transfer information on safety inspections to the Division by electronic means. During the initial implementation of the electronic inspection process, the vendor selected by the Division shall provide the equipment and software at no cost to a station that holds a license on October 1, 2008.

(c) Mechanic Qualifications. — An applicant for a license as a safety inspection mechanic must meet all of the following requirements:

(1) Have successfully completed an eight-hour course approved by the Division that teaches students about the safety equipment a motor vehicle is required to have to pass a safety inspection and how to conduct a safety inspection using equipment to electronically transmit the vehicle information and inspection results.

(2) Have a drivers license.

(3) Be of good character and have a reputation for honesty.

(d) Self-Inspector Qualifications. — An applicant for a license as a safety self-inspector must meet all of the following requirements:

(1) Operate a fleet of at least 10 vehicles that are subject to a safety inspection.

(2) Regularly employ or contract with an individual who has a safety inspection mechanic license and who will perform a safety inspection on the vehicles that are part of the self-inspector's fleet. (1965, c. 734, s. 1; 1967, c. 692, s. 2; 1975, c. 716, s. 5; 1993 (Reg. Sess., 1994), c. 754, s. 1; 1997-29, s. 1; 2007-503, s. 3; 2008-190, s. 2.)

Effect of Amendments. — Session Laws 2008-190, s. 2, effective October 1, 2008, inserted "approved by the Division" in the first sentence of subdivision (b)(4).

§ 20-183.4C. When a vehicle must be inspected; three-day trip permit.

(a) Inspection. — A vehicle that is subject to a safety inspection, an emissions inspection, or both must be inspected as follows:

(1) A new vehicle must be inspected before it is sold at retail in this State. Upon purchase, a receipt approved by the Division must be provided to the new owner certifying compliance.

(1a) A new motor vehicle dealer who is also licensed pursuant to this Article may, notwithstanding subdivision (1) of this section, examine the safety and emissions control devices on a new motor vehicle and perform such services necessary to ensure the motor vehicle conforms to the required specifications established by the manufacturer and contained in its predelivery check list. The completion of the predelivery inspection procedure required or recommended by the manufacturer on a new motor vehicle shall constitute the inspection required by subdivision (1) of this section. For the purposes of this subdivision, the date of inspection shall be deemed to be the date of the sale of the motor vehicle to a purchaser.

(2) A used vehicle must be inspected before it is offered for sale at retail in this State by a dealer. Upon purchase, a receipt approved by the Division must be provided to the new owner certifying compliance.

(3) Repealed by Session Law 2007-503, s. 5, effective October 1, 2008.

(4) A new or used vehicle acquired by a resident of this State from outside the State must be inspected before the vehicle is registered with the Division.

(5) A vehicle owned by a new resident of this State who transfers the registration of the vehicle from the resident's former home state to this State must be inspected before the vehicle is registered with the Division.

(5a) Repealed by Session Law 2007-503, s. 5, effective October 1, 2008.

(6) A vehicle that has been inspected in accordance with this Part must be inspected by the last day of the month in which the registration on the vehicle expires.

(7) A vehicle that is required to be inspected in accordance with this Part may be inspected 90 days prior to midnight of the last day of the month as designated by the vehicle registration sticker.

(8) A new or used vehicle acquired from a retailer in this State and registered with the Division with a new registration or a transferred registration must be inspected in accordance with this Part when the current registration expires.

(9) A used vehicle acquired from a private sale in this State must be inspected in accordance with this Part before the vehicle is registered

with the Division unless it has received a passing inspection within the previous 12 months.

(10) An unregistered vehicle must be inspected before the vehicle is registered with the Division unless it has received a passing inspection within the previous 12 months.

(11) A person who owns a vehicle located outside of this State when its emissions inspection becomes due may obtain an emissions inspection in the jurisdiction where the vehicle is located, in lieu of a North Carolina emissions inspection, as long as the inspection meets the requirements of 40 C.F.R. § 51.

(b) Permit. — The Division may issue a three-day trip permit to a person that authorizes the person to drive an insured vehicle whose inspection authorization or registration has expired. The permit must describe the vehicle whose inspection authorization or registration has expired. The permit authorizes the person to drive the described vehicle only from the place the vehicle is parked to an inspection station, repair shop, or Division or contract agent registration office.

The Division may issue a 10-day temporary permit to a person that authorizes the person to drive a vehicle that failed to pass the emissions inspection. The permit must describe the vehicle that failed to pass inspection and the date that it failed to pass inspection. (1993 (Reg. Sess., 1994), c. 754, s. 1; 1997-29, s. 2; 2001-504, s. 11; 2007-481, s. 2; 2007-503, s. 5; 2008-190, s. 3.)

Effect of Amendments. —

Session Laws 2008-190, s. 3, effective October 1, 2008, substituted "three-day" for "one-way" in the section heading; substituted "before" for "within 10 days after" in subdivisions (a)(4) and (a)(5); and rewrote subdivisions (a)(9), (a)(10), and subsection (b).

Article 7.

Miscellaneous Provisions Relating to Motor Vehicles.

§ 20-219.2. Removal of unauthorized vehicles from private lots.

(a) It shall be unlawful for any person other than the owner or lessee of a privately owned or leased parking space to park a motor or other vehicle in such private parking space without the express permission of the owner or lessee of such space; provided, that such private parking lot be clearly designated as such by a sign no smaller than 24 inches by 24 inches prominently displayed at the entrance thereto and the parking spaces within the lot be clearly marked by signs setting forth the name of each individual lessee or owner; a vehicle parked in a privately owned parking space in violation of this section may be removed from such space upon the written request of the parking space owner or lessee to a place of storage and the registered owner of such motor vehicle shall become liable for removal and storage charges. Any person who removes a vehicle pursuant to this section shall not be held liable for damages for the removal of the vehicle to the owner, lienholder or other person legally entitled to the possession of the vehicle removed; however, any person who intentionally or negligently damages a vehicle in the removal of such vehicle, or intentionally or negligently inflicts injury upon any person in the removal of such vehicle, may be held liable for damages.

(b) Any person violating any of the provisions of this section shall be guilty of a Class 3 misdemeanor and upon conviction shall be only fined not more than ten dollars ($10.00) in the discretion of the court.

(c) This section shall apply only to the Counties of Craven, Dare, Forsyth, Gaston, Guilford, New Hanover, Orange, Richmond, Robeson, Wake, Wilson and to the Cities of Durham, Jacksonville, Charlotte and Fayetteville. (1969, cc. 173, 288; 1971, c. 986; 1973, c. 183; c. 981, s. 1; c. 1330, s. 36; 1975, c. 575; 1979, c. 380; 1979, 2nd Sess., c. 1119; 1981 (Reg. Sess., 1982), c. 1251, s. 3; 1989, c. 417; c. 644, s. 1; 1993, c. 539, s. 383; 1994, Ex. Sess., c. 24, s. 14(c); 2008-68, s. 1.)

Effect of Amendments. — Session Laws 2008-68, s. 1, effective December 1, 2008, and applicable to offenses committed on or after that date, inserted "Richmond" in subsection (c).

CASE NOTES

Cited in Kirschbaum v. McLaurin Parking Co., — N.C. App. —, 656 S.E.2d 683, 2008 N.C. App. LEXIS 258 (2008).

ARTICLE 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

§ 20-279.1. Definitions.

CASE NOTES

Coverage Available to Sheriff's Deputy. — County's policy controlled the underinsured motorist coverage available to a deputy sheriff as the North Carolina Motor Vehicle Safety and Financial Responsibility Act, G.S. 20-279.1 et seq., did not apply due to G.S. 20-279.32. N.C. Counties Liab. & Prop. Joint Risk Mgmt. Agency v. Curry, — N.C. App. —, 662 S.E.2d 678, 2008 N.C. App. LEXIS 1225 (July 1, 2008).

Cited in Great American Ins. Co. v. Freeman, — N.C. App. —, 665 S.E.2d 536, 2008 N.C. App. LEXIS 1612 (2008).

§ 20-279.21. "Motor vehicle liability policy" defined.

(a) A "motor vehicle liability policy" as said term is used in this Article shall mean an owner's or an operator's policy of liability insurance, certified as provided in G.S. 20-279.19 or 20-279.20 as proof of financial responsibility, and issued, except as otherwise provided in G.S. 20-279.20, by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person named therein as insured.

(b) Such owner's policy of liability insurance:

(1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: thirty thousand dollars ($30,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, sixty thousand dollars ($60,000) because of bodily injury to or

G.S. 20-279.21 (b)(3) and (b)(4) set out twice. See notes.

death of two or more persons in any one accident, and twenty-five thousand dollars ($25,000) because of injury to or destruction of property of others in any one accident; and

(3) **(Effective until January 1, 2009)** No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, under provisions filed with and approved by the Commissioner of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom, in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars ($1,000,000), as selected by the policy owner. The provisions shall include coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of injury to or destruction of the property of such insured, with a limit in the aggregate for all insureds in any one accident of up to the limits of property damage liability in the owner's policy of liability insurance, and subject, for each insured, to an exclusion of the first one hundred dollars ($100.00) of such damages. The provision shall further provide that a written statement by the liability insurer, whose name appears on the certification of financial responsibility made by the owner of any vehicle involved in an accident with the insured, that the other motor vehicle was not covered by insurance at the time of the accident with the insured shall operate as a prima facie presumption that the operator of the other motor vehicle was uninsured at the time of the accident with the insured for the purposes of recovery under this provision of the insured's liability insurance policy. The coverage required under this subdivision is not applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. If the named insured in the policy does not reject uninsured motorist coverage and does not select different coverage limits, the amount of uninsured motorist coverage shall be equal to the highest limit of bodily injury and property damage liability coverage for any one vehicle in the policy. Once the option to reject the uninsured motorist coverage or to select different coverage limits is offered by the insurer, the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless the named insured makes a written request to exercise a different option. The selection or rejection of uninsured motorist coverage or the failure to select or reject by a named insured is valid and binding on all insureds and vehicles under the policy. Rejection of or selection of different coverage limits for uninsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by a named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.

If a person who is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle is an insured under the uninsured motorist coverage of a policy that insures more than one motor vehicle, that person shall not be permitted to combine the uninsured motorist limit applicable to any one motor vehicle with the uninsured motorist limit applicable to any other motor vehicle to determine the total amount of uninsured motorist coverage available to that person. If a person who is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle is an insured under the uninsured motorist coverage of more than one policy, that person may combine the highest applicable uninsured motorist limit available under each policy to determine the total amount of uninsured motorist coverage available to that person. The previous sentence shall apply only to insurance on nonfleet private passenger motor vehicles as described in G.S. 58-40-10(1) and (2).

In addition to the above requirements relating to uninsured motorist insurance, every policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance or use of any motor vehicle, which policy is delivered or issued for delivery in this State, shall be subject to the following provisions which need not be contained therein.

a. A provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name. The insurer, upon being served with copy of summons, complaint or other pleading, shall have the time allowed by statute in which to answer, demur or otherwise plead (whether the pleading is verified or not) to the summons, complaint or other process served upon it. The consent of the insurer shall not be required for the initiation of suit by the insured against the uninsured motorist: Provided, however, no action shall be initiated by the insured until 60 days following the posting of notice to the insurer at the address shown on the policy or after personal delivery of the notice to the insurer or its agent setting forth the belief of the insured that the prospective defendant or defendants are uninsured motorists. No default judgment shall be entered when the insurer has timely filed an answer or other pleading as required by law. The failure to post notice to the insurer 60 days in advance of the initiation of suit shall not be grounds for dismissal of the action, but shall automatically extend the time for the filing of an answer or other pleadings to 60 days after the time of service of the summons, complaint, or other process on the insurer.

b. Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may

G.S. 20-279.21 (b)(3) and (b)(4) set out twice. See notes.

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institute an action directly against the insurer: Provided, in that event, the insured, or someone in his behalf, shall report the accident within 24 hours or as soon thereafter as may be practicable, to a police officer, peace officer, other judicial officer, or to the Commissioner of Motor Vehicles. The insured shall also within a reasonable time give notice to the insurer of his injury, the extent thereof, and shall set forth in the notice the time, date and place of the injury. Thereafter, on forms to be mailed by the insurer within 15 days following receipt of the notice of the accident to the insurer, the insured shall furnish to insurer any further reasonable information concerning the accident and the injury that the insurer requests. If the forms are not furnished within 15 days, the insured is deemed to have complied with the requirements for furnishing information to the insurer. Suit may not be instituted against the insurer in less than 60 days from the posting of the first notice of the injury or accident to the insurer at the address shown on the policy or after personal delivery of the notice to the insurer or its agent. The failure to post notice to the insurer 60 days before the initiation of the suit shall not be grounds for dismissal of the action, but shall automatically extend the time for filing of an answer or other pleadings to 60 days after the time of service of the summons, complaint, or other process on the insurer.

Provided under this section the term "uninsured motor vehicle" shall include, but not be limited to, an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability within the limits specified therein because of insolvency.

An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within three years after such an accident. Nothing herein shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to the insured than is provided herein.

In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of coverage, the insurer making payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of that person against any person or organization legally responsible for the bodily injury for which the payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

For the purpose of this section, an "uninsured motor vehicle" shall be a motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance in at least the amounts specified in subsection (c) of G.S. 20-279.5, or there is that insurance but the insurance company writing the insurance denies coverage thereunder, or has become bankrupt, or there is no bond or deposit of money or securities as provided in G.S. 20-279.24 or 20-279.25 in lieu of the bodily injury and property damage liability insurance, or the owner of the motor vehicle has not qualified as a self-insurer under the provisions of G.S. 20-279.33, or a vehicle that is not subject to the provisions of the Motor Vehicle Safety and Financial

Responsibility Act; but the term "uninsured motor vehicle" shall not include:

a. A motor vehicle owned by the named insured;
b. A motor vehicle that is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;
c. A motor vehicle that is owned by the United States of America, Canada, a state, or any agency of any of the foregoing (excluding, however, political subdivisions thereof);
d. A land motor vehicle or trailer, if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle; or
e. A farm-type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of the motor vehicle.

(3) **(Effective January 1, 2009)** No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, under provisions filed with and approved by the Commissioner of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom, with limits equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy. The named insured may purchase uninsured motorist bodily injury coverage with greater limits, subject to the limitation that in no event shall uninsured motorist bodily injury coverage limits exceed one million dollars ($1,000,000) per person and one million dollars ($1,000,000) per accident. The insurer shall notify the named insured of his or her right to purchase uninsured motorist bodily injury coverage with greater limits, when the policy is issued and renewed, as provided in subsection (m) of this section. The provisions shall include coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of injury to or destruction of the property of such insured, with a limit in the aggregate for all insureds in any one accident equal to the highest limits of property damage liability coverage for any one vehicle insured in the owner's policy of liability insurance, and subject, for each insured, to an exclusion of the first one hundred dollars ($100.00) of such damages. The provision shall further provide that a written statement by the liability insurer, whose name appears on the certification of financial responsibility made by the owner of any vehicle involved in an accident with the insured, that the other motor vehicle was not covered by insurance at

the time of the accident with the insured shall operate as a prima facie presumption that the operator of the other motor vehicle was uninsured at the time of the accident with the insured for the purposes of recovery under this provision of the insured's liability insurance policy.

If a person who is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle is an insured under the uninsured motorist coverage of a policy that insures more than one motor vehicle, that person shall not be permitted to combine the uninsured motorist limit applicable to any one motor vehicle with the uninsured motorist limit applicable to any other motor vehicle to determine the total amount of uninsured motorist coverage available to that person. If a person who is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle is an insured under the uninsured motorist coverage of more than one policy, that person may combine the highest applicable uninsured motorist limit available under each policy to determine the total amount of uninsured motorist coverage available to that person. The previous sentence shall apply only to insurance on nonfleet private passenger motor vehicles as described in G.S. 58-40-10(1) and (2).

In addition to the above requirements relating to uninsured motorist insurance, every policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance or use of any motor vehicle, which policy is delivered or issued for delivery in this State, shall be subject to the following provisions which need not be contained therein.

a. A provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name. The insurer, upon being served with copy of summons, complaint or other pleading, shall have the time allowed by statute in which to answer, demur or otherwise plead (whether the pleading is verified or not) to the summons, complaint or other process served upon it. The consent of the insurer shall not be required for the initiation of suit by the insured against the uninsured motorist: Provided, however, no action shall be initiated by the insured until 60 days following the posting of notice to the insurer at the address shown on the policy or after personal delivery of the notice to the insurer or its agent setting forth the belief of the insured that the prospective defendant or defendants are uninsured motorists. No default judgment shall be entered when the insurer has timely filed an answer or other pleading as required by law. The failure to post notice to the insurer 60 days in advance of the initiation of suit shall not be grounds for dismissal of the action, but shall automatically extend the time for the filing of an answer or other pleadings to 60 days after the time of service of the summons, complaint, or other process on the insurer.

b. Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer: Provided, in that event, the insured, or someone in his behalf, shall report the accident within 24 hours or as soon thereafter as may be practicable, to a police officer, peace officer, other judicial officer, or to the Commissioner of Motor Vehicles. The insured shall also within a reasonable time give notice to the insurer of his injury, the extent thereof, and shall set forth in the notice the time, date and place of the injury. Thereafter, on forms to be mailed by the insurer within 15 days following receipt of the notice of the accident to the insurer, the insured shall furnish to insurer any further reasonable information concerning the accident and the injury that the insurer requests. If the forms are not furnished within 15 days, the insured is deemed to have complied with the requirements for furnishing information to the insurer. Suit may not be instituted against the insurer in less than 60 days from the posting of the first notice of the injury or accident to the insurer at the address shown on the policy or after personal delivery of the notice to the insurer or its agent. The failure to post notice to the insurer 60 days before the initiation of the suit shall not be grounds for dismissal of the action, but shall automatically extend the time for filing of an answer or other pleadings to 60 days after the time of service of the summons, complaint, or other process on the insurer.

Provided under this section the term "uninsured motor vehicle" shall include, but not be limited to, an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability within the limits specified therein because of insolvency.

An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within three years after such an accident. Nothing herein shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to the insured than is provided herein.

In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of coverage, the insurer making payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of that person against any person or organization legally responsible for the bodily injury for which the payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

For the purpose of this section, an "uninsured motor vehicle" shall be a motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance in at least the amounts specified in subsection (c) of G.S. 20-279.5, or there is that insurance but the insurance company writing the insurance denies coverage thereunder, or has become bankrupt, or there is no bond or deposit of money or securities as provided in G.S. 20-279.24 or 20-279.25 in lieu of the bodily injury and property damage liability insurance, or the owner of the motor vehicle has not qualified as a self-insurer under the provisions of G.S. 20-279.33, or a vehicle that is not subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act; but the term "uninsured motor vehicle" shall not include:

a. A motor vehicle owned by the named insured;
b. A motor vehicle that is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;
c. A motor vehicle that is owned by the United States of America, Canada, a state, or any agency of any of the foregoing (excluding, however, political subdivisions thereof);
d. A land motor vehicle or trailer, if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle; or
e. A farm-type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of the motor vehicle.

Notwithstanding the provisions of this subsection, no policy of motor vehicle liability insurance applicable solely to commercial motor vehicles as defined in G.S. 20-4.01(3d) or applicable solely to fleet vehicles shall be required to provide uninsured motorist coverage. Any motor vehicle liability policy that insures both commercial motor vehicles as defined in G.S. 20-4.01(3d) and noncommercial motor vehicles shall provide uninsured motorist coverage in accordance with the provisions of this subsection in amounts equal to the highest limits of bodily injury and property damage liability coverage for any one noncommercial motor vehicle insured under the policy, subject to the right of the insured to purchase higher uninsured motorist bodily injury liability coverage limits as set forth in this subsection. For the purpose of the immediately preceding sentence, noncommercial motor vehicle shall mean any motor vehicle that is not a commercial motor vehicle as defined in G.S. 20-4.01(3d), but that is otherwise subject to the requirements of this subsection.

(4) **(Effective until January 1, 2009)** Shall, in addition to the coverages set forth in subdivisions (2) and (3) of this subsection, provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars ($1,000,000) as selected by the policy owner. An "uninsured motor vehicle," as

described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle if the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are less than or equal to that policy's bodily injury liability limits. For the purposes of this subdivision, the term "highway vehicle" means a land motor vehicle or trailer other than (i) a farm-type tractor or other vehicle designed for use principally off public roads and while not upon public roads, (ii) a vehicle operated on rails or crawler-treads, or (iii) a vehicle while located for use as a residence or premises. The provisions of subdivision (3) of this subsection shall apply to the coverage required by this subdivision. Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. Exhaustion of that liability coverage for the purpose of any single liability claim presented for underinsured motorist coverage is deemed to occur when either (a) the limits of liability per claim have been paid upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. Underinsured motorist coverage is deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant under the exhausted liability policy.

In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident. Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy; provided that this sentence shall apply only to insurance on nonfleet private passenger motor vehicles as described in G.S. 58-40-15(9) and (10). The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

G.S. 20-279.21 (b)(3) and (b)(4) set out twice. See notes.

An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability insurance policy covering the ownership, use, and maintenance of the underinsured highway vehicle. In the event of payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer. No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured motorist where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice. Further, the insurer shall have the right, at its election, to pursue its claim by assignment or subrogation in the name of the claimant, and the insurer shall not be denominated as a party in its own name except upon its own election. Assignment or subrogation as provided in this subdivision shall not, absent contrary agreement, operate to defeat the claimant's right to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for damages beyond those paid by the underinsured motorist insurer. The claimant and the underinsured motorist insurer may join their claims in a single suit without requiring that the insurer be named as a party. Any claimant who intends to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for moneys beyond those paid by the underinsured motorist insurer shall before doing so give notice to the insurer and give the insurer, at its expense, the opportunity to participate in the prosecution of the claim. Upon the entry of judgment in a suit upon any such claim in which the underinsured motorist insurer and claimant are joined, payment upon the judgment, unless otherwise agreed to, shall be applied pro rata to the claimant's claim beyond payment by the insurer of the owner, operator or maintainer of the underinsured highway vehicle and the claim of the underinsured motorist insurer.

A party injured by the operation of an underinsured highway vehicle who institutes a suit for the recovery of moneys for those injuries and in such an amount that, if recovered, would support a claim under underinsured motorist coverage shall give notice of the initiation of the suit to the underinsured motorist insurer as well as to the insurer providing primary liability coverage upon the underinsured highway vehicle. Upon receipt of notice, the underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party. The underinsured motorist insurer may elect, but may not be compelled, to appear in the action in its own name and present therein a claim against other parties; provided that application is made to and approved by a presiding superior court judge, in

G.S. 20-279.21 (b)(3) and (b)(4) set out twice. See notes.

any such suit, any insurer providing primary liability insurance on the underinsured highway vehicle may upon payment of all of its applicable limits of liability be released from further liability or obligation to participate in the defense of such proceeding. However, before approving any such application, the court shall be persuaded that the owner, operator, or maintainer of the underinsured highway vehicle against whom a claim has been made has been apprised of the nature of the proceeding and given his right to select counsel of his own choice to appear in the action on his separate behalf. If an underinsured motorist insurer, following the approval of the application, pays in settlement or partial or total satisfaction of judgment moneys to the claimant, the insurer shall be subrogated to or entitled to an assignment of the claimant's rights against the owner, operator, or maintainer of the underinsured highway vehicle and, provided that adequate notice of right of independent representation was given to the owner, operator, or maintainer, a finding of liability or the award of damages shall be res judicata between the underinsured motorist insurer and the owner, operator, or maintainer of underinsured highway vehicle.

As consideration for payment of policy limits by a liability insurer on behalf of the owner, operator, or maintainer of an underinsured motor vehicle, a party injured by an underinsured motor vehicle may execute a contractual covenant not to enforce against the owner, operator, or maintainer of the vehicle any judgment that exceeds the policy limits. A covenant not to enforce judgment shall not preclude the injured party from pursuing available underinsured motorist benefits, unless the terms of the covenant expressly provide otherwise, and shall not preclude an insurer providing underinsured motorist coverage from pursuing any right of subrogation.

The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy. Once the option to reject underinsured motorist coverage or to select different coverage limits is offered by the insurer, the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless a named insured makes a written request to exercise a different option. The selection or rejection of underinsured motorist coverage by a named insured or the failure to select or reject is valid and binding on all insureds and vehicles under the policy.

Rejection of or selection of different coverage limits for underinsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.

(4) **(Effective January 1, 2009)** Shall, in addition to the coverages set forth in subdivisions (2) and (3) of this subsection, provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this section, with limits equal to the highest limits of bodily injury liability

coverage for any one vehicle insured under the policy. The named insured may purchase underinsured motorist coverage with greater limits, subject to the limitation that in no event shall the underinsured motorist coverage limits exceed one million dollars ($1,000,000) per person and one million dollars ($1,000.000) per accident. The insurer shall notify the named insured of his or her right to purchase underinsured motorist coverage with greater limits, when the policy is issued and renewed, as provided in subsection (m) of this section. An "uninsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle unless the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's bodily injury liability limits. For the purposes of this subdivision, the term "highway vehicle" means a land motor vehicle or trailer other than (i) a farm-type tractor or other vehicle designed for use principally off public roads and while not upon public roads, (ii) a vehicle operated on rails or crawler-treads, or (iii) a vehicle while located for use as a residence or premises. The provisions of subdivision (3) of this subsection shall apply to the coverage required by this subdivision. Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. Exhaustion of that liability coverage for the purpose of any single liability claim presented for underinsured motorist coverage is deemed to occur when either (a) the limits of liability per claim have been paid upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. Underinsured motorist coverage is deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant under the exhausted liability policy.

In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident. Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy; provided that this sentence shall apply only to insurance on nonfleet private passenger motor vehicles as described in G.S. 58-40-15(9) and (10). The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability insurance policy covering the ownership, use, and maintenance of the underinsured highway vehicle. In the event of payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer. No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured motorist where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice. Further, the insurer shall have the right, at its election, to pursue its claim by assignment or subrogation in the name of the claimant, and the insurer shall not be denominated as a party in its own name except upon its own election. Assignment or subrogation as provided in this subdivision shall not, absent contrary agreement, operate to defeat the claimant's right to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for damages beyond those paid by the underinsured motorist insurer. The claimant and the underinsured motorist insurer may join their claims in a single suit without requiring that the insurer be named as a party. Any claimant who intends to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for moneys beyond those paid by the underinsured motorist insurer shall before doing so give notice to the insurer and give the insurer, at its expense, the opportunity to participate in the prosecution of the claim. Upon the entry of judgment in a suit upon any such claim in which the underinsured motorist insurer and claimant are joined, payment upon the judgment, unless otherwise agreed to, shall be applied pro rata to the claimant's claim beyond payment by the insurer of the owner, operator or maintainer of the underinsured highway vehicle and the claim of the underinsured motorist insurer.

A party injured by the operation of an underinsured highway vehicle who institutes a suit for the recovery of moneys for those injuries and in such an amount that, if recovered, would support a claim under underinsured motorist coverage shall give notice of the

G.S. 20-279.21 (b)(3) and (b)(4) set out twice. See notes.

initiation of the suit to the underinsured motorist insurer as well as to the insurer providing primary liability coverage upon the underinsured highway vehicle. Upon receipt of notice, the underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party. The underinsured motorist insurer may elect, but may not be compelled, to appear in the action in its own name and present therein a claim against other parties; provided that application is made to and approved by a presiding superior court judge, in any such suit, any insurer providing primary liability insurance on the underinsured highway vehicle may upon payment of all of its applicable limits of liability be released from further liability or obligation to participate in the defense of such proceeding. However, before approving any such application, the court shall be persuaded that the owner, operator, or maintainer of the underinsured highway vehicle against whom a claim has been made has been apprised of the nature of the proceeding and given his right to select counsel of his own choice to appear in the action on his separate behalf. If an underinsured motorist insurer, following the approval of the application, pays in settlement or partial or total satisfaction of judgment moneys to the claimant, the insurer shall be subrogated to or entitled to an assignment of the claimant's rights against the owner, operator, or maintainer of the underinsured highway vehicle and, provided that adequate notice of right of independent representation was given to the owner, operator, or maintainer, a finding of liability or the award of damages shall be res judicata between the underinsured motorist insurer and the owner, operator, or maintainer of underinsured highway vehicle.

As consideration for payment of policy limits by a liability insurer on behalf of the owner, operator, or maintainer of an underinsured motor vehicle, a party injured by an underinsured motor vehicle may execute a contractual covenant not to enforce against the owner, operator, or maintainer of the vehicle any judgment that exceeds the policy limits. A covenant not to enforce judgment shall not preclude the injured party from pursuing available underinsured motorist benefits, unless the terms of the covenant expressly provide otherwise, and shall not preclude an insurer providing underinsured motorist coverage from pursuing any right of subrogation.

Notwithstanding the provisions of this subsection, no policy of motor vehicle liability insurance applicable solely to commercial motor vehicles as defined in G.S. 20-4.01(3d) or applicable solely to fleet vehicles shall be required to provide underinsured motorist coverage. Any motor vehicle liability policy that insures both commercial motor vehicles as defined in G.S. 20-4.01(3d) and noncommercial motor vehicles shall provide underinsured motorist coverage in accordance with the provisions of this subsection in an amount equal to the highest limits of bodily injury liability coverage for any one noncommercial motor vehicle insured under the policy, subject to the right of the insured to purchase higher underinsured motorist bodily injury liability coverage limits as set forth in this subsection. For the purpose of the immediately preceding sentence, noncommercial motor vehicle shall mean any motor vehicle that is not a commercial motor vehicle as defined in G.S. 20-4.01(3d), but that is otherwise subject to the requirements of this subsection.

(c) Such operator's policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him, and within 30 days following the date of its delivery to him of any motor vehicle owned by him, within the same territorial limits and subject to the same limits of liability as are set forth above with respect to an owner's policy of liability insurance.

(d) Such motor vehicle liability policy shall state the name and address of the named insured, the coverage afforded by the policy, the premium charged therefor, the policy period and the limits of liability, and shall contain an agreement or be endorsed that insurance is provided thereunder in accordance with the coverage defined in this Article as respects bodily injury and death or property damage, or both, and is subject to all the provisions of this Article.

(e) Uninsured or underinsured motorist coverage that is provided as part of a motor vehicle liability policy shall insure that portion of a loss uncompensated by any workers' compensation law and the amount of an employer's lien determined pursuant to G.S. 97-10.2(h) or (j). In no event shall this subsection be construed to require that coverage exceed the applicable uninsured or underinsured coverage limits of the motor vehicle policy or allow a recovery for damages already paid by workers' compensation. The policy need not insure a loss from any liability for damage to property owned by, rented to, in charge of or transported by the insured.

(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

(1) Except as hereinafter provided, the liability of the insurance carrier with respect to the insurance required by this Article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy. As to policies issued to insureds in this State under the assigned risk plan or through the North Carolina Motor Vehicle Reinsurance Facility, a default judgment taken against such an insured shall not be used as a basis for obtaining judgment against the insurer unless counsel for the plaintiff has forwarded to the insurer, or to one of its agents, by registered or certified mail with return receipt requested, or served by any other method of service provided by law, a copy of summons, complaint, or other pleadings, filed in the action. The return receipt shall, upon its return to plaintiff's counsel, be filed with the clerk of court wherein the action is pending against the insured and shall be admissible in evidence as proof of notice to the insurer. The refusal of insurer or its agent to accept delivery of the registered mail, as provided in this section, shall not affect the validity of such notice and any insurer or agent of an insurer refusing to accept such registered mail shall be charged with the knowledge of the contents of such notice. When notice has been sent to an agent of the insurer such notice shall be notice to the insurer. The word "agent" as used in this subsection shall include, but shall not be limited to, any person designated by the insurer as its agent for the service of process, any person duly licensed by the insurer in the State as insurance agent, any general agent of the company in the State of North Carolina, and any employee of the company in a managerial or other responsible position, or the North Carolina Commissioner of Insurance; provided, where the return receipt is signed by an employee of the insurer or an employee of an

agent for the insurer, shall be deemed for the purposes of this subsection to have been received. The term "agent" as used in this subsection shall not include a producer of record or broker, who forwards an application for insurance to the North Carolina Motor Vehicle Reinsurance Facility.

The insurer, upon receipt of summons, complaint or other process, shall be entitled, upon its motion, to intervene in the suit against its insured as a party defendant and to defend the same in the name of its insured. In the event of such intervention by an insurer it shall become a named party defendant. The insurer shall have 30 days from the signing of the return receipt acknowledging receipt of the summons, complaint or other pleading in which to file a motion to intervene, along with any responsive pleading, whether verified or not, which it may deem necessary to protect its interest: Provided, the court having jurisdiction over the matter may, upon motion duly made, extend the time for the filing of responsive pleading or continue the trial of the matter for the purpose of affording the insurer a reasonable time in which to file responsive pleading or defend the action. If, after receiving copy of the summons, complaint or other pleading, the insurer elects not to defend the action, if coverage is in fact provided by the policy, the insurer shall be bound to the extent of its policy limits to the judgment taken by default against the insured, and noncooperation of the insured shall not be a defense.

If the plaintiff initiating an action against the insured has complied with the provisions of this subsection, then, in such event, the insurer may not cancel or annul the policy as to such liability and the defense of noncooperation shall not be available to the insurer: Provided, however, nothing in this section shall be construed as depriving an insurer of its defenses that the policy was not in force at the time in question, that the operator was not an "insured" under policy provisions, or that the policy had been lawfully canceled at the time of the accident giving rise to the cause of action.

Provided further that the provisions of this subdivision shall not apply when the insured has delivered a copy of the summons, complaint or other pleadings served on him to his insurance carrier within the time provided by law for filing answer, demurrer or other pleadings.

(2) The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage;

(3) The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision (2) of subsection (b) of this section;

(4) The policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of the Article shall constitute the entire contract between the parties.

(g) Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Article. With respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

(h) Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this Article.

(i) Any motor vehicle liability policy may provide for the prorating of the insurance thereunder with other valid and collectible insurance.

(j) The requirements for a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements.

(k) Any binder issued pending the issuance of a motor vehicle liability policy shall be deemed to fulfill the requirements for such a policy.

(*l*) A party injured by an uninsured motor vehicle covered under a policy in amounts less than those set forth in G.S. 20-279.5, may execute a contractual covenant not to enforce against the owner, operator, or maintainer of the uninsured vehicle any judgment that exceeds the liability policy limits, as consideration for payment of any applicable policy limits by the insurer where judgment exceeds the policy limits. A covenant not to enforce judgment shall not preclude the injured party from pursuing available uninsured motorist benefits, unless the terms of the covenant expressly provide otherwise, and shall not preclude an insurer providing uninsured motorist coverage from pursuing any right of subrogation.

(m) **(Effective January 1, 2009)** Every insurer that sells motor vehicle liability policies subject to the requirements of subdivisions (b)(3) and (b)(4) of this section shall give reasonable notice to the named insured, when the policy is issued and renewed, that the named insured may purchase uninsured motorist bodily injury coverage and, if applicable, underinsured motorist coverage with limits up to one million dollars ($1,000,000) per person and one million dollars ($1,000,000) per accident. An insurer shall be deemed to have given reasonable notice if it includes the following or substantially similar language on the policy's original and renewal declarations pages or in a separate notice accompanying the original and renewal declarations pages in at least 10 point type:

"NOTICE: YOU MAY PURCHASE UNINSURED MOTORIST BODILY INJURY COVERAGE AND, IF APPLICABLE, UNDERINSURED MOTORIST COVERAGE WITH LIMITS UP TO ONE MILLION DOLLARS ($1,000,000) PER PERSON AND ONE MILLION DOLLARS ($1,000,000) PER ACCIDENT. THIS INSURANCE PROTECTS YOU AND YOUR FAMILY AGAINST INJURIES CAUSED BY THE NEGLIGENCE OF OTHER DRIVERS WHO MAY HAVE LIMITED OR ONLY MINIMUM COVERAGE OR EVEN NO LIABILITY INSURANCE. YOU SHOULD CONTACT YOUR INSURANCE COMPANY OR AGENT TO DISCUSS YOUR OPTIONS FOR OBTAINING THIS ADDITIONAL COVERAGE. YOU SHOULD ALSO READ YOUR ENTIRE POLICY TO UNDERSTAND WHAT IS COVERED UNDER UNINSURED AND UNDERINSURED MOTORIST COVERAGES."

(n) **(Effective January 1, 2009)** Nothing in this section shall be construed to provide greater amounts of uninsured or underinsured motorist coverage in a liability policy than the insured has purchased from the insurer under this section.

(o) **(Effective January 1, 2009)** An insurer that fails to comply with subsection (m) of this section is subject to a civil penalty under G.S. 58-2-70. (1953, c. 1300, s. 21; 1955, c. 1355; 1961, c. 640; 1965, c. 156; c. 674, s. 1; c. 898; 1967, c. 277, s. 4; c. 854; c. 1159, s. 1; c. 1162, s. 1; c. 1186, s. 1; c. 1246, s. 1; 1971, c. 1205, s. 2; 1973, c. 745, s. 4; 1975, c. 326, ss. 1, 2; c. 716, s. 5; c. 866, ss. 1-4; 1979, cc. 190, 675; c. 832, ss. 6, 7; 1983, c. 777, ss. 1, 2; 1985, c. 666, s. 74; 1985 (Reg. Sess., 1986), c. 1027, ss. 41, 42; 1987, c. 529; 1987 (Reg. Sess., 1988), c. 975, s. 33; 1991, c. 469, s. 4; c. 636, s. 3; c. 646, ss. 1, 2; c. 761, s. 12.3; 1991 (Reg. Sess., 1992), c. 837, s. 9; 1997-396, ss. 2, 3; 1999-195, s. 1; 1999-228, s. 4; 2003-311, ss. 1, 2; 2008-124, ss. 1.1, 1.2.)

Subdivisions (b)(3) and (b)(4) are set out twice. — The first versions of subdivisions (b)(3) and (b)(4) set out above are effective until January 1, 2009. The second version of subdivisions (b)(3) and (b)(4) set out above are effective January 1, 2009.

Editor's Note. —

Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, ss. 1.1 and 1.2, effective January 1, 2009, and applicable to policies issued or renewed on or after that date, in subdivision (b)(3), rewrote the first paragraph and added the last paragraph; in subdivision (b)(4), rewrote the first paragraph, deleted the former sixth and seventh paragraphs, and added the last paragraph; added subsections (m) through (o).

CASE NOTES

I. General Consideration.
III. Uninsured Motorist Coverage.
IV. Underinsured Motorist Coverage.

I. GENERAL CONSIDERATION.

Applied in State Farm Mut. Auto. Ins. Co. v. Gaylor, — N.C. App. —, 660 S.E.2d 104, 2008 N.C. App. LEXIS 821 (2008).

Cited in Piles v. Allstate Ins. Co., — N.C. App. —, 653 S.E.2d 181, 2007 N.C. App. LEXIS 2449 (2007).

III. UNINSURED MOTORIST COVERAGE.

Subdivision (b)(3)b of this section requires physical contact, etc.

Insured's breach of contract and related claims against his automobile insurer were properly dismissed under G.S. 20-278.21(b)(3)(b) when his complaint alleged that he had struck a pine tree log which had fallen off of a truck and was lying in the middle on the interstate, but no evidence showed from what vehicle, if any, the pine tree log fell from, when it fell, or how long it had been lying on the interstate prior to impact, and thus, the complaint did not satisfy the physical contact requirement. Moore v. Nationwide Mut. Ins. Co., — N.C. App. —, 664 S.E.2d 326, 2008 N.C. App. LEXIS 1171 (2008).

Illustrative Case. —

Insured was not precluded as a matter of law from recovering under the uninsured motorist policy because it was possible that a reasonable interpretation of the uninsured motorist policy at issue was that a rock, which flew off a dump truck carting a load of rocks (which was unquestionably an expected use of the truck) and hit a vehicle, was a sufficiently direct collision between the truck and the vehicle. Geico Ins. Co. v. Larson, 542 F. Supp. 2d 441, 2008 U.S. Dist. LEXIS 12643 (E.D.N.C. 2008).

IV. UNDERINSURED MOTORIST COVERAGE.

Entitlement to UIM Coverage. —

While under G.S. 20-279.21(b)(4) an insurer was not subject to the jurisdiction of the North Carolina Rate Bureau and, therefore, was not required to use the Rate Bureau approved form, the insurer nonetheless was required to prove that an insured with a fleet of covered vehicles had validly rejected underinsured motorist (UIM) coverage or selected alternative UIM coverage limits. Because the record was devoid of any evidence that the insured made such a rejection or selection, the policy's liability limit for any auto applied with respect to UIM coverage. Great American Ins. Co. v. Freeman, — N.C. App. —, 665 S.E.2d 536, 2008 N.C. App. LEXIS 1612 (2008).

§ 20-279.31. Other violations; penalties.

CASE NOTES

Giving False Information for a Motor Vehicle Crash Report. — Trial court committed error by vacating a jury's verdict convicting a female defendant of giving false information for a motor vehicle crash report in violation of G.S. 20-279.31(b) because: (1) the female defendant "gave information" by telling an officer she was the driver of a vehicle involved in an accident; (2) it could be inferred that a male defendant was the driver of the vehicle, so it could be inferred that the female defendant knowingly gave false information; and (3) the driver's identity was a required part of a reportable accident report. State v. Hernandez, — N.C. App. —, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008).

§ 20-279.32. Exceptions.

CASE NOTES

Coverage Available to Sheriff's Deputy. — County's policy controlled the underinsured motorist coverage available to a deputy sheriff as the North Carolina Motor Vehicle Safety and Financial Responsibility Act, G.S. 20-279.1, did not apply due to G.S. 20-279.32. N.C. Counties Liab. & Prop. Joint Risk Mgmt. Agency v. Curry, — N.C. App. —, 662 S.E.2d 678, 2008 N.C. App. LEXIS 1225 (July 1, 2008).

Applied in Great American Ins. Co. v. Freeman, — N.C. App. —, 665 S.E.2d 536, 2008 N.C. App. LEXIS 1612 (2008).

§ 20-279.39. Title of Article.

CASE NOTES

Cited in Great American Ins. Co. v. Freeman, — N.C. App. —, 665 S.E.2d 536, 2008 N.C. App. LEXIS 1612 (2008).

ARTICLE 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

§ 20-286. Definitions.

CASE NOTES

Negative equity and gap insurance do not come within the definition of "purchase money obligation," and thus cannot give rise to a purchase money security interest. Wells Fargo Fin. N.C. 1, Inc. v. Price, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 97420 (E.D.N.C. Nov. 14, 2007).

§ 20-305. Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession.

It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them:

(1) To require, coerce, or attempt to coerce any dealer to accept delivery of any motor vehicle or vehicles, parts or accessories therefor, or any other commodities, which shall not have been ordered by that dealer, or to accept delivery of any motor vehicle or vehicles which have been equipped in a manner other than as specified by the dealer.

(2) To require, coerce, or attempt to coerce any dealer to enter into any agreement with such manufacturer, factory branch, distributor, or distributor branch, or representative thereof, or do any other act unfair to such dealer, by threatening to cancel any franchise existing between such manufacturer, factory branch, distributor, distributor branch, or representative thereof, and such dealer;

(3) **(See Editor's note for applicability)** Unfairly without due regard to the equities of the dealer, and without just provocation, to cancel the franchise of such dealer;

(4) Notwithstanding the terms of any franchise agreement, to prevent or refuse to approve the sale or transfer of the ownership of a dealership by the sale of the business, stock transfer, or otherwise, or the transfer, sale or assignment of a dealer franchise, or a change in the executive management or principal operator of the dealership, or relocation of the dealership to another site within the dealership's relevant market area, if the Commissioner has determined, if requested in writing by the dealer within 30 days after receipt of an objection to the proposed transfer, sale, assignment, relocation, or change, and after a hearing on the matter, that the failure to permit or honor the transfer, sale, assignment, relocation, or change is unreasonable under the circumstances. No franchise may be transferred, sold, assigned, relocated, or the executive management or principal operators changed, unless the franchisor has been given at least 30 days' prior written notice as to the proposed transferee's name and address, financial ability, and qualifications of the proposed transferee, a copy of the purchase agreement between the dealership and the proposed transferee, the identity and qualifications of the persons proposed to be involved in executive management or as principal operators, and the location and site plans of any proposed relocation. The franchisor shall send the dealership and the proposed transferee notice of objection, by registered or certified mail, return receipt requested, to the proposed transfer, sale, assignment, relocation, or change within 30 days after receipt of notice from the dealer, as provided in this section. The notice of objection shall state in detail all factual and legal bases for the objection on the part of the franchisor to the proposed transfer, sale, assignment, relocation, or change that is specifically referenced in this subdivision. An objection to a proposed transfer, sale, assignment, relocation, or change in the executive management or principal operator of the dealership may only be premised upon the factual and legal bases specifically referenced in this subdivision. A manufacturer's notice of objection which is based upon factual or legal issues that are not specifically referenced in this subdivision as being issues upon which the Commissioner shall base his determination shall not be effective to preserve the franchisor's right to object to the proposed transfer sale, assignment, relocation, or change, provided the dealership or proposed transferee has submitted written notice, as required above, as to the proposed transferee's name and address, financial ability, and qualifications of the proposed transferee, a copy of the purchase agreement between the dealership and the proposed transferee, the identity and qualifications of the persons proposed to be involved in the executive management or as principal operators, and the location and site plans of any proposed relocation. Failure by the franchisor to send notice of objection within 30 days shall constitute waiver by the franchisor of any right to object to the proposed transfer, sale, assignment, relocation, or change. If the franchisor requires additional information to complete its review, the franchisor shall notify the dealership within 15 days after receipt of the proposed transferee's name and address, financial ability, and qualifications, a copy of the purchase agreement between the dealership and the proposed transferee, the identity and qualifications of the persons proposed to be involved in executive management or as principal operators, and the location and site plans

of any proposed relocation. If the franchisor fails to request additional information from the dealer or proposed transferee within 15 days of receipt of this initial information, the 30-day time period within which the franchisor may provide notice of objection shall be deemed to run from the initial receipt date. Otherwise, the 30-day time period within which the franchisor may provide notice of objection shall run from the date the franchisor has received the supplemental information requested from the dealer or proposed transferee; provided, however, that failure by the franchisor to send notice of objection within 60 days of the franchisor's receipt of the initial information from the dealer shall constitute waiver by the franchisor of any right to object to the proposed transfer, sale, assignment, relocation, or change. With respect to a proposed transfer of ownership, sale, or assignment, the sole issue for determination by the Commissioner and the sole issue upon which the Commissioner shall hear or consider evidence is whether, by reason of lack of good moral character, lack of general business experience, or lack of financial ability, the proposed transferee is unfit to own the dealership. For purposes of this subdivision, the refusal by the manufacturer to accept a proposed transferee who is of good moral character and who otherwise meets the written, reasonable, and uniformly applied business experience and financial requirements, if any, required by the manufacturer of owners of its franchised automobile dealerships is presumed to demonstrate the manufacturer's failure to prove that the proposed transferee is unfit to own the dealership. With respect to a proposed change in the executive management or principal operator of the dealership, the sole issue for determination by the Commissioner and the sole issue on which the Commissioner shall hear or consider evidence shall be whether, by reason of lack of training, lack of prior experience, poor past performance, or poor character, the proposed candidate for a position within the executive management or as principal operator of the dealership is unfit for the position. For purposes of this subdivision, the refusal by the manufacturer to accept a proposed candidate for executive management or as principal operator who is of good moral character and who otherwise meets the written, reasonable, and uniformly applied standards or qualifications, if any, of the manufacturer relating to the business experience and prior performance of executive management required by the manufacturers of its dealers is presumed to demonstrate the manufacturer's failure to prove the proposed candidate for executive management or as principal operator is unfit to serve the capacity. With respect to a proposed relocation or other proposed change, the issue for determination by the Commissioner is whether the proposed relocation or other change is unreasonable under the circumstances. For purposes of this subdivision, the refusal by the manufacturer to agree to a proposed relocation which meets the written, reasonable, and uniformly applied standards or criteria, if any, of the manufacturer relating to dealer relocations is presumed to demonstrate that the manufacturer's failure to prove the proposed relocation is unreasonable under the circumstances. The manufacturer shall have the burden of proof before the Commissioner under this subdivision. It is unlawful for a manufacturer to, in any way, condition its approval of a proposed transfer, sale, assignment, change in the dealer's executive management, principal operator, or appointment of a designated successor, on the existing or proposed dealer's willingness to construct a new facility, renovate the existing facility, acquire or refrain from acquiring one or more line-makes of vehicles, separate or divest one or more line-makes of vehicle, or establish or maintain exclusive facilities, personnel, or display space. It is unlawful for a manufacturer to, in any way, condition its approval of a proposed relocation on the existing or proposed dealer's willingness to acquire or refrain from acquiring one or more line-makes of vehicles, separate or divest one or more line-makes of vehicle, or establish or maintain exclusive facilities, personnel, or display space. The opinion or determination of a franchisor that the continued existence of one of its franchised dealers situated in this State is not viable, or that the dealer holds or fails to hold licensing rights for the sale of other line-makes of vehicles in a manner consistent with the franchisor's existing or future distribution or marketing plans, shall not constitute a lawful basis for the franchisor to fail or refuse to approve a dealer's proposed relocation: provided, however, that nothing contained in this subdivision shall be deemed to prevent or prohibit a franchisor from failing to approve a dealer's proposed relocation on grounds that the specific site or facility proposed by the dealer is otherwise unreasonable under the circumstances. Approval of a relocation pursuant to this subdivision shall not in itself constitute the franchisor's representation or assurance of the dealer's viability at that location.

(5) To enter into a franchise establishing an additional new motor vehicle dealer or relocating an existing new motor vehicle dealer into a relevant market area where the same line make is then represented without first notifying in writing the Commissioner and each new motor vehicle dealer in that line make in the relevant market area of the intention to establish an additional dealer or to relocate an existing dealer within or into that market area. Within 30 days of receiving such notice or within 30 days after the end of any appeal procedure provided by the manufacturer, any new motor vehicle dealer may file with the Commissioner a protest to the establishing or relocating of the new motor vehicle dealer. When a protest is filed, the Commissioner shall promptly inform the manufacturer that a timely protest has been filed, and that the manufacturer shall not establish or relocate the proposed new motor vehicle dealer until the Commissioner has held a hearing and has determined that there is good cause for permitting the addition or relocation of such new motor vehicle dealer.

a. This section does not apply:

1. To the relocation of an existing new motor vehicle dealer within that dealer's relevant market area, provided that the relocation not be at a site within 10 miles of a licensed new motor vehicle dealer for the same line make of motor vehicle. If this sub-subdivision is applicable, only dealers trading in the same line-make of vehicle that are located within the 10-mile radius shall be entitled to notice from the manufacturer and have the protest rights afforded under this section.
2. If the proposed additional new motor vehicle dealer is to be established at or within two miles of a location at which a former licensed new motor vehicle dealer for the same line make of new motor vehicle had ceased operating within the previous two years.
3. To the relocation of an existing new motor vehicle dealer within two miles of the existing site of the new motor vehicle dealership if the franchise has been operating on a regular basis from the existing site for a minimum of three years immediately preceding the relocation.

4. To the relocation of an existing new motor vehicle dealer if the proposed site of the relocated new motor vehicle dealership is further away from all other new motor vehicle dealers of the same line make in that relevant market area.
5. Repealed by Session Laws 2008-156, s. 3, effective August 3, 2008.

b. In determining whether good cause has been established for not entering into or relocating an additional new motor vehicle dealer for the same line make, the Commissioner shall take into consideration the existing circumstances, including, but not limited to:
1. The permanency of the investment of both the existing and proposed additional new motor vehicle dealers;
2. Growth or decline in population, density of population, and new car registrations in the relevant market area;
3. Effect on the consuming public in the relevant market area;
4. Whether it is injurious or beneficial to the public welfare for an additional new motor vehicle dealer to be established;
5. Whether the new motor vehicle dealers of the same line make in that relevant market area are providing adequate competition and convenient customer care for the motor vehicles of the same line make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel;
6. Whether the establishment of an additional new motor vehicle dealer or relocation of an existing new motor vehicle dealer in the relevant market area would increase competition in a manner such as to be in the long-term public interest; and
7. The effect on the relocating dealer of a denial of its relocation into the relevant market area.

c. The Commissioner shall try to conduct the hearing and render his final determination if possible, within 180 days after a protest is filed.

d. Any parties to a hearing by the Commissioner concerning the establishment or relocating of a new motor vehicle dealer shall have a right of review of the decision in a court of competent jurisdiction pursuant to Chapter 150B of the General Statutes.

e. In a hearing involving a proposed additional dealership, the manufacturer or distributor has the burden of proof under this section. In a proceeding involving the relocation of an existing dealership, the dealer seeking to relocate has the burden of proof under this section.

f. If the Commissioner determines, following a hearing, that good cause exists for permitting the proposed additional or relocated motor vehicle dealership, the dealer seeking the proposed additional or relocated motor vehicle dealership must, within two years, obtain a license from the Commissioner for the sale of vehicles at the relevant site, and actually commence operations at the site selling new motor vehicles of all line makes, as permitted by the Commissioner. Failure to obtain a permit and commence sales within two years shall constitute waiver by the dealer of the dealer's right to the additional or relocated dealership, requiring renotification, a new hearing, and a new determination as provided in this section. If the Commissioner fails to determine that good cause exists for permitting the proposed additional or relocated motor vehicle dealership, the manufacturer seeking the proposed additional dealership or dealer seeking to relocate may not again provide notice of its intention or otherwise attempt to establish an additional dealership or relocate to any location within 10 miles of the site of the original proposed additional dealership or relocation site for a minimum of three years from the date of the Commissioner's determination.

g. **(See Editor's note for applicability)** For purposes of this subdivision, the addition, creation, or operation of a "satellite" or other facility, not physically part of or contiguous to an existing licensed new motor vehicle dealer, whether or not owned or operated by a person or other entity holding a franchise as defined by G.S. 20-286(8a), at which warranty service work authorized or reimbursed by a manufacturer is performed or at which new motor vehicles are offered for sale to the public, shall be considered an additional new motor vehicle dealer requiring a showing of good cause, prior notification to existing new motor vehicle dealers of the same line make of vehicle within the relevant market area by the manufacturer and the opportunity for a hearing before the Commissioner as provided in this subdivision.

(6) Notwithstanding the terms, provisions or conditions of any franchise or notwithstanding the terms or provisions of any waiver, to terminate, cancel or fail to renew any franchise with a licensed new motor vehicle dealer unless the manufacturer has satisfied the notice requirements of subparagraph c. and the Commissioner has determined, if requested in writing by the dealer within (i) the time period specified in G.S. 20-305(6)c.1.II., III., or IV., as applicable, or (ii) the effective date of the franchise termination specified or proposed by the manufacturer in the notice of termination, whichever period of time is longer, and after a hearing on the matter, that there is good cause for the termination, cancellation, or nonrenewal of the franchise and that the manufacturer has acted in good faith as defined in this act regarding the termination, cancellation or nonrenewal. When such a petition is made to the Commissioner by a dealer for determination as to the existence of good cause and good faith for the termination, cancellation or nonrenewal of a franchise, the Commissioner shall promptly inform the manufacturer that a timely petition has been filed, and the franchise in question shall continue in effect pending the Commissioner's decision. The Commissioner shall try to conduct the hearing and render a final determination within 180 days after a petition has been filed. If the termination, cancellation or nonrenewal is pursuant to G.S. 20-305(6)c.1.III. then the Commissioner shall give the proceeding priority consideration and shall try to render his final determination no later than 90 days after the petition has been filed. Any parties to a hearing by the Commissioner under this section shall have a right of review of the decision in a court of competent jurisdiction pursuant to Chapter 150B of the General Statutes. Any determination of the Commissioner under this section finding that good cause exists for the nonrenewal, cancellation, or termination of any franchise shall automatically be stayed during any period that the affected dealer shall have the right to judicial review or appeal of the determination before the superior court or any other appellate court and during the pendency of any appeal; provided, however, that within 30 days of entry of the Commissioner's order, the affected dealer provide such security as the reviewing court, in its discretion, may deem appropriate for payment of such costs and damages as may

be incurred or sustained by the manufacturer by reason of and during the pendency of the stay. Although the right of the affected dealer to such stay is automatic, the procedure for providing such security and for the award of damages, if any, to the manufacturer upon dissolution of the stay shall be in accordance with G.S. 1A-1, Rule 65(d) and (e). No such security provided by or on behalf of any affected dealer shall be forfeited or damages awarded against a dealer who obtains a stay under this subdivision in the event the ownership of the affected dealership is subsequently transferred, sold, or assigned to a third party in accordance with this subdivision or subdivision (4) of this section and the closing on such transfer, sale, or assignment occurs no later than 180 days after the date of entry of the Commissioner's order. Furthermore, unless and until the termination, cancellation, or nonrenewal of a dealer's franchise shall finally become effective, in light of any stay or any order of the Commissioner determining that good cause exists for the termination, cancellation, or nonrenewal of a dealer's franchise as provided in this paragraph, a dealer who receives a notice of termination, cancellation, or nonrenewal from a manufacturer as provided in this subdivision shall continue to have the same rights to assign, sell, or transfer the franchise to a third party under the franchise and as permitted under G.S. 20-305(4) as if notice of the termination had not been given by the manufacturer. Any franchise under notice or threat of termination, cancellation, or nonrenewal by the manufacturer which is duly transferred in accordance with G.S. 20-305(4) shall not be subject to termination by reason of failure of performance or breaches of the franchise on the part of the transferor.

a. Notwithstanding the terms, provisions or conditions of any franchise or the terms or provisions of any waiver, good cause shall exist for the purposes of a termination, cancellation or nonrenewal when:
    1. There is a failure by the new motor vehicle dealer to comply with a provision of the franchise which provision is both reasonable and of material significance to the franchise relationship provided that the dealer has been notified in writing of the failure within 180 days after the manufacturer first acquired knowledge of such failure;
    2. If the failure by the new motor vehicle dealer relates to the performance of the new motor vehicle dealer in sales or service, then good cause shall be defined as the failure of the new motor vehicle dealer to comply with reasonable performance criteria established by the manufacturer if the new motor vehicle dealer was apprised by the manufacturer in writing of the failure; and
        I. The notification stated that notice was provided of failure of performance pursuant to this section;
        II. The new motor vehicle dealer was afforded a reasonable opportunity, for a period of not less than 180 days, to comply with the criteria; and
        III. The new motor vehicle dealer failed to demonstrate substantial progress towards compliance with the manufacturer's performance criteria during such period and the new motor vehicle dealer's failure was not primarily due to economic or market factors within the dealer's relevant market area which were beyond the dealer's control.

b. The manufacturer shall have the burden of proof under this section.

c. Notification of Termination, Cancellation and Nonrenewal. —
  1. Notwithstanding the terms, provisions or conditions of any franchise prior to the termination, cancellation or nonrenewal of any franchise, the manufacturer shall furnish notification of termination, cancellation or nonrenewal to the new motor vehicle dealer as follows:
     I. In the manner described in G.S. 20-305(6)c2 below; and
     II. Not less than 90 days prior to the effective date of such termination, cancellation or nonrenewal; or
     III. Not less than 15 days prior to the effective date of such termination, cancellation or nonrenewal with respect to any of the following:
        A. Insolvency of the new motor vehicle dealer, or filing of any petition by or against the new motor vehicle dealer under any bankruptcy or receivership law;
        B. Failure of the new motor vehicle dealer to conduct its customary sales and service operations during its customary business hours for seven consecutive business days, except for acts of God or circumstances beyond the direct control of the new motor vehicle dealer;
        C. Revocation of any license which the new motor vehicle dealer is required to have to operate a dealership;
        D. Conviction of a felony involving moral turpitude, under the laws of this State or any other state, or territory, or the District of Columbia.
     IV. Not less than 180 days prior to the effective date of such termination, cancellation, or nonrenewal which occurs as a result of any change in ownership, operation, or control of all or any part of the business of the manufacturer, factory branch, distributor, or distributor branch whether by sale or transfer of assets, corporate stock or other equity interest, assignment, merger, consolidation, combination, joint venture, redemption, operation of law or otherwise; or the termination, suspension, or cessation of a part or all of the business operations of the manufacturers, factory branch, distributor, or distributor branch; or discontinuance of the sale of the product line or a change in distribution system by the manufacturer whether through a change in distributors or the manufacturer's decision to cease conducting business through a distributor altogether.
     V. Unless the failure by the new motor vehicle dealer relates to the performance of the new motor vehicle dealer in sales or service, not more than one year after the manufacturer first acquired knowledge of the basic facts comprising the failure.
  2. Notification under this section shall be in writing; shall be by certified mail or personally delivered to the new motor vehicle dealer; and shall contain:
     I. A statement of intention to terminate, cancel or not to renew the franchise;
     II. A detailed statement of all of the material reasons for the termination, cancellation or nonrenewal; and
     III. The date on which the termination, cancellation or nonrenewal takes effect.

3. Notification provided in G.S. 20-305(6)c1II of 90 days prior to the effective date of such termination, cancellation or renewal may run concurrent with the 180 days designated in G.S. 20-305(6)a2II provided the notification is clearly designated by a separate written document mailed by certified mail or personally delivered to the new motor vehicle dealer.

d. Payments.

1. Upon the termination, nonrenewal or cancellation of any franchise by the manufacturer or distributor, pursuant to this section, the new motor vehicle dealer shall be allowed fair and reasonable compensation by the manufacturer for the:
   I. New motor vehicle inventory that has been acquired from the manufacturer within 18 months, at a price not to exceed the original manufacturer's price to the dealer, and which has not been altered or damaged, and which has not been driven more than 200 miles, and for which no certificate of title has been issued;
   II. Unused, undamaged and unsold supplies and parts purchased from the manufacturer, at a price not to exceed the original manufacturer's price to the dealer, provided such supplies and parts are currently offered for sale by the manufacturer or distributor in its current parts catalogs and are in salable condition;
   III. Equipment, signs, and furnishings that have not been altered or damaged and that have been required by the manufacturer or distributor to be purchased by the new motor vehicle dealer from the manufacturer or distributor, or their approved sources; and
   IV. Special tools that have not been altered or damaged and that have been required by the manufacturer or distributor to be purchased by the new motor vehicle dealer from the manufacturer or distributor, or their approved sources within five years immediately preceding the termination, nonrenewal or cancellation of the franchise.

2. Fair and reasonable compensation for the above shall be paid by the manufacturer within 90 days of the effective date of termination, cancellation or nonrenewal, provided the new motor vehicle dealer has clear title to the inventory and has conveyed title and possession of the same to the manufacturer. The manufacturer shall be obligated to pay or reimburse the dealer for any transportation charges associated with the manufacturer's repurchase obligations under this sub-subparagraph. The manufacturer may not charge the dealer any handling, restocking, or other similar costs or fees associated with items repurchased by the manufacturer under this sub-subparagraph.

3. In addition to the other payments set forth in this section, if a termination, cancellation, or nonrenewal is premised upon any of the occurrences set forth in G.S. 20-305(6)c.1.IV., then the manufacturer shall be liable to the dealer for an amount at least equivalent to the fair market value of the franchise on (i) the date the franchisor announces the action which results in termination, cancellation, or nonrenewal; or (ii) the date the action which results in termination, cancellation, or nonrenewal first became general knowledge; or (iii) the day

12 months prior to the date on which the notice of termination, cancellation, or nonrenewal is issued, whichever amount is higher. Payment is due within 90 days of the effective date of the termination, cancellation, or nonrenewal. If the termination, cancellation, or nonrenewal is due to a manufacturer's change in distributors, the manufacturer may avoid paying fair market value to the dealer if the new distributor or the manufacturer offers the dealer a franchise agreement with terms acceptable to the dealer.

e. Dealership Facilities Assistance upon Termination, Cancellation or Nonrenewal.

In the event of the termination, cancellation or nonrenewal by the manufacturer or distributor under this section, except termination, cancellation or nonrenewal for insolvency, license revocation, conviction of a crime involving moral turpitude, or fraud by a dealer-owner:

1. Subject to paragraph 3, if the new motor vehicle dealer is leasing the dealership facilities from a lessor other than the manufacturer, the manufacturer shall pay the new motor vehicle dealer a sum equivalent to the rent for the unexpired term of the lease or three year's rent, whichever is less, or such longer term as is provided in the franchise agreement between the dealer and manufacturer; except that, in the case of motorcycle dealerships, the manufacturer shall pay the new motor vehicle dealer the sum equivalent to the rent for the unexpired term of the lease or one year's rent, whichever is less, or such longer term as provided in the franchise agreement between the dealer and manufacturer; or
2. Subject to paragraph 3, if the new motor vehicle dealer owns the dealership facilities, the manufacturer shall pay the new motor vehicle dealer a sum equivalent to the reasonable rental value of the dealership facilities for three years, or for one year in the case of motorcycle dealerships.
3. In order to be entitled to facilities assistance from the manufacturer, as provided in this paragraph e., the dealer, owner, or lessee, as the case may be, shall have the obligation to mitigate damages by listing the demised premises for lease or sublease with a licensed real estate agent within 30 days after the effective date of the termination of the franchise and thereafter by reasonably cooperating with said real estate agent in the performance of the agent's duties and responsibilities. In the event that the dealer, owner, or lessee is able to lease or sublease the demised premises, the dealer shall be obligated to pay the manufacturer the net revenue received from such mitigation up to the total amount of facilities assistance which the dealer has received from the manufacturer pursuant to sub-subdivisions 1. and 2. To the extent and for such uses and purposes as may be consistent with the terms of the lease, a manufacturer who pays facilities assistance to a dealer under this paragraph e. shall be entitled to occupy and use the dealership facilities during the years for which the manufacturer shall have paid rent under sub-subdivisions 1. and 2.
4. In the event the termination relates to fewer than all of the franchises operated by the dealer at a single location, the

amount of facilities assistance which the manufacturer is required to pay the dealer under this sub-subdivision shall be based on the proportion of gross revenue received from the sale and lease of new vehicles by the dealer and from the dealer's parts and service operations during the three years immediately preceding the effective date of the termination (or any shorter period that the dealer may have held these franchises) of the line-makes being terminated, in relation to the gross revenue received from the sale and lease of all line-makes of new vehicles by the dealer and from the total of the dealer's and parts and service operations from this location during the same three-year period.

5. The compensation required for facilities assistance under this paragraph e. shall be paid by the manufacturer within 90 days of the effective date of termination, cancellation, or nonrenewal.

f. The provisions of sub-subdivisions d. and e. above shall not be applicable when the termination, nonrenewal or cancellation of the franchise agreement is the result of the voluntary act of the dealer.

Notwithstanding the terms of any contract or agreement, any dealer's termination or resignation shall not be deemed to be voluntary if that termination or resignation occurred under the manufacturer's threat of nonrenewal, cancellation, or termination of the franchise.

g. A franchise shall continue in full force and operation notwithstanding a change, in whole or in part, of an established plan or system of distribution of the motor vehicles offered for sale under the franchise. The appointment of a new manufacturer, factory branch, distributor, or distributor branch for motor vehicles offered for sale under the franchise agreement shall be deemed to be a change of an established plan or system of distribution.

Upon the occurrence of the change, the Division shall deny an application of a manufacturer, factory branch, distributor, or distributor branch for a license or license renewal unless the applicant for a license as a manufacturer, factory branch, distributor, or distributor branch offers to each motor vehicle dealer who is a party to a franchise for that line-make a new franchise agreement containing substantially the same provisions which were contained in the previous franchise agreement or files an affidavit with the Division acknowledging its undertaking to assume and fulfill the rights, duties, and obligations of its predecessor under the previous franchise agreement.

(7) Notwithstanding the terms of any contract or agreement, to prevent or refuse to honor the succession to a dealership, including the franchise, by a motor vehicle dealer's designated successor as provided for under this subsection.

a. Any owner of a new motor vehicle dealership may appoint by will, or any other written instrument, a designated successor to succeed in the respective ownership interest or interest as principal operator of the owner in the new motor vehicle dealership, including the franchise, upon the death or incapacity of the owner or principal operator. In order for succession to the position of principal operator to occur by operation of law in accordance with sub-subdivision c. below, the owner's choice of a successor must be approved by the dealer, in accordance with the dealer's bylaws, if applicable, either prior or subsequent to the death or incapacity of the existing principal operator.

b. Any objections by a manufacturer or distributor to an owner's appointment of a designated successor shall be asserted in accordance with the following procedure:
    1. Within 30 days after receiving written notice of the identity of the owner's designated successor and general information as to the financial ability and qualifications of the designated successor, the franchisor shall send the owner and designated successor notice of objection, by registered or certified mail, return receipt requested, to the appointment of the designated successor. The notice of objection shall state in detail all facts which constitute the basis for the contention on the part of the manufacturer or distributor that good cause, as defined in this sub-subdivision below, exists for rejection of the designated successor. Failure by the franchisor to send notice of objection within 30 days and otherwise as provided in this sub-subdivision shall constitute waiver by the franchisor of any right to object to the appointment of the designated successor.
    2. Any time within 30 days of receipt of the manufacturer's notice of objection the owner or the designated successor may file a request in writing with the Commissioner that the Commissioner hold an evidentiary hearing and determine whether good cause exists for rejection of the designated successor. When such a request is filed, the Commissioner shall promptly inform the affected manufacturer or distributor that a timely request has been filed.
    3. The Commissioner shall endeavor to hold the evidentiary hearing required under this sub-subdivision and render a determination within 180 days after receipt of the written request from the owner or designated successor. In determining whether good cause exists for rejection of the owner's appointed designated successor, the manufacturer or distributor has the burden of proving that the designated successor is a person who is not of good moral character or does not meet the franchisor's existing written and reasonable standards and, considering the volume of sales and service of the new motor vehicle dealer, uniformly applied minimum business experience standards in the market area.
    4. Any parties to a hearing by the Commissioner concerning whether good cause exists for the rejection of the dealer's designated successor shall have a right of review of the decision in a court of competent jurisdiction pursuant to Chapter 150B of the General Statutes.
    5. Nothing in this sub-subdivision shall preclude a manufacturer or distributor from, upon its receipt of written notice from an owner of the identity of the owner's designated successor, requiring that the designated successor promptly provide personal and financial data that is reasonably necessary to determine the financial ability and qualifications of the designated successor; provided, however, that such a request for additional information shall not delay any of the time periods or constraints contained herein.
    6. In the event death or incapacity of the owner or principal operator occurs prior to the time a manufacturer or distrib-

utor receives notice of the owner's appointment of a designated successor or before the Commissioner has rendered a determination as provided above, the existing franchise shall remain in effect and the designated successor shall be deemed to have succeeded to all of the owner's or principal operator's rights and obligations in the dealership and under the franchise until a determination is made by the Commissioner or the rights of the parties have otherwise become fixed in accordance with this sub-subdivision.

c. Except as otherwise provided in sub-subdivision d. of this subdivision, any designated successor of a deceased or incapacitated owner or principal operator of a new motor vehicle dealership appointed by such owner in substantial compliance with this section shall, by operation of law, succeed at the time of such death or incapacity to all of the rights and obligations of the owner or principal operator in the new motor vehicle dealership and under either the existing franchise or any other successor, renewal, or replacement franchise.

d. Within 60 days after the death or incapacity of the owner or principal operator, a designated successor appointed in substantial compliance with this section shall give the affected manufacturer or distributor written notice of his or her succession to the position of owner or principal operator of the new motor vehicle dealership; provided, however, that the failure of the designated successor to give the manufacturer or distributor written notice as provided above within 60 days of the death or incapacity of the owner or principal operator shall not result in the waiver or termination of the designated successor's right to succeed to the ownership of the new motor vehicle dealership unless the manufacturer or distributor gives written notice of this provision to either the designated successor or the deceased or incapacitated owner's executor, administrator, guardian or other fiduciary by certified or registered mail, return receipt requested, and said written notice grants not less than 30 days time within which the designated successor may give the notice required hereunder, provided the designated successor or the deceased or incapacitated owner's executor, administrator, guardian or other fiduciary has given the manufacturer reasonable notice of death or incapacity. Within 30 days of receipt of the notice by the manufacturer or distributor from the designated successor provided in this paragraph, the manufacturer or distributor may request that the designated successor complete the application forms generally utilized by the manufacturer or distributor to review the designated successor's qualifications to establish a successor dealership. Within 30 days of receipt of the completed forms, the manufacturer or distributor shall send a letter by certified or registered mail, return receipt requested, advising the designated successor of facts and circumstances which have changed since the manufacturer's or distributor's original approval of the designated successor, and which have caused the manufacturer or distributor to object to the designated successor. Upon receipt of such notice, the designated successor may either designate an alternative successor or may file a request for evidentiary hearing in accordance with the procedures provided in sub-subdivisions b. 2.-5. of this subdivision. In any such hearing, the manufacturer or distributor shall be limited to facts and circumstances which did not exist at the time the designated successor was originally approved or evidence which was originally requested to be produced by the designated successor at the time of the original request and was fraudulent.

e. The designated successor shall agree to be bound by all terms and conditions of the franchise in effect between the manufacturer or distributor and the owner at the time of the owner's or principal operator's death or incapacity, if so requested in writing by the manufacturer or distributor subsequent to the owner's or principal operator's death or incapacity.

f. This section does not preclude an owner of a new motor vehicle dealership from designating any person as his or her successor by written instrument filed with the manufacturer or distributor, and, in the event there is an inconsistency between the successor named in such written instrument and the designated successor otherwise appointed by the owner consistent with the provisions of this section, and that written instrument has not been revoked by the owner of the new motor vehicle dealership in writing to the manufacturer or distributor, then the written instrument filed with the manufacturer or distributor shall govern as to the appointment of the successor.

(8) To require, coerce, or attempt to coerce any new motor vehicle dealer in this State to order or accept delivery of any new motor vehicle with special features, accessories or equipment not included in the list price of those motor vehicles as publicly advertised by the manufacturer or distributor.

(9) To require, coerce, or attempt to coerce any new motor vehicle dealer in this State to purchase nondiagnostic computer equipment or programs, to participate monetarily in an advertising campaign or contest, or to purchase unnecessary or unreasonable quantities of any promotional materials, training materials, training programs, showroom or other display decorations, materials, computer equipment or programs, or special tools at the expense of the new motor vehicle dealer, provided that nothing in this subsection shall preclude a manufacturer or distributor from including an unitemized uniform charge in the base price of the new motor vehicle charged to the dealer where such charge is attributable to advertising costs incurred or to be incurred by the manufacturer or distributor in the ordinary courses of its business.

(10) To require, coerce, or attempt to coerce any new motor vehicle dealer in this State to change the capital structure of the new motor vehicle dealer or the means by or through which the new motor vehicle dealer finances the operation of the dealership provided that the new motor vehicle dealer at all times meets any reasonable capital standards determined by the manufacturer in accordance with uniformly applied criteria; and also provided that no change in the capital structure shall cause a change in the principal management or have the effect of a sale of the franchise without the consent of the manufacturer or distributor, provided that said consent shall not be unreasonably withheld.

(11) To require, coerce, or attempt to coerce any new motor vehicle dealer in this State to refrain from participation in the management of, investment in, or the acquisition of any other line of new motor vehicle or related products; Provided, however, that this subsection does not apply unless the new motor vehicle dealer maintains a reasonable line of credit for each make or line of new motor vehicle, and the new motor

vehicle dealer remains in compliance with any reasonable capital standards and facilities requirements of the manufacturer. The reasonable facilities requirements shall not include any requirement that a new motor vehicle dealer establish or maintain exclusive facilities, personnel, or display space.

(12) To require, coerce, or attempt to coerce any new motor vehicle dealer in this State to change location of the dealership, or to make any substantial alterations to the dealership premises or facilities, when to do so would be unreasonable, or without written assurance of a sufficient supply of new motor vehicles so as to justify such an expansion, in light of the current market and economic conditions.

(13) To require, coerce, or attempt to coerce any new motor vehicle dealer in this State to prospectively assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability to be imposed by this law or to require any controversy between a new motor vehicle dealer and a manufacturer, distributor, or representative, to be referred to any person other than the duly constituted courts of the State or the United States of America, or to the Commissioner, if such referral would be binding upon the new motor vehicle dealer.

(14) To delay, refuse, or fail to deliver motor vehicles or motor vehicle parts or accessories in reasonable quantities relative to the new motor vehicle dealer's facilities and sales potential in the new motor vehicle dealer's market area as determined in accordance with reasonably applied economic principles, or within a reasonable time, after receipt of an order from a dealer having a franchise for the retail sale of any new motor vehicle sold or distributed by the manufacturer or distributor, any new vehicle, parts or accessories to new vehicles as are covered by such franchise, and such vehicles, parts or accessories as are publicly advertised as being available or actually being delivered. The delivery to another dealer of a motor vehicle of the same model and similarly equipped as the vehicle ordered by a motor vehicle dealer who has not received delivery thereof, but who has placed his written order for the vehicle prior to the order of the dealer receiving the vehicle, shall be evidence of a delayed delivery of, or refusal to deliver, a new motor vehicle to a motor vehicle dealer within a reasonable time, without cause. Except as may be required by any consent decree of the Commissioner or other order of the Commissioner or court of competent jurisdiction, each manufacturer shall allocate its products in a manner that provides each of its franchised dealers in this State an adequate supply of vehicles by series, product line, and model to achieve the manufacturer's minimum sales requirements, planning volume, or sales objectives and that is fair and equitable to all of its franchised dealers in this State. Additionally, each manufacturer shall make available to each of its franchised dealers in this State a minimum of one of each vehicle series, model, or product line that the manufacturer advertises nationally as being available for purchase. A manufacturer shall not unfairly discriminate among its franchised dealers in this allocation process. This subsection is not violated, however, if such failure is caused by acts or causes beyond the control of the manufacturer, distributor, factory branch, or factory representative.

(15) To refuse to disclose to any new motor vehicle dealer, handling the same line make, the manner and mode of distribution of that line make within the State.

(16) To award money, goods, services, or any other benefit to any new motor vehicle dealership employee, either directly or indirectly, un-

less such benefit is promptly accounted for, and transmitted to, or approved by, the new motor vehicle dealer.

(17) To increase prices of new motor vehicles which the new motor vehicle dealer had ordered and which the manufacturer or distributor has accepted for immediate delivery for private retail consumers prior to the new motor vehicle dealer's receipt of the written official price increase notification. A sales contract signed by a private retail consumer shall constitute evidence of each such order provided that the vehicle is in fact delivered to that customer. Price differences applicable to new model or series shall not be considered a price increase or price decrease. Price changes caused by either: (i) the addition to a new motor vehicle of required or optional equipment; or (ii) revaluation of the United States dollar, in the case of foreign-make vehicles or components; or (iii) an increase in transportation charges due to increased rates imposed by carriers; or (iv) new tariffs or duties imposed by the United States of America or any other governmental authority, shall not be subject to the provisions of this subsection.

(18) To prevent or attempt to prevent a dealer from receiving fair and reasonable compensation for the value of the franchised business transferred in accordance with G.S. 20-305(4) above, or to prevent or attempt to prevent, through the exercise of any contractual right of first refusal or otherwise, a dealer located in this State from transferring the franchised business to such persons or other entities as the dealer shall designate in accordance with G.S. 20-305(4). The opinion or determination of a manufacturer that the existence or location of one of its franchised dealers situated in this State is not viable or is not consistent with the manufacturer's distribution or marketing forecast or plans shall not constitute a lawful basis for the manufacturer to fail or refuse to approve a dealer's proposed transfer of ownership submitted in accordance with G.S. 20-305(4), or "good cause" for the termination, cancellation, or nonrenewal of the franchise under G.S. 20-305(6) or grounds for the objection to an owner's designated successor appointed pursuant to G.S. 20-305(7).

(19) To offer any refunds or other types of inducements to any person for the purchase of new motor vehicles of a certain line make to be sold to the State or any political subdivision thereof without making the same offer available upon request to all other new motor vehicle dealers in the same line make within the State.

(20) To release to any outside party, except under subpoena or as otherwise required by law or in an administrative, judicial or arbitration proceeding involving the manufacturer or new motor vehicle dealer, any confidential business, financial, or personal information which may be from time to time provided by the new motor vehicle dealer to the manufacturer, without the express written consent of the new motor vehicle dealer.

(21) To deny any new motor vehicle dealer the right of free association with any other new motor vehicle dealer for any lawful purpose.

(22) To unfairly discriminate among its new motor vehicle dealers with respect to warranty reimbursements or authority granted its new motor vehicle dealers to make warranty adjustments with retail customers.

(23) To engage in any predatory practice against or unfairly compete with a new motor vehicle dealer located in this State.

(24) To terminate any franchise solely because of the death or incapacity of an owner who is not listed in the franchise as one on whose expertise and abilities the manufacturer relied in the granting of the franchise.

(25) To require, coerce, or attempt to coerce a new motor vehicle dealer in this State to either establish or maintain exclusive facilities, personnel, or display space.

(26) To resort to or to use any false or misleading advertisement in the conducting of its business as a manufacturer or distributor in this State.

(27) To knowingly make, either directly or through any agent or employee, any material statement which is false or misleading or conceal any material facts which induce any new motor vehicle dealer to enter into any agreement or franchise or to take any action which is materially prejudicial to that new motor vehicle dealer or his business.

(28) To require, coerce, or attempt to coerce any new motor vehicle dealer to purchase or order any new motor vehicle as a precondition to purchasing, ordering, or receiving any other new motor vehicle or vehicles. Nothing herein shall prevent a manufacturer from requiring that a new motor vehicle dealer fairly represent and inventory the full line of new motor vehicles which are covered by the franchise agreement.

(29) To require, coerce, or attempt to coerce any new motor vehicle dealer to sell, transfer, or otherwise issue stock or other ownership interest in the dealership corporation to a general manager or any other person involved in the management of the dealership other than the dealer principal or dealer operator named in the franchise, unless the dealer principal or dealer operator is an absentee owner who is not involved in the operation of the dealership on a regular basis.

(30) To vary the price charged to any of its franchised new motor vehicle dealers located in this State for new motor vehicles based on the dealer's purchase of new facilities, supplies, tools, equipment, or other merchandise from the manufacturer, the dealer's relocation, remodeling, repair, or renovation of existing dealerships or construction of a new facility, the dealer's participation in training programs sponsored, endorsed, or recommended by the manufacturer, whether or not the dealer is dualed with one or more other line makes of new motor vehicles, or the dealer's sales penetration. Except as provided in this subdivision, it shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them to vary the price charged to any of its franchised new motor vehicle dealers located in this State for new motor vehicles based on the dealer's sales volume, the dealer's level of sales or customer service satisfaction, the dealer's purchase of advertising materials, signage, nondiagnostic computer hardware or software, communications devices, or furnishings, or the dealer's participation in used motor vehicle inspection or certification programs sponsored or endorsed by the manufacturer.

The price of the vehicle, for purposes of this subdivision shall include the manufacturer's use of rebates, credits, or other consideration that has the effect of causing a variance in the price of new motor vehicles offered to its franchised dealers located in the State.

Notwithstanding the foregoing, nothing in this subdivision shall be deemed to preclude a manufacturer from establishing sales contests or promotions that provide or award dealers or consumers rebates or incentives; provided, however, that the manufacturer complies with all of the following conditions:

a. With respect to manufacturer to consumer rebates and incentives, the manufacturer's criteria for determining eligibility shall:

1. Permit all of the manufacturer's franchised new motor vehicle dealers in this State to offer the rebate or incentive; and
2. Be uniformly applied and administered to all eligible consumers.

b. With respect to manufacturer to dealer rebates and incentives, the rebate or incentive program shall:
   1. Be based solely on the dealer's actual or reasonably anticipated sales volume or on a uniform per vehicle sold or leased basis;
   2. Be uniformly available, applied, and administered to all of the manufacturer's franchised new motor vehicle dealers in this State; and
   3. Provide that any of the manufacturer's franchised new motor vehicle dealers in this State may, upon written request, obtain the method or formula used by the manufacturer in establishing the sales volumes for receiving the rebates or incentives and the specific calculations for determining the required sales volumes of the inquiring dealer and any of the manufacturer's other franchised new motor vehicle dealers located within 75 miles of the inquiring dealer.

Nothing contained in this subdivision shall prohibit a manufacturer from providing assistance or encouragement to a franchised dealer to remodel, renovate, recondition, or relocate the dealer's existing facilities, provided that this assistance, encouragement, or rewards are not determined on a per vehicle basis.

It is unlawful for any manufacturer to charge or include the cost of any program or policy prohibited under this subdivision in the price of new motor vehicles that the manufacturer sells to its franchised dealers or purchasers located in this State.

In the event that as of October 1, 1999, a manufacturer was operating a program that varied the price charged to its franchised dealers in this State in a manner that would violate this subdivision, or had in effect a documented policy that had been conveyed to its franchised dealers in this State and that varied the price charged to its franchised dealers in this State in a manner that would violate this subdivision, it shall be lawful for that program or policy, including amendments to that program or policy that are consistent with the purpose and provisions of the existing program or policy, or a program or policy similar thereto implemented after October 1, 1999, to continue in effect as to the manufacturer's franchised dealers located in this State until June 30, 2010.

In the event that as of June 30, 2001, a manufacturer was operating a program that varied the price charged to its franchised dealers in this State in a manner that would violate this subdivision, or had in effect a documented policy that had been conveyed to its franchised dealers in this State and that varied the price charged to its franchised dealers in this State in a manner that would violate this subdivision, and the program or policy was implemented in this State subsequent to October 1, 1999, and prior to June 30, 2001, and provided that the program or policy is in compliance with this subdivision as it existed as of June 30, 2001, it shall be lawful for that program or policy, including amendments to that program or policy that comply with this subdivision as it existed as of June 30, 2001, to continue in effect as to the manufacturer's franchised dealers located in this State until June 30, 2010.

Any manufacturer shall be required to pay or otherwise compensate any franchise dealer who has earned the right to receive payment or other compensation under a program in accordance with the manufacturer's program or policy.

The provisions of this subdivision shall not be applicable to multiple or repeated sales of new motor vehicles made by a new motor vehicle dealer to a single purchaser under a bona fide fleet sales policy of a manufacturer, factory branch, distributor, or distributor branch.

(31) Notwithstanding the terms of any contract, franchise, agreement, release, or waiver, to require that in any civil or administrative proceeding in which a new motor vehicle dealer asserts any claims, rights, or defenses arising under this Article or under the franchise, that the dealer or any nonprevailing party compensate the manufacturer or prevailing party for any court costs, attorneys' fees, or other expenses incurred in the litigation.

(32) To require that any of its franchised new motor vehicle dealers located in this State pay any extra fee, purchase unreasonable or unnecessary quantities of advertising displays or other materials, or remodel, renovate, or recondition the dealers' existing facilities in order to receive any particular model or series of vehicles manufactured or distributed by the manufacturer for which the dealers have a valid franchise. Notwithstanding the foregoing, nothing contained in this subdivision shall be deemed to prohibit or prevent a manufacturer from requiring that its franchised dealers located in this State purchase special tools or equipment, stock reasonable quantities of certain parts, or participate in training programs which are reasonably necessary for those dealers to sell or service any model or series of vehicles.

(33) To fail to reimburse a dealer located in this State in full for the actual cost of providing a loaner vehicle to any customer who is having a vehicle serviced at the dealership if the provision of such a loaner vehicle is required by the manufacturer.

(34) To require, coerce, or attempt to coerce any new motor vehicle dealer in this State to participate monetarily in any training program whose subject matter is not expressly limited to specific information necessary to sell or service the models of vehicles the dealer is authorized to sell or service under the dealer's franchise with that manufacturer. Examples of training programs with respect to which a manufacturer is prohibited from requiring the dealer's monetary participation include, but are not limited to, those which purport to teach morale-boosting employee motivation, teamwork, or general principles of customer relations. A manufacturer is further prohibited from requiring the personal attendance of an owner or dealer principal of any dealership located in this State at any meeting or training program at which it is reasonably possible for another member of the dealer's management to attend and later relate the subject matter of the meeting or training program to the dealership's owners or principal operator.

(35) Notwithstanding the terms of any franchise, agreement, waiver or novation, to limit the number of franchises of the same line make of vehicle that any franchised motor vehicle dealer, including its parent(s), subsidiaries, and affiliates, if any, may own or operate or attach any restrictions or conditions on the ownership or operation of multiple franchises of the same line make of motor vehicle without making the same limitations, conditions, and restrictions applicable to all of its other franchisees.

(36) With regard to any manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof that owns and operates a new

motor vehicle dealership, directly or indirectly through any subsidiary or affiliated entity as provided in G.S. 20-305.2, to unreasonably discriminate against any other new motor vehicle dealer in the same line make in any matter governed by the motor vehicle franchise, including the sale or allocation of vehicles or other manufacturer or distributor products, or the execution of dealer programs for benefits.

(37) Subdivisions (11) and (25) of this section shall not apply to any manufacturer, manufacturer branch, distributor, distributor branch, or any affiliate or subsidiary thereof of new motor vehicles which manufactures or distributes exclusively new motor vehicles with a gross weight rating of 8,500 pounds or more, provided that the following conditions are met: (i) the manufacturer has, as of November 1, 1996, an agreement in effect with at least three of its franchised dealers within the State, and which agreement was, in fact, being enforced by the manufacturer, requiring the dealers to maintain separate and exclusive facilities for the vehicles it manufactures or distributes; and (ii) there existed at least seven dealerships (locations) of that manufacturer within the State as of January 1, 1999.

(38) Notwithstanding the terms, provisions, or conditions of any agreement, franchise, novation, waiver, or other written instrument, to assign or change a franchised new motor vehicle dealer's area of responsibility under the franchise arbitrarily or without due regard to the present or projected future pattern of motor vehicle sales and registrations within the dealer's market and without having provided the affected dealer with written notice of the change in the dealer's area of responsibility and a detailed description of the change in writing by registered or certified mail, return receipt requested. A franchised new motor vehicle dealer who believes that a manufacturer, factory branch, distributor, or distributor branch with whom the dealer has entered into a franchise has violated this subdivision may file a petition before the Commissioner as provided in G.S. 20-301(b) contesting the franchised new motor vehicle dealer's assigned area of responsibility. At the hearing before the Commissioner, the affected manufacturer, factory branch, distributor, or distributor branch shall have the burden of proving that all portions of its current or proposed area of responsibility for the petitioning franchised new motor vehicle dealer are reasonable in light of the present or projected future pattern of motor vehicle sales and registrations within the franchised new motor vehicle dealer's market. If a protest is or has been filed under G.S. 20-305(5) and the franchised new motor vehicle dealer's area of responsibility is included in the relevant market area under the protest, any protest filed under this subdivision shall be consolidated with that protest for hearing and joint disposition of all of the protests.

(39) Notwithstanding the terms, provisions, or conditions of any agreement, franchise, novation, waiver, or other written instrument, to require, coerce, or attempt to coerce any of its franchised motor vehicle dealers in this State to purchase or lease one or more signs displaying the name of the manufacturer or franchised motor vehicle dealer upon unreasonable or onerous terms or conditions or if installation of the additional signage would violate local signage or zoning laws to which the franchised motor vehicle dealer is subject. Any term, provision, or condition of any agreement, franchise, waiver, novation, or any other written instrument which is in violation of this subdivision shall be deemed null and void and without force and effect.

(40) Notwithstanding the terms, provisions, or conditions of any agreement or franchise, to require any dealer to floor plan any of the dealer's inventory or finance the acquisition, construction, or renovation of any of the dealer's property or facilities by or through any financial source or sources designated by the manufacturer, factory branch, distributor, or distributor branch, including any financial source or sources that is or are directly or indirectly owned, operated, or controlled by the manufacturer, factory branch, distributor, or distributor branch.

(41) Notwithstanding the terms, provisions, or conditions of any agreement or franchise, to use or consider the performance of any of its franchised new motor vehicle dealers located in this State relating to the sale of the manufacturer's new motor vehicles or ability to satisfy any minimum sales or market share quota or responsibility relating to the sale of the manufacturer's new motor vehicles in determining:

a. The dealer's eligibility to purchase program, certified, or other used motor vehicles from the manufacturer;

b. The volume, type, or model of program, certified, or other used motor vehicles the dealer shall be eligible to purchase from the manufacturer;

c. The price or prices of any program, certified, or other used motor vehicles that the dealer shall be eligible to purchase from the manufacturer; or

d. The availability or amount of any discount, credit, rebate, or sales incentive the dealer shall be eligible to receive from the manufacturer for the purchase of any program, certified, or other used motor vehicles offered for sale by the manufacturer. (1955, c. 1243, s. 21; 1973, c. 88, ss. 1, 2; 1983, c. 704, ss. 5-10; 1987, c. 827, s. 1; 1991, c. 510, ss. 2-4; 1993, c. 123, s. 1; c. 331, s. 2; 1995, c. 163, s. 13; c. 480, s. 3; 1997-319, s. 3; 1999-335, s. 2; 1999-336, s. 1; 2001-510, ss. 2, 6; 2003-113, ss. 2, 3, 4; 2005-409, s. 2; 2005-463, s. 2; 2007-513, ss. 2-4, 9, 12; 2008-156, s. 3; 2008-187, s. 50.)

Editor's Note. —

Session Law 2008-187, s. 50, provides that it is contingent upon Senate Bill 1800, 2007 Regular Session, becoming law. Senate Bill 1800 was enacted as Session Laws 2008-156.

Effect of Amendments. —

Session Laws 2008-156, s. 3, effective August 3, 2008, deleted subdivision (5)a.5. regarding the distance required between motor vehicle dealers selling the same line make.

Session Laws 2008-187, s. 50, effective August 7, 2008, made minor stylistice changes in (5)a. See the Editor's note.

ARTICLE 16.

Professional Housemoving.

§ 20-356. Definitions.

As used in this Article, the following terms mean:

(1) Department. — The Department of Transportation.

(2) House. — A dwelling, building, or other structure in excess of 15 feet in width. Mobile homes, manufactured homes, or modular homes, or portions thereof, are not within this definition when being transported from the manufacturer or from a licensed retail dealer location to the first set-up site.

(3) Housemover. — A person licensed under this Article.

(4) Person. — An individual, corporation, partnership, association, or any other business entity.

(5) Secretary. — The Secretary of the Department of Transportation.

(6) Unsafe practices. — Any act that is determined by a final agency decision of an enforcing agency or by a court of competent jurisdiction to create a hazard to the motoring public, or any citations under the Occupational Safety and Health Act that have become a final order within the last three years for willful serious violations or for failing to abate serious violations, as defined in G.S. 95-127. (1977, c. 720, s. 1; 1979, c. 475, s. 2; 2001-424, s. 27.17(a); 2005-354, s. 1; 2008-89, s. 1.)

Effect of Amendments. — Session Laws 2008-89, s. 1, effective December 1, 2008, and applicable to licenses issued and offenses committed on or after that date, rewrote the section.

§ 20-358. Qualifications to become licensed.

The Department shall issue annual printed licenses to applicants meeting the following conditions:

(1) The applicant must be at least 21 years of age; present acceptable evidence of good character and show sufficient housemoving experience on the application form furnished by the Department. Proof of creditable housemoving experience must be furnished at the time of application for those applicants not previously licensed by the Department. Creditable housemoving experience means extensive and responsible training gained by the applicant while engaged actively and directly on a full-time basis in the moving of houses and structures on public roads and highways with at least five years of experience. Examples of the capacity in which a person may work in gaining experience include the following in building moving operations:

a. Moving superintendent,
b. Moving foreman, and
c. General mechanic and helper in the housemoving profession or trade.

To comply with the requirement of proof of creditable housemoving experience, each applicant not previously licensed under this Article shall submit to the Department an affidavit from a certified public accountant that the applicant has documented employment records for a period of five continuous years from a person or persons licensed by this State or another state for housemoving. Each applicant not previously licensed under this Article shall also submit to the Department affidavits from a person or persons licensed in this State or another state in housemoving, who have employed the applicant in housemoving, providing in detail the applicant's full-time experience, including any supervisory duties and experience, in housemoving.

(2) Repealed by Session Laws 1981, c. 818, s. 3.

(3) The applicant must furnish proof that all of the vehicles, excluding "beams and dollies" and "hauling units," to be used in the movement of buildings, structures, or other extraordinary objects wider than 15 feet have met the requirements of G.S. 20-183.2 pertaining to the equipment inspection of motor vehicles; provided that the "beams and dollies" and "hauling units" are excluded from inspection under G.S. 20-183.2 and, further, are not required to be equipped with brakes.

(4) The applicant must exhibit his federal employer's identification number.

(5) The applicant must pay an annual license fee of one hundred dollars ($100.00). (1977, c. 720, s. 3; 1981, c. 818, s. 3; 1991 (Reg. Sess., 1992), c. 813, s. 2; 2005-354, s. 2; 2008-89, s. 2.)

Editor's Note. — Session Laws 2008-89, s. 6, provides: "An applicant for a housemoving license under Article 16 of Chapter 20 of the General Statutes with at least 24 months' experience under G.S. 20-358(1) as of December 1, 2008, may be initially licensed without additional experience until December 1, 2011."

Effect of Amendments. — Session Laws 2008-89, s. 2, effective December 1, 2008, and applicable to licenses issued and offenses committed on or after that date, in subdivision (1), substituted "21 years" for " 18 years" in the first sentence, in the third sentence, substituted "Creditable housemoving" for "Housemoving" at the beginning, and substituted "five years of experience" for "24 months experience" at the end, and added the last paragraph.

§ 20-363. Removal and replacement of obstructions.

All obstructions, including mailboxes, traffic signals, signs, and utility lines will be removed immediately prior to and replaced immediately after the move at the expense of the mover. Any property, real or personal, to be removed, which is not located in the right-of-way, shall not be removed until the owner is notified and arrangements for and approval from the owner are obtained. (1977, c. 720, s. 8; 2008-89, s. 3.)

Effect of Amendments. — Session Laws 2008-89, s. 3, effective December 1, 2008, and applicable to licenses issued and offenses committed on or after that date, in the first sentence, inserted "mailboxes" near the beginning, and deleted "provided that arrangements for and approval from the owner is obtained" from the end, and added the second sentence.

§ 20-371. Penalties.

(a) Any person violating the provisions of this Article or the regulations of the Department governing housemoving shall be guilty of a Class 1 misdemeanor.

(b) The Department is hereby authorized in the name of the State to apply for relief by injunction, in the established manner provided in cases of civil procedure, without bond, to enforce the provisions of this Article, or to restrain any violation thereof. In such proceedings, it shall not be necessary to allege or prove either that an adequate remedy at law does not exist, or that substantial or irreparable damage would result from the continued violation thereof. (1977, c. 720, s. 16; 1993, c. 539, s. 392; 1994, Ex. Sess., c. 24, s. 14(c); 2008-89, s. 4.)

Effect of Amendments. — Session Laws 2008-89, s. 4, effective December 1, 2008, and applicable to licenses issued and offenses committed on or after that date, substituted "Class 1 misdemeanor" for "Class 3 misdemeanor which may include a fine of not more than five hundred dollars ($500.00)" at the end of subsection (a).

§ 20-374. Unsafe practices.

(a) If the Department determines that a housemover has engaged in unsafe practices, all licenses, permits, and authorizations issued to the person pursuant to this Article shall be revoked for a period of six months.

(b) Any person whose license, permit, or authorization issued under this Article is revoked pursuant to this section may request a hearing to be held before the Secretary or a person designated by the Secretary. The licensee shall be notified in writing no less than 10 days prior to the hearing of the time and place of the hearing. At the hearing, the parties shall be given an opportunity to present evidence on issues of fact, examine and cross-examine witnesses, and present arguments on issues of law. The decision of the Secretary or of the person designated by the Secretary shall be final. Any person aggrieved by the final decision may seek judicial review of the decision in accordance with the provisions of Article 4 of Chapter 150B of the General Statutes. (2008-89, s. 5.)

Editor's Note. — Session Laws 2008-89, s. 7, made this section effective December 1, 2008, and applicable to licenses issued and offenses committed on or after that date.

Chapter 22B.

Contracts Against Public Policy.

Article 1.

Invalid Agreements.

§ 22B-1. Construction indemnity agreements invalid.

CASE NOTES

Applied in Blaylock Grading Co., LLP v. Smith, — N.C. App. —, 658 S.E.2d 680, 2008 N.C. App. LEXIS 653 (2008).

§ 22B-2. Contracts to improve real property.

CASE NOTES

Choice of Law and Forum Selection Clauses Invalid. — Superior court erred in dismissing a subcontractor's breach of contract claim for improper venue since the contract pertained to the improvement of real property located in North Carolina and was for labor and materials, and thus, the contract's choice of law and forum selection clauses were invalid under G.S. 22B-2. Price & Price Mech. of N.C., Inc. v. Miken Corp., — N.C. App. —, 661 S.E.2d 775, 2008 N.C. App. LEXIS 1130 (June 17, 2008).

§ 22B-3. Contracts with forum selection provisions.

CASE NOTES

Cited in Price & Price Mech. of N.C., Inc. v. Miken Corp., — N.C. App. —, 661 S.E.2d 775, 2008 N.C. App. LEXIS 1130 (June 17, 2008).

Chapter 24.

Interest.

Article 1.

General Provisions.

Sec.
24-1.1E. Restrictions and limitations on high-cost home loans.
24-1.1F. Rate spread home loans.

Article 1.

General Provisions.

§ 24-1. Legal rate is eight percent.

CASE NOTES

Maximum Legal Rate of Interest for Agricultural Loans. — Following a default judgment for a creditor against the debtors, the interest rate in a security agreement between the parties was incorrect under G.S. 24-1 because the maximum legal rate for the extension of credit for agricultural loans was capped at eight percent. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

§ 24-1.1. Contract rates and fees.

CASE NOTES

Liability for Loan Servicer. — Loan servicing company that filed a claim on behalf of a mortgage company and that represented the company through an assignment of the original loan could not be liable for alleged usury because the loan servicing company was an agent of the assignee mortgage company and was not the holder of the note. Tetterton v. Ocwen Fed. Bank (In re Tetterton), 379 B.R. 594, 2007 Bankr. LEXIS 4190 (Bankr. E.D.N.C. 2007).

Litigation Lending Agreement was Usurious. — Injured driver's loan agreement with a litigation lender was usurious under G.S. 24-1.1 since the driver's repayment obligations were ultimately subject to whether the recovery on the personal injury claim was sufficient to satisfy all or part of her debt to the lender, the agreement demonstrated the parties' understanding that the principal "shall be or may be" returned, the interest rate exceeded the permitted amount, and the lender intentionally entered into the contract to receive a greater amount of interest than that allowed by G.S. 24-1.1. Odell v. Legal Bucks, LLC, — N.C. App. —, 665 S.E.2d 767, 2008 N.C. App. LEXIS 1619 (2008).

§ 24-1.1E. Restrictions and limitations on high-cost home loans.

(a) Definitions. — The following definitions apply for the purposes of this section:

(1) "Affiliate" means any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. § 1841 et seq.), as amended from time to time.

(2) "Annual percentage rate" means the annual percentage rate for the loan calculated according to the provisions of the federal Truth-in-

Lending Act (15 U.S.C. § 1601, et seq.), and the regulations promulgated thereunder by the Federal Reserve Board (as said Act and regulations are amended from time to time).

(3) "Bona fide loan discount points" means loan discount points knowingly paid by the borrower for the purpose of reducing, and which in fact result in a bona fide reduction of, the interest rate or time-price differential applicable to the loan, provided the amount of the interest rate reduction purchased by the discount points is reasonably consistent with established industry norms and practices for secondary mortgage market transactions.

(4) A "high-cost home loan" means a loan other than a reverse mortgage transaction in which:

a. The principal amount of the loan (or, in the case of an open-end credit plan, the borrower's initial maximum credit limit) does not exceed the lesser of (i) the conforming loan size limit for a single-family dwelling as established from time to time by Fannie Mae, or (ii) three hundred thousand dollars ($300,000);

b. The borrower is a natural person;

c. The debt is incurred by the borrower primarily for personal, family, or household purposes;

d. The loan is secured by either (i) a security interest in a manufactured home (as defined in G.S. 143-147(7)) which is or will be occupied by the borrower as the borrower's principal dwelling, or (ii) a mortgage or deed of trust on real estate upon which there is located or there is to be located a structure or structures designed principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling; and

e. The terms of the loan exceed one or more of the thresholds as defined in subdivision (6) of this section.

(4a) **(Effective until January 1, 2009)** "Mortgage broker" is as defined in G.S. 53-243.01(14).

(4a) **(Effective January 1, 2009)** "Mortgage broker" is as defined in G.S. 53-243.01.

(5) "Points and fees" is defined as provided in this subdivision.

a. The term includes all of the following:

1. All items required to be disclosed under sections 226.4(a) and 226.4(b) of Title 12 of the Code of Federal Regulations, as amended from time to time, except interest or the time-price differential.

2. All charges for items listed under section 226.4(c)(7) of Title 12 of the Code of Federal Regulations, as amended from time to time, but only if the lender receives direct or indirect compensation in connection with the charge or the charge is paid to an affiliate of the lender; otherwise, the charges are not included within the meaning of the phrase "points and fees".

3. To the extent not otherwise included in sub-subdivision a.1. or a.2. of this subdivision, all compensation paid from any source to a mortgage broker, including compensation paid to a mortgage broker in a table-funded transaction. A bona fide sale of a loan in the secondary mortgage market shall not be considered a table-funded transaction, and a table-funded transaction shall not be considered a secondary market transaction.

4. The maximum prepayment fees and penalties which may be charged or collected under the terms of the loan documents.

b. Notwithstanding the remaining provisions of this subdivision, the term does not include (i) taxes, filing fees, recording and other charges and fees paid or to be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest; and (ii) fees paid to a person other than a lender or an affiliate of the lender or to the mortgage broker or an affiliate of the mortgage broker for the following: fees for tax payment services; fees for flood certification; fees for pest infestation and flood determinations; appraisal fees; fees for inspections performed prior to closing; credit reports; surveys; attorneys' fees (if the borrower has the right to select the attorney from an approved list or otherwise); notary fees; escrow charges, so long as not otherwise included under sub-subdivision a. of this subdivision; title insurance premiums; and premiums for insurance against loss or damage to property, including hazard insurance and flood insurance premiums, provided that the conditions in section 226.4(d)(2) of Title 12 of the Code of Federal Regulations are met.

c. For open-end credit plans, the term includes those points and fees described in sub-subdivisions a.1. through a.3. of this subdivision that are charged at or before loan closing, plus (i) the minimum additional fees the borrower would be required to pay to draw down an amount equal to the total loan amount, and (ii) the maximum prepayment fees and penalties which may be charged or collected under the terms of the loan documents.

(5a) A "table-funded transaction" is a loan transaction closed by a mortgage broker in the mortgage broker's own name with funds advanced by a person other than the mortgage broker in which the loan is assigned contemporaneously or within one business day of the funding of the loan to the person that advanced the funds.

(6) "Thresholds" means:

a. Without regard to whether the loan transaction is or may be a "residential mortgage transaction" (as the term "residential mortgage transaction" is defined in section 226.2(a)(24) of Title 12 of the Code of Federal Regulations, as amended from time to time), the annual percentage rate of the loan at the time the loan is consummated is such that the loan is considered a "mortgage" under section 152 of the Home Ownership and Equity Protection Act of 1994 (Pub. Law 103-25, [15 U.S.C. § 1602(aa)]), as the same may be amended from time to time, and regulations adopted pursuant thereto by the Federal Reserve Board, including section 226.32 of Title 12 of the Code of Federal Regulations, as the same may be amended from time to time;

b. The total points and fees, as defined in G.S. 24-1.1E(a)(5), exceed five percent (5%) of the total loan amount if the total loan amount is twenty thousand dollars ($20,000) or more, or (ii) the lesser of eight percent (8%) of the total loan amount or one thousand dollars ($1,000), if the total loan amount is less than twenty thousand dollars ($20,000); provided, the following discount points and prepayment fees and penalties shall be excluded from the calculation of the total points and fees payable by the borrower:

1. Up to and including two bona fide loan discount points payable by the borrower in connection with the loan transaction, but only if the interest rate from which the loan's interest rate will be discounted does not exceed by more than one percent-

age point (1%) the required net yield for a 90-day standard mandatory delivery commitment for a reasonably comparable loan from either Fannie Mae or the Federal Home Loan Mortgage Corporation, whichever is greater;

2. Up to and including one bona fide loan discount point payable by the borrower in connection with the loan transaction, but only if the interest rate from which the loan's interest rate will be discounted does not exceed by more than two percentage points (2%) the required net yield for a 90-day standard mandatory delivery commitment for a reasonably comparable loan from either Fannie Mae or the Federal Home Loan Mortgage Corporation, whichever is greater;
3. For a closed-end loan, prepayment fees and penalties which may be charged or collected under the terms of the loan documents which do not exceed one percent (1%) of the amount prepaid, provided the loan documents do not permit the lender to charge or collect any prepayment fees or penalties more than 30 months after the loan closing;
4. For an open-end credit plan, prepayment fees and penalties which may be charged or collected under the terms of the loan documents which do not exceed one percent (1%) of the amount prepaid, provided the loan documents do not permit the lender to charge or collect any prepayment fees or penalties more than (i) 30 months after the loan closing if the borrower has no right or option under the loan documents to repay all or any portion of the outstanding balance of the open-end credit plan at a fixed interest rate over a specified period of time or, (ii) if the borrower has a right or option under the loan documents to repay all or any portion of the outstanding balance of the open-end credit plan at a fixed interest rate over a specified period of time, 30 months after the date the borrower voluntarily exercises that right or option; or

c. If the loan is a closed-end loan, the loan documents permit the lender to charge or collect prepayment fees or penalties more than 30 months after the loan closing or which exceed, in the aggregate, more than two percent (2%) of the amount prepaid. If the loan is an open-end credit plan, the loan documents permit the lender to charge or collect prepayment fees or penalties (i) more than 30 months after the loan closing if the borrower has no right or option under the loan documents to repay all or any portion of the outstanding balance of the open-end credit plan at a fixed interest rate over a specified period of time or, (ii) if the borrower has a right or option under the loan documents to repay all or any portion of the outstanding balance of the open-end credit plan at a fixed interest rate over a specified period of time, more than 30 months after the date the borrower voluntarily exercises that right or option, or (iii) which exceed, in the aggregate, more than two percent (2%) of the amount prepaid.

(7) For a closed-end loan, "total loan amount" has the same meaning as the term "total loan amount" as used in section 226.32 of Title 12 of the Code of Federal Regulations, and shall be calculated in accordance with the Federal Reserve Board's Official Staff Commentary thereto. For an open-end credit plan, "total loan amount" means the borrower's initial maximum credit limit.

(b) Limitations. — A high-cost home loan shall be subject to the following limitations:

(1) No call provision. — No high-cost home loan may contain a provision which permits the lender, in its sole discretion, to accelerate the indebtedness. This provision does not apply when repayment of the loan has been accelerated by default, pursuant to a due-on-sale provision, or pursuant to some other provision of the loan documents unrelated to the payment schedule.

(2) No balloon payment. — No high-cost home loan may contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments. This provision does not apply when the payment schedule is adjusted to the seasonal or irregular income of the borrower.

(3) No negative amortization. — No high-cost home loan may contain a payment schedule with regular periodic payments that cause the principal balance to increase.

(4) No increased interest rate. — No high-cost home loan may contain a provision which increases the interest rate after default. This provision does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents, provided the change in the interest rate is not triggered by the event of default or the acceleration of the indebtedness.

(5) No advance payments. — No high-cost home loan may include terms under which more than two periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower.

(6) No modification or deferral fees. — A lender may not charge a borrower any fees to modify, renew, extend, or amend a high-cost home loan or to defer any payment due under the terms of a high-cost home loan.

(c) Prohibited Acts and Practices. — The following acts and practices are prohibited in the making of a high-cost home loan:

(1) No lending without home-ownership counseling. — A lender may not make a high-cost home loan without first receiving certification from a counselor approved by the North Carolina Housing Finance Agency that the borrower has received counseling on the advisability of the loan transaction and the appropriate loan for the borrower.

(2) No lending without due regard to repayment ability. — As used in this subsection, the term "obligor" refers to each borrower, co-borrower, cosigner, or guarantor obligated to repay a loan. A lender may not make a high-cost home loan unless the lender reasonably believes at the time the loan is consummated that one or more of the obligors, when considered individually or collectively, will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status, and other financial resources (other than the borrower's equity in the dwelling which secures repayment of the loan). An obligor shall be presumed to be able to make the scheduled payments to repay the obligation if, at the time the loan is consummated, the obligor's total monthly debts, including amounts owed under the loan, do not exceed fifty percent (50%) of the obligor's monthly gross income as verified by the credit application, the obligor's financial statement, a credit report, financial information provided to the lender by or on behalf of the obligor, or any other reasonable means; provided, no presumption of inability to make the scheduled payments to repay the obligation shall arise solely from the fact that, at the time the loan is consummated, the obligor's total monthly debts (including amounts owed under the loan) exceed fifty percent (50%) of the obligor's monthly gross income.

(3) No financing of fees or charges. — In making a high-cost home loan, a lender may not directly or indirectly finance:
  a. Any prepayment fees or penalties payable by the borrower in a refinancing transaction if the lender or an affiliate of the lender is the noteholder of the note being refinanced;
  b. Any points and fees; or
  c. Any other charges payable to third parties.

(4) No benefit from refinancing existing high-cost home loan with new high-cost home loan. — A lender may not charge a borrower points and fees in connection with a high-cost home loan if the proceeds of the high-cost home loan are used to refinance an existing high-cost home loan held by the same lender as noteholder.

(5) Restrictions on home-improvement contracts. — A lender may not pay a contractor under a home-improvement contract from the proceeds of a high-cost home loan other than (i) by an instrument payable to the borrower or jointly to the borrower and the contractor, or (ii) at the election of the borrower, through a third-party escrow agent in accordance with terms established in a written agreement signed by the borrower, the lender, and the contractor prior to the disbursement.

(6) No shifting of liability. — A lender is prohibited from shifting any loss, liability, or claim of any kind to the closing agent or closing attorney for any violation of this section.

(d) Unfair and Deceptive Acts or Practices. — Except as provided in subsection (e) of this section, the making of a high-cost home loan which violates any provisions of subsection (b) or (c) of this section is hereby declared usurious in violation of the provisions of this Chapter and unlawful as an unfair or deceptive act or practice in or affecting commerce in violation of the provisions of G.S. 75-1.1. The provisions of this section shall apply to any person who in bad faith attempts to avoid the application of this section by (i) the structuring of a loan transaction as an open-end credit plan for the purpose and with the intent of evading the provisions of this section when the loan would have been a high-cost home loan if the loan had been structured as a closed-end loan, or (ii) dividing any loan transaction into separate parts for the purpose and with the intent of evading the provisions of this section, or (iii) any other such subterfuge. The Attorney General, the Commissioner of Banks, or any party to a high-cost home loan may enforce the provisions of this section. Any person seeking damages or penalties under the provisions of this section may recover damages under either this Chapter or Chapter 75, but not both.

(e) Corrections and Unintentional Violations. — A lender in a high-cost home loan who, when acting in good faith, fails to comply with subsections (b) or (c) of this section, will not be deemed to have violated this section if the lender establishes that either:

(1) Within 30 days of the loan closing and prior to the institution of any action under this section, the borrower is notified of the compliance failure, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the borrower, (i) make the high-cost home loan satisfy the requirements of subsections (b) and (c) of this section, or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home loan subject to the provisions of this section; or

(2) The compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such errors, and within 60 days after the discovery of the compliance failure and prior to the institution of any action under

this section or the receipt of written notice of the compliance failure, the borrower is notified of the compliance failure, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the borrower, (i) make the high-cost home loan satisfy the requirements of subsections (b) and (c) of this section, or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home loan subject to the provisions of this section. Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations under this section is not a bona fide error.

(f) Severability. — The provisions of this section shall be severable, and if any phrase, clause, sentence, or provision is declared to be invalid or is preempted by federal law or regulation, the validity of the remainder of this section shall not be affected thereby. If any provision of this section is declared to be inapplicable to any specific category, type, or kind of points and fees, the provisions of this section shall nonetheless continue to apply with respect to all other points and fees.

(g) A mortgage broker who brokers a high-cost home loan that violates any provisions of subsection (b) or (c) of this section shall be jointly and severally liable with the lender. (1999-332, s. 2; 2000-140, s. 40.1; 2001-487, s. 14(a); 2003-401, s. 3; 2007-352, ss. 1-3; 2008-227, s. 2; 2008-228, s. 15.)

Subdivision (a)(4a) is set out twice. — The first version of subdivision (a)(4a) set out above is effective until January 1, 2009. The second version of subdivision (a)(4a) set out above is effective January 1, 2009.

Effect of Amendments. —

Session Laws 2008-227, s. 2, effective October 1, 2008, substituted "fees, as defined in G.S. 24-1.1E(a)(5)" for "fees payable by the borrower at or before the loan closing" in subdivision (a)(6)b.

Session Laws 2008-228, s. 15, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, substituted "G.S. 53-243.01" for "G.S. 53-243.01(14)" in subdivision (a)(4a).

CASE NOTES

"High-Cost Home Loan." — Loan that the debtor had taken with the original creditor did not qualify as a high cost home loan, and the subsequent loan servicer was entitled to summary judgment as a matter of law because the debtor's closing costs did not amount to five percent of the total loan amount when the appraisal fees and attorneys' fees were excluded from the calculation. Tetterton v. Ocwen Fed. Bank (In re Tetterton), 379 B.R. 594, 2007 Bankr. LEXIS 4190 (Bankr. E.D.N.C. 2007).

§ 24-1.1F. Rate spread home loans.

(a) Definitions. — The following definitions apply for purposes of this section:

(1) Annual percentage rate. — The annual percentage rate for the loan calculated according to the provisions of the federal Truth-in-Lending Act (15 U.S.C. § 1601, et seq.) and the regulations promulgated thereunder by the Federal Reserve Board, as that Act and regulations are amended from time to time.

(2) Closed-end loan. — A loan other than an open-end credit plan as defined in this section.

(3) Home loan. — A loan that has all of the following characteristics:

a. The loan is not an equity line of credit as defined in G.S. 24-9(a)(2), a construction loan as defined in G.S. 24-10(c), or a reverse mortgage transaction.

b. The borrower is a natural person.

c. The debt is incurred by the borrower primarily for personal, family, or household purposes.

d. The principal amount of the loan does not exceed the conforming loan size limit for a single-family dwelling as established from time to time for Fannie Mae.

e. The loan is secured by (i) a security interest in a manufactured home, as defined in G.S. 143-147(7), in the State which is or will be occupied by the borrower as the borrower's principal dwelling, (ii) a mortgage or deed of trust on real property in the State upon which there is located an existing structure designed principally for occupancy of from one to four families that is or will be occupied by the borrower as the borrower's principal dwelling, or (iii) a mortgage or deed of trust on real property in the State upon which there is to be constructed using the loan proceeds a structure or structures designed principally for occupancy of from one to four families which, when completed, will be occupied by the borrower as the borrower's principal dwelling.

f. A purpose of the loan is to (i) purchase the dwelling, (ii) construct, repair, rehabilitate, remodel, or improve the dwelling or the real property on which it is located, (iii) satisfy and replace an existing obligation secured by the same real property, or (iv) consolidate existing consumer debts into a new home loan.

(4) **(Effective until January 1, 2009)**Mortgage broker. — A mortgage broker as defined in G.S. 53-243.01(14).

(4) **(Effective January 1, 2009)**Mortgage broker. — A mortgage broker as defined in G.S. 53-243.01.

(5) Obligor. — Each borrower, co-borrower, cosigner, or guarantor obligated to repay a rate spread home loan.

(6) Open-end credit plan. — Credit extended by a lender under a plan in which (i) the lender reasonably contemplates repeated transactions, (ii) the lender may charge interest or otherwise impose a finance charge from time to time on an outstanding unpaid balance, and (iii) the amount of credit that may be extended to the obligor during the term of the plan, up to any credit limit set by the lender, is generally made available to the extent that any outstanding balance is repaid.

(7) Rate spread home loan. — A home loan in which all the following apply:

a. The difference between the annual percentage rate for the loan and the yield on U.S. Treasury securities having comparable periods of maturity is either equal to or greater than (i) 3 percentage points (3%), if the loan is secured by a first lien mortgage or deed of trust, or (ii) 5 percentage points (5%), if the loan is secured by a subordinate lien mortgage or deed of trust. Without regard to whether the loan is subject to or reportable under the provisions of the Home Mortgage Disclosure Act (12 U.S.C. § 2801, et seq.)(HMDA), the difference between the annual percentage rate and the yield on Treasury securities having comparable periods of maturity shall be determined using the same procedures and calculation methods applicable to loans that are subject to the reporting requirements of HMDA, as those procedures and calculation methods are amended from time to time, provided that the yield on Treasury securities shall be determined as of the fifteenth day of the month prior to the application for the loan.

b. The difference between the annual percentage rate for the loan and the conventional mortgage rate is either equal to or greater than

(i) 1.75 percentage points (1.75%), if the loan is secured by a first lien mortgage or deed of trust, or (ii) 3.75 percentage points (3.75%), if the loan is secured by a subordinate lien mortgage or deed of trust. For purposes of this calculation, the "conventional mortgage rate" means the most recent daily contract interest rate on commitments for fixed-rate first mortgages published by the Board of Governors of the Federal Reserve System in its Statistical Release H.15, or any publication that may supersede it, during the week preceding the week in which the interest rate for the loan is set.

(b) No prepayment fees or penalties shall be charged or collected on a rate spread home loan.

(c) No lender shall make a rate spread home loan unless the lender reasonably and in good faith believes at the time the loan is consummated that one or more of the obligors, when considered individually or collectively, has the ability to repay the loan according to its terms and to pay applicable real estate taxes and hazard insurance premiums. If a lender making a rate spread home loan knows that one or more mortgage loans secured by the same real property will be made contemporaneously to the same borrower with the rate spread home loan being made by that lender, the lender making the rate spread home loan must document the borrower's ability to repay the combined payments of all loans on the same real property.

(1) A lender's analysis of an obligor's ability to repay a rate spread home loan according to the loan terms and to pay related real estate taxes and insurance premiums shall be based on a consideration of the obligor's credit history, current and expected income, current obligations, employment status, and other financial resources other than the obligor's equity in the real property that secures repayment of the rate spread home loan.

(2) In determining an obligor's ability to repay a rate spread home loan, the lender shall take reasonable steps to verify the accuracy and completeness of information provided by or on behalf of the obligor using tax returns, payroll receipts, bank records, reasonable alternative methods, or reasonable third-party verification.

(3) In determining an obligor's ability to repay a rate spread home loan according to its terms when the loan has an adjustable rate feature, the lender shall take into consideration any balance increase that may accrue from any negative amortization provision. The lender shall calculate the monthly payment amount for principal and interest by assuming (i) the loan proceeds are fully disbursed on the date of the loan closing, (ii) the loan is to be repaid in substantially equal monthly amortizing payments of principal and interest over the entire term of the loan, with no balloon payment, and (iii) the interest rate over the entire term of the loan is a fixed rate equal to the fully indexed interest rate at the time of the loan closing, without considering any initial discounted rate. The "fully indexed interest rate at the time of the loan closing" is the interest rate that would have applied at the time of the closing had the initial interest rate been determined by the application of the same interest rate formula, (for example, an interest rate index plus or minus a margin) that applies under the terms of the loan documents to subsequent interest rate adjustments, disregarding any limitations on the amount by which the interest rate may change at any one time.

(4) A lender's analysis of an obligor's ability to repay a rate spread loan may utilize reasonable commercially recognized underwriting standards and methodologies, including automated underwriting systems,

provided the standards and methodologies comply with the provisions of this section.

(d) The making of a rate spread home loan which violates subsection (b) or (c) of this section is hereby declared usurious in violation of the provisions of this Chapter. In addition, any prepayment penalty in violation of this section shall be unenforceable. However, an obligor shall not be entitled to recover twice for the same wrong. The Attorney General, the Commissioner of Banks, or any party to a rate spread home loan may enforce the provisions of this section. This section establishes specific consumer protections in rate spread home loans in addition to other consumer protections that may be otherwise available by law. A mortgage broker who brokers a rate spread home loan that violates the provisions of this section shall be jointly and severally liable with the lender.

(e) The provisions of this section shall apply to any person who in bad faith attempts to avoid the application of this section by (i) dividing any loan transaction into separate parts for the purpose and with the intent of evading the provisions of this section, or (ii) any other such subterfuge.

(f) A lender in a rate spread home loan who, when acting in good faith, fails to comply with this section, will not be deemed to have violated this section if the lender establishes that either:

(1) Within 90 days of the loan closing and prior to the institution of any action against the lender under this section, the borrower was notified of the compliance failure, the lender tendered appropriate restitution, the lender offered, at the borrower's option, either to (i) make the rate spread home loan comply with subsection (b) or (c), or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a rate spread home loan subject to the provisions of this section, and within a reasonable period of time following the borrower's election of remedies, the lender took appropriate action based on the borrower's choice; or

(2) The compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid such errors, and within 120 days after the discovery of the compliance failure and prior to the institution of any action against the lender under this section or the lender's receipt of written notice of the compliance failure, the borrower was notified of the compliance failure, the lender tendered appropriate restitution, the lender offered, at the borrower's option, either to (i) make the rate spread home loan comply with subsection (b) or (c) of this section, or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a rate spread home loan subject to the provisions of this section, and within a reasonable period of time following the borrower's election of remedies, the lender took appropriate action based on the borrower's choice. Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations under this section is not a bona fide error.

(g) The provisions of this section shall be severable, and if any phrase, clause, sentence, or provision is declared to be invalid or is preempted by federal law or regulation, the validity of the remainder of this section shall not be affected thereby. (2007-352, s. 4; 2008-228, s. 16.)

Subdivision (a)(4) is set out twice. — The first version of subdivision (a)(4) set out above is effective until January 1, 2009. The second version of subdivision (a)(4) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws

2008-228, s. 16, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, substituted "G.S. 53-243.01" for "G.S. 53-243.01(14)" in subdivision (a)(4).

§ 24-2.1. Transactions governed by Chapter.

CASE NOTES

Cited in Odell v. Legal Bucks, LLC, — N.C. App. —, 665 S.E.2d 767, 2008 N.C. App. LEXIS 1619 (2008).

§ 24-5. Interest on judgments.

CASE NOTES

I. In General.
II. Contracts.
III. Other Actions.

I. IN GENERAL.

Cited in Faison & Gillespie v. Lorant, — N.C. App. —, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

II. CONTRACTS.

Application to Secured Creditors. — Provisions of G.S. 24-5 did not directly apply to secured creditor's action against creditors who auctioned off the debtors' collateral because the statute was limited to actions for breach of contract. However, the secured creditor's action was one for the tort of conversion, and the secured creditor had no action against the creditors for breach of the security agreement between the debtors and the secured creditor as the creditors were not parties to the agreement. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

Prejudgment Interest from Breach of Contract. — After a railroad breached a contract to relocate, at its own expense, a certain rail line to a phosphate plant, pursuant to G.S. 24-5(a), the plant was entitled to prejudgment interest on the plant's damages award accruing from the date of the contract breach. PCS Phosphate Co. v. Norfolk S. Corp., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 54199 (E.D.N.C. Jan. 28, 2008).

III. OTHER ACTIONS.

Interest Improper on Punitive Double Damages. — Trial court should not have awarded prejudgment interest and post-judgment interest on both the compensatory and the G.S. 84-13 punitive double damage award in the state bar's action against the attorney for reimbursement of funds paid to the two clients after the attorney breached the attorney's fiduciary duty to them and converted their funds. G.S. 24-5(b) only allowed interest to be awarded for compensatory damages. N.C. State Bar v. Gilbert, — N.C. App. —, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

§ 24-8. Loans not in excess of $300,000; what interest, fees and charges permitted.

CASE NOTES

What Constitutes Bona Fide Fee. — The court's inquiry concerning whether a fee charged by a lender is bona fide for purposes of G.S. 24-8(d) focuses on whether services were actually provided or whether the fee included charges for unstated services. Capparelli v. Amerifirst Home Improvement Fin. Co., 535 F. Supp. 2d 554, 2008 U.S. Dist. LEXIS 11315 (E.D.N.C. 2008).

In a case in which homeowners alleged that a lender charged improper fees for a title search, an appraisal, and document preparation because the closing agent that performed the services was not legally authorized, the fees were held to be bona fide within the meaning of G.S. 24-8(d) since the services were actually performed and the lender was not required to ensure whether the closing agent needed or had a license. Capparelli v. Amerifirst Home Improvement Fin. Co., 535 F. Supp. 2d 554, 2008 U.S. Dist. LEXIS 11315 (E.D.N.C. 2008).

§ 24-10.2. Consumer protections in certain home loans.

CASE NOTES

Cited in Tillman v. Commer. Credit Loans, Inc., 362 N.C. 93, 655 S.E.2d 362, 2008 N.C. LEXIS 21 (2008).

§ 24-11. Certain revolving credit charges.

CASE NOTES

Excess Interest Rate Rendered Security Interest Invalid. — Creditor took a security interest in a debtor's motorcycle in violation of G.S. 24-11(c) because the 19.742% per annum interest rate charged by the creditor on the revolving line of credit exceeded 1.25% per month and the debtor was allowed to recover attorney's fees. Worley v. GE Moneybank (In re Worley), — Bankr. —, 2008 Bankr. LEXIS 1893 (Bankr. E.D.N.C. June 16, 2008).

Chapter 25.

Uniform Commercial Code.

ARTICLE 1.

General Provisions.

PART 2.

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION.

§ 25-1-206. Presumptions.

CASE NOTES

Applied in Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., — N.C. App. —, 665 S.E.2d 493, 2008 N.C. App. LEXIS 1555 (2008).

PART 3.

TERRITORIAL APPLICABILITY AND GENERAL RULES.

§ 25-1-303. Course of performance, course of dealing, and usage of trade.

CASE NOTES

Arbitration as Usage of Trade. — Pursuant to G.S. 25-1-303(c), cotton purchaser met its burden of proving that arbitration is a usage of trade in the textile industry. Atl. Textiles v. Avondale Inc. (In re Cotton Yarn Antitrust Litig.), 505 F.3d 274, 2007 U.S. App. LEXIS 23979 (4th Cir. 2007).

Issue Properly One for Jury Where Course of Dealing Did Not Resolve Issue.. — Whether a purported agent for a limited liability corporation (LLC) who purchased large quantities of gasoline but failed to pay for it was personally liable was an issue properly left to the jury, where the extensive course of dealing between the parties under G.S. 25-1-303, did not resolve the issue, and the LLC became insolvent. Henderson Oil Co. v. Cowart, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 6078 (W.D.N.C. Jan. 14, 2008).

ARTICLE 2.

Sales.

PART 1.

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER.

§ 25-2-101. Short title.

Cross References. — For rules related to drinking water and limitations on implied warranties as to suppliers of water, see G.S. 130A-315.

§ 25-2-103. Definitions and index of definitions.

CASE NOTES

Cited in Henderson Oil Co. v. Cowart, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 6078 (W.D.N.C. Jan. 14, 2008).

PART 3.

General Obligation and Construction of Contract.

§ 25-2-301. General obligations of parties.

CASE NOTES

Cited in Henderson Oil Co. v. Cowart, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 6078 (W.D.N.C. Jan. 14, 2008).

§ 25-2-314. Implied warranty: Merchantability; usage of trade.

Cross References. — For rules related to drinking water and limitations on implied warranties as to suppliers of water, see G.S. 130A-315.

§ 25-2-315. Implied warranty: Fitness for particular purpose.

Cross References. — For rules related to drinking water and limitations on implied warranties as to suppliers of water, see G.S. 130A-315.

PART 4.

Title, Creditors and Good Faith Purchasers.

§ 25-2-403. Power to transfer; good faith purchase of goods; "entrusting."

CASE NOTES

Cited in Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

ARTICLE 9.

Secured Transactions.

PART 1.

GENERAL PROVISIONS.

SUBPART 1. Short Title, Definitions, and General Concepts.

§ 25-9-102. Definitions and index of definitions.

CASE NOTES

Cited in All Points Capital Corp. v. Laurel Hill Paper Co. (In re Laurel Hill Paper Co.), 387 B.R. 677, 2008 Bankr. LEXIS 854 (Bankr. M.D.N.C. 2008).

§ 25-9-103. Purchase-money security interest; application of payments; burden of establishing.

CASE NOTES

Purchase-Money Security Interest. — Where a bankruptcy debtor's pre-bankruptcy purchase of a vehicle included financing of negative equity in a trade-in vehicle, 11 U.S.C.S. § 1325(a), did not preclude treatment of the portion of a claim of a creditor secured by the new vehicle for the negative equity was unsecured, since the creditor's purchase-money security interest did not extend to the negative equity portion of the creditor's claim; for purposes of a purchase-money security interest under G.S. 25-9-103, the payoff of negative equity was not part of the price of the new vehicle, and payment of the debtor's pre-existing debt secured by other collateral was not value given to enable the debtor to acquire rights in or use of the new vehicle. In re Conyers, 379 B.R. 576, 2007 Bankr. LEXIS 3773 (Bankr. M.D.N.C. 2007).

Negative equity and gap insurance do not come within the definition of "purchase money obligation," and thus cannot give rise to a purchase money security interest. Wells Fargo Fin. N.C. 1, Inc. v. Price, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 97420 (E.D.N.C. Nov. 14, 2007).

Creditor's claim based on financing a bankruptcy debtor's vehicle purchase was not fully secured, even though transactional costs such as charges for taxes, a license and registration fee, and an administrative fee were included in the purchase money obligation under G.S. 25-9-103, since the creditor's purchase money security interest did not extend to negative equity of the debtor's trade-in and charges for insurance, an extended warranty, and a lease payoff. In re Sherwood, — Bankr. —, 2008 Bankr. LEXIS 1995 (Bankr. E.D.N.C. Jan. 29, 2008).

Bankruptcy. — Because a Chapter 13 debtor financed an extended service contract, along with the purchase price of the vehicle, the debtor could not treat the amount owed for the contract as unsecured under 11 U.S.C.S. § 506(a) and the "hanging paragraph" of 11 U.S.C.S. § 1325 because a charge for the contract was so tied to the value of the collateral that it was a purchase money obligation under G.S. 25-9-103. In re Jernigan, — Bankr. —, 2008 Bankr. LEXIS 1159 (Bankr. E.D.N.C. Mar. 31, 2008).

SUBPART 2. Applicability of Article.

§ 25-9-109. Scope.

CASE NOTES

Article 9 does not apply where collateral consists of unearned insurance premiums, etc. —

Debtor's motion for summary judgment on the adversary proceeding of the 44A claimants to recover on liens for unpaid labor and materials was denied because the motion relied on G.S. 25-9-334, which was not applicable to priority questions involving nonpossessory statutory liens under N.C. Gen. Stat. ch. 44A. All Points Capital Corp. v. Laurel Hill Paper Co. (In re Laurel Hill Paper Co.), 387 B.R. 677, 2008 Bankr. LEXIS 854 (Bankr. M.D.N.C. 2008).

PART 3.

Perfection and Priority.

SUBPART 2. Perfection.

§ 25-9-315. Secured party's rights on disposition of collateral and in proceeds.

CASE NOTES

Secured Credit Could Bring Conversion Action After Security Sold at Auction. — Secured creditor could recover on a conversion claim under G.S. 25-9-315 since the creditors and the auctioneer auctioned off the debtors' cattle herd in which the secured creditor held a security interest, but the creditors and the auctioneer did not pay any of the proceeds to the secured creditor. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

SUBPART 3. Priority.

§ 25-9-333. Priority of certain liens arising by operation of law.

CASE NOTES

Cited in All Points Capital Corp. v. Laurel Hill Paper Co. (In re Laurel Hill Paper Co.), 387 B.R. 677, 2008 Bankr. LEXIS 854 (Bankr. M.D.N.C. 2008).

§ 25-9-334. Priority of security interests in fixtures and crops.

CASE NOTES

Not Applicable to Nonpossessory Statutory Liens. — Priority of nonpossessory statutory liens such as N.C. Gen. Stat. ch. 44A liens are not determined under any provision of Article 9 of the Uniform Commercial Code. G.S. 25-9-334 has no applicability in determining priority as between claimants under N.C. Gen. Stat. ch. 44A and claimants under Article 9 of the Uniform Commercial Code. All Points Capital Corp. v. Laurel Hill Paper Co. (In re Laurel

Hill Paper Co.), 387 B.R. 677, 2008 Bankr. LEXIS 854 (Bankr. M.D.N.C. 2008).

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PART 6.

DEFAULT.

SUBPART 1. Default and Enforcement of Security Interest.

§ 25-9-610. Disposition of collateral after default.

CASE NOTES

Sale by Auction When No Default. — Auctioneer and creditors were precluded from auctioning off the debtors cattle herd, and not paying in any of the proceeds from the sale to the secured creditor because the auctioneer had no security interest in the cattle and the debtors were not in default under their security agreements with the creditors. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

§ 25-9-611. Notification before disposition of collateral.

CASE NOTES

Applied in Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

§ 25-9-615. Application of proceeds of disposition; liability for deficiency and right to surplus.

CASE NOTES

Failure to Pay Secured Creditor Following Auction. — Auctioneer and creditors were precluded from auctioning off the debtors cattle herd, and not paying in any of the proceeds from the sale to the secured creditor, because the auctioneer had no security interest in the cattle and the debtors were not in default under their security agreements with the creditors. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

Chapter 25A.

Retail Installment Sales Act.

§ 25A-1. Scope of act.

CASE NOTES

Transaction Held Not Consumer Credit Sale. — Retail Installment Sales Act, G.S. 25A, did not apply where a creditor's financing of a debtor's motorcycle purchase was not a consumer credit sale. Worley v. GE Moneybank (In re Worley), — Bankr. —, 2008 Bankr. LEXIS 1893 (Bankr. E.D.N.C. June 16, 2008).

§ 25A-2. "Consumer credit sale" defined.

CASE NOTES

Transaction Held Not Consumer Credit Sale. —

Retail Installment Sales Act, G.S. 25A, did not apply since the creditor's financing of a debtor's motorcycle purchase was not a consumer credit sale. Worley v. GE Moneybank (In re Worley), — Bankr. —, 2008 Bankr. LEXIS 1893 (Bankr. E.D.N.C. June 16, 2008).

§ 25A-9. "Amount financed" defined.

CASE NOTES

Purchase-Money Security Interest. — Negative equity and gap insurance do not come within the definition of "purchase money obligation," and thus cannot give rise to a purchase money security interest. Wells Fargo Fin. N.C. 1, Inc. v. Price, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 97420 (E.D.N.C. Nov. 14, 2007).

§ 25A-25. Preservation of consumers' claims and defenses.

CASE NOTES

Defense Not Available. — Where homeowners obtained a loan for construction of a swimming pool on their property, and the homeowners alleged that the company constructing the pool fraudulently induced the homeowners to endorse and deliver checks to the company, such fraud could not be asserted against the lender to warrant reformation of the note since the homeowners did not allege any fraudulent misrepresentation on the part of the lender with regard to the note. Capparelli v. Amerifirst Home Improvement Fin. Co., 535 F. Supp. 2d 554, 2008 U.S. Dist. LEXIS 11315 (E.D.N.C. 2008).

Chapter 28A.

Administration of Decedents' Estates.

Article 18.

Actions and Proceedings.

§ 28A-18-1. Survival of actions to and against personal representative.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Beneficiary Lacked Standing to Sue Executor Absent Evidence of Demand Prior to Decedent's Death. — Absent evidence of an assertion of a prior demand against the executor before the decedent's death, or evidence that the beneficiary sought to remove the executor through petition before the clerk of superior court, the beneficiary lacked standing to sue the executor after the decedent died. Horry v. Woodbury, — N.C. App. —, 659 S.E.2d 88, 2008 N.C. App. LEXIS 706 (2008).

§ 28A-18-2. Death by wrongful act of another; recovery not assets.

CASE NOTES

IV. Distribution of Recovery.

IV. DISTRIBUTION OF RECOVERY.

Construction with Workers' Compensation Act. — Right for decedent's estate to bring an action against the third-party tortfeasors, was conferred by G.S. 28A-18-2; however, the relative rights between decedent's estate and respondent employer and its insurer were governed by G.S. 97-10.2. Parker v. C.C. Mangum Co. (In re Estate of Bullock), — N.C. App. —, 655 S.E.2d 869, 2008 N.C. App. LEXIS 218 (Feb. 5, 2008).

Article 27.

Apportionment of Federal Estate Tax.

§ 28A-27-1. Definitions.

CASE NOTES

Cited in Pope v. Rollins (In re Estate of Pope), — N.C. App. —, 666 S.E.2d 140, 2008 N.C. App. LEXIS 1626 (2008).

§ 28A-27-5. Exemptions, deductions, and credits.

CASE NOTES

Cited in Pope v. Rollins (In re Estate of Pope), — N.C. App. —, 666 S.E.2d 140, 2008 N.C. App. LEXIS 1626 (2008).

Chapter 29.

Intestate Succession.

Article 6.

Illegitimate Children.

§ 29-19. Succession by, through and from illegitimate children.

CASE NOTES

Voluntary Support Agreement Used to Establish Right to Inherit. — G.S. 110-132 does not imply that voluntary support agreements are strictly limited such that they may have no legal implications other than that of child support; it acknowledges that voluntary support agreements, when properly acknowledged and approved by a trial court, have the same force and effect as a trial court's order of support. Accordingly, a voluntary support agreement could be used to establish that an out-of-wedlock child was entitled to inherit under G.S. 29-19(b). In re Estate of Potts, 186 N.C. App. 460, 651 S.E.2d 297, 2007 N.C. App. LEXIS 2188 (2007).

Decedent's out-of-wedlock child was entitled to inherit under G.S. 29-19(b)(2). The decedent had acknowledged in a voluntary support agreement that he was the child's father; the agreement was executed by a notary, who was a certifying officer; and it was filed during both the decedent's and the child's lifetimes with the clerk of superior court in the decedent's county. In re Estate of Potts, 186 N.C. App. 460, 651 S.E.2d 297, 2007 N.C. App. LEXIS 2188 (2007).

Chapter 30.

Surviving Spouses.

Article 1A.

Elective Share.

§ 30-3.1. Right of elective share.

CASE NOTES

I. Decisions under Current Law.

I. DECISIONS UNDER CURRENT LAW.

Cited in Pope v. Rollins (In re Estate of Pope), — N.C. App. —, 666 S.E.2d 140, 2008 N.C. App. LEXIS 1626 (2008).

§ 30-3.2. Definitions.

CASE NOTES

Trust Not Part of Total Net Assets. — Superior court did not err in denying a widow's claim for an elective share because the assets in a decedent's trust were not part of his total net assets; the trust assets were part of the decedent's gross estate, and no value was left in the trust for purposes of calculating the decedent's total net assets because the taxable estate was zero since the assets of the trust were all transferred to a corporation organized for a charitable purpose. Pope v. Rollins (In re Estate of Pope), — N.C. App. —, 666 S.E.2d 140, 2008 N.C. App. LEXIS 1626 (2008).

Superior court did not err in denying a widow's claim for an elective share because the assets in a decedent's trust were not part of his total net assets; when the Elective Share Act, G.S. 30-3.2(4)(e), refers to "the taxable estate," it means the decedent's gross estate less any deductions, and because G.S. 30-3.2(4)(e), encompasses property included in the taxable estate of the decedent "pursuant to" the Internal Revenue Code, the General Assembly was referring to "the taxable estate" as defined by the Internal Revenue Code. Pope v. Rollins (In re Estate of Pope), — N.C. App. —, 666 S.E.2d 140, 2008 N.C. App. LEXIS 1626 (2008).

Superior court did not err in denying a widow's claim for an elective share because the assets in a decedent's trust were not part of his total net assets; the decedent did not have legal title within the meaning of the Elective Share Act, G.S. 30-3.2(4)(a) because legal title to the decedent's trust assets was held collectively by the trustees. Pope v. Rollins (In re Estate of Pope), — N.C. App. —, 666 S.E.2d 140, 2008 N.C. App. LEXIS 1626 (2008).

§ 30-3.4. Procedure for determining the elective share.

CASE NOTES

I. Decisions under Current Law.

I. DECISIONS UNDER CURRENT LAW.

Summary Judgment Proper. — Widow's claim that the clerk of the superior court did not comply with the procedural requirements of the Elective Share Act, G.S. 30-3.4, when he resolved the widow's action seeking an elective share on the parties' cross-motions for summary judgment was not properly before the court of appeals because the record did not contain any indication that the widow ever objected to the clerk's resolving the case on summary judgment prior to appealing. Pope v. Rollins (In re Estate of Pope), — N.C. App. —, 666 S.E.2d 140, 2008 N.C. App. LEXIS 1626 (2008).

Chapter 31.

Wills.

Article 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.

CASE NOTES

III. Time Limit.

III. TIME LIMIT.

Will Probated Over 125 Years Ago. — Even if the court were to find a valid fraud claim or sufficient state action to support a 42 U.S.C.S. § 1983 claim, the statute of limitations barred plaintiffs' claims, as plaintiffs were objecting to transfers made under a will probated over 125 years ago. Majeed v. North Carolina, 520 F. Supp. 2d 720, 2007 U.S. Dist. LEXIS 74441 (E.D.N.C. Oct. 4, 2007).

Chapter 32.

Fiduciaries.

ARTICLE 1.

Uniform Fiduciaries Act.

§ 32-2. Definition of terms.

CASE NOTES

Reasonable Care Demonstrated by Fiduciary. — Because a bank, which was the trustee of a trust, demonstrated reasonable care by taking precautionary steps to protect the retained funds and investing the funds in a liquid and risk-free money market account until the pending litigation was resolved, there was no breach of fiduciary duty under G.S. 32-2. Heinitsh v. Wachovia Bank, — N.C. App. —, 665 S.E.2d 541, 2008 N.C. App. LEXIS 1618 (2008).

ARTICLE 7.

Investment and Deposit of Trust Funds.

§ 32-71. Investment; prudent person rule.

CASE NOTES

No Violation of Standard Shown. — Because a bank, which was the trustee of a trust, demonstrated reasonable care by taking precautionary steps to protect the retained funds and investing the funds in a liquid and risk-free money market account until the pending litigation was resolved, there was no breach of fiduciary duty under G.S. 32-2. Heinitsh v. Wachovia Bank, — N.C. App. —, 665 S.E.2d 541, 2008 N.C. App. LEXIS 1618 (2008).

Chapter 32A.

Powers of Attorney.

Article 3.

Health Care Powers of Attorney.

Sec.
32A-15. General purpose of this Article.
Sec.
32A-25.1. Statutory form health care power of attorney.

Article 3.

Health Care Powers of Attorney.

§ 32A-15. General purpose of this Article.

(a) The General Assembly recognizes as a matter of public policy the fundamental right of an individual to control the decisions relating to his or her medical care, and that this right may be exercised on behalf of the individual by an agent chosen by the individual.

(b) The purpose of this Article is to establish an additional, nonexclusive method for an individual to exercise his or her right to give, withhold, or withdraw consent to medical treatment, including mental health treatment, when the individual lacks sufficient understanding or capacity to make or communicate health care decisions.

(c) This Article is intended and shall be construed to be consistent with the provisions of Article 23 of Chapter 90 of the General Statutes provided that in the event of a conflict between the provisions of this Article and Article 23 of Chapter 90, the provisions of Article 23 of Chapter 90 control. No conflict between these Chapters exists when either a health care power of attorney or a declaration provides that the declaration is subject to decisions of a health care agent. If no declaration has been executed by the principal as provided in G.S. 90-321 that expressly covers the principal's present condition and if the health care agent has been given the specific authority in a health care power of attorney to authorize the withholding or discontinuing of life-prolonging measures when the principal is in such condition, the measures may be withheld or discontinued as provided in the health care power of attorney upon the direction and under the supervision of the attending physician, as G.S. 90-322 shall not apply in such case. Nothing in this Article shall be construed to authorize any affirmative or deliberate act or omission to end life other than to permit the natural process of dying.

(d) This Article is intended and shall be construed to be consistent with the provisions of Part 3A of Article 16 of Chapter 130A of the General Statutes. In the event of a conflict between the provisions of this Article and Part 3A of Article 16 of Chapter 130A, the provisions of Part 3A of Article 16 of Chapter 130A control. (1991, c. 639, s. 1; 1993, c. 523, s. 1; 1998-198, s. 1; 1998-217, s. 53; 2007-502, s. 1; 2008-153, s. 4.)

Effect of Amendments. — Session Laws 2008-153, s. 4, effective August 2, 2008, substituted "Part 3A" for "Part 3" three times in subsection (d).

§ 32A-25.1. Statutory form health care power of attorney.

(a) The use of the following form in the creation of a health care power of attorney is lawful and, when used, it shall meet the requirements of and be construed in accordance with the provisions of this Article:

HEALTH CARE POWER OF ATTORNEY

NOTE: YOU SHOULD USE THIS DOCUMENT TO NAME A PERSON AS YOUR HEALTH CARE AGENT IF YOU ARE COMFORTABLE GIVING THAT PERSON BROAD AND SWEEPING POWERS TO MAKE HEALTH CARE DECISIONS FOR YOU. THERE IS NO LEGAL REQUIREMENT THAT ANYONE EXECUTE A HEALTH CARE POWER OF ATTORNEY.

EXPLANATION: *You have the right to name someone to make health care decisions for you when you cannot make or communicate those decisions. This form may be used to create a health care power of attorney, and meets the requirements of North Carolina law. However, you are not required to use this form, and North Carolina law allows the use of other forms that meet certain requirements. If you prepare your own health care power of attorney, you should be very careful to make sure it is consistent with North Carolina law.*

This document gives the person you designate as your health care agent ***broad powers*** *to make health care decisions for you when you cannot make the decision yourself or cannot communicate your decision to other people. You should discuss your wishes concerning life-prolonging measures, mental health treatment, and other health care decisions with your health care agent. Except to the extent that you express specific limitations or restrictions in this form, your health care agent may make any health care decision you could make yourself.*

This form does not impose a duty on your health care agent to exercise granted powers, but when a power is exercised, your health care agent will be obligated to use due care to act in your best interests and in accordance with this document.

This Health Care Power of Attorney form is intended to be valid in any jurisdiction in which it is presented, but places outside North Carolina may impose requirements that this form does not meet.

If you want to use this form, you must complete it, sign it, and have your signature witnessed by two qualified witnesses and proved by a notary public. Follow the instructions about which choices you can initial very carefully. ***Do not sign this form until*** *two witnesses and a notary public are present to watch you sign it. You then should give a copy to your health care agent and to any alternates you name. You should consider filing it with the Advance Health Care Directive Registry maintained by the North Carolina Secretary of State:* http://www.nclifelinks.org/ahcdr/

1. Designation of Health Care Agent.

I, ________________, being of sound mind, hereby appoint the following person(s) to serve as my health care agent(s) to act for me and in my name (in any way I could act in person) to make health care decisions for me as authorized in this document. My designated health care agent(s) shall serve alone, in the order named.

A. Name: ____________________ Home Telephone: ________________

Home Address: ______________________ Work Telephone: ______________________
______________________ Cellular Telephone: ______________________
B. Name: ______________________ Home Telephone: ______________________
Home Address: ______________________ Work Telephone: ______________________
______________________ Cellular Telephone: ______________________
C. Name: ______________________ Home Telephone: ______________________
Home Address: ______________________ Work Telephone: ______________________
______________________ Cellular Telephone: ______________________

Any successor health care agent designated shall be vested with the same power and duties as if originally named as my health care agent, and shall serve any time his or her predecessor is not reasonably available or is unwilling or unable to serve in that capacity.

2. Effectiveness of Appointment.

My designation of a health care agent expires only when I revoke it. Absent revocation, the authority granted in this document shall become effective when and if one of the physician(s) listed below determines that I lack capacity to make or communicate decisions relating to my health care, and will continue in effect during that incapacity, or until my death, except if I authorize my health care agent to exercise my rights with respect to anatomical gifts, autopsy, or disposition of my remains, this authority will continue after my death to the extent necessary to exercise that authority.

1. ______________ *(Physician)*
2. ______________ *(Physician)*

If I have not designated a physician, or no physician(s) named above is reasonably available, the determination that I lack capacity to make or communicate decisions relating to my health care shall be made by my attending physician.

3. Revocation.

Any time while I am competent, I may revoke this power of attorney in a writing I sign or by communicating my intent to revoke, in any clear and consistent manner, to my health care agent or my health care provider.

4. General Statement of Authority Granted.

Subject to any restrictions set forth in Section 5 below, I grant to my health care agent full power and authority to make and carry out all health care decisions for me. These decisions include, but are not limited to:

A. Requesting, reviewing, and receiving any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records, and to consent to the disclosure of this information.
B. Employing or discharging my health care providers.
C. Consenting to and authorizing my admission to and discharge from a hospital, nursing or convalescent home, hospice, long-term care facility, or other health care facility.
D. Consenting to and authorizing my admission to and retention in a facility for the care or treatment of mental illness.
E. Consenting to and authorizing the administration of medications for mental health treatment and electroconvulsive treatment (ECT) commonly referred to as "shock treatment."
F. Giving consent for, withdrawing consent for, or withholding consent for, X-ray, anesthesia, medication, surgery, and all other diagnostic and treatment procedures ordered by or under the authorization of a licensed physician, dentist, podiatrist, or other health care provider. This authorization specifically includes the power to consent to measures for relief of pain.

G. Authorizing the withholding or withdrawal of life-prolonging measures.

H. Providing my medical information at the request of any individual acting as my attorney-in-fact under a durable power of attorney or as a Trustee or successor Trustee under any Trust Agreement of which I am a Grantor or Trustee, or at the request of any other individual whom my health care agent believes should have such information. I desire that such information be provided whenever it would expedite the prompt and proper handling of my affairs or the affairs of any person or entity for which I have some responsibility. In addition, I authorize my health care agent to take any and all legal steps necessary to ensure compliance with my instructions providing access to my protected health information. Such steps shall include resorting to any and all legal procedures in and out of courts as may be necessary to enforce my rights under the law and shall include attempting to recover attorneys' fees against anyone who does not comply with this health care power of attorney.

I. To the extent I have not already made valid and enforceable arrangements during my lifetime that have not been revoked, exercising any right I may have to authorize an autopsy or direct the disposition of my remains.

J. Taking any lawful actions that may be necessary to carry out these decisions, including, but not limited to: (i) signing, executing, delivering, and acknowledging any agreement, release, authorization, or other document that may be necessary, desirable, convenient, or proper in order to exercise and carry out any of these powers; (ii) granting releases of liability to medical providers or others; and (iii) incurring reasonable costs on my behalf related to exercising these powers, provided that this health care power of attorney shall not give my health care agent general authority over my property or financial affairs.

5. Special Provisions and Limitations.
(Notice: The authority granted in this document is intended to be as broad as possible so that your health care agent will have authority to make any decisions you could make to obtain or terminate any type of health care treatment or service. If you wish to limit the scope of your health care agent's powers, you may do so in this section. If none of the following are initialed, there will be no special limitations on your agent's authority.)

A. Limitations about Artificial Nutrition or Hydration: In exercising the authority to make health care decisions on my behalf, my health care agent:

______________ *(Initial)* shall NOT have the authority to withhold artificial nutrition (such as through tubes) OR may exercise that authority only in accordance with the following special provisions:

____

____

______________ *(Initial)* shall NOT have the authority to withhold artificial hydration (such as through tubes) OR may exercise that authority only in accordance with the following special provisions:

____

____

NOTE: If you initial either block but do not insert any special provisions, your health care agent shall

have NO AUTHORITY to withhold artificial nutrition or hydration. ______________________________

______________ *(Initial)*

B. Limitations Concerning Health Care Decisions. In exercising the authority to make health care decisions on my behalf, the authority of my health care agent is subject to the following special provisions: (Here you may include any specific provisions you deem appropriate such as: your own definition of when life-prolonging measures should be withheld or discontinued, or instructions to refuse any specific types of treatment that are inconsistent with your religious beliefs, or are unacceptable to you for any other reason.)

____

____

NOTE: DO NOT initial unless you insert a limitation.

______________ *(Initial)*

C. Limitations Concerning Mental Health Decisions. In exercising the authority to make mental health decisions on my behalf, the authority of my health care agent is subject to the following special provisions: (Here you may include any specific provisions you deem appropriate such as: limiting the grant of authority to make only mental health treatment decisions, your own instructions regarding the administration or withholding of psychotropic medications and electroconvulsive treatment (ECT), instructions regarding your admission to and retention in a health care facility for mental health treatment, or instructions to refuse any specific types of treatment that are unacceptable to you.)

____

____

NOTE: DO NOT initial unless you insert a limitation.

______________ *(Initial)*

D. Advance Instruction for Mental Health Treatment. (Notice: This health care power of attorney may incorporate or be combined with an advance instruction for mental health treatment, executed in accordance with Part 2 of Article 3 of Chapter 122C of the General Statutes, which you may use to state your instructions regarding mental health treatment in the event you lack capacity to make or communicate mental health treatment decisions. Because your health care agent's decisions must be consistent with any statements you have expressed in an advance instruction, you should indicate here whether you have executed an advance instruction for mental health treatment):

____

____

NOTE: DO NOT initial unless you insert a limitation.

______________ *(Initial)*

E. Autopsy and Disposition of Remains. In exercising the authority to make decisions regarding autopsy and disposition of remains on my behalf, the authority of my health care agent is subject to the following special provisions and limitations. (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority and the scope of authority, or instructions regarding burial or cremation):

____

____

NOTE: DO NOT initial unless you insert a limitation.

6. Organ Donation.

To the extent I have not already made valid and enforceable arrangements during my lifetime that have not been revoked, my health care agent may exercise any right I may have to:

____________ donate any needed organs or parts; or
(Initial)

____________ donate only the following organs or parts:
(Initial)

____

NOTE: DO NOT INITIAL BOTH BLOCKS ABOVE.

____________ donate my body for anatomical study if needed.
(Initial)

____________ In exercising the authority to make donations, my health care agent is subject to the following special provisions and limitations: (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority and the scope of authority, or instructions regarding gifts of the body or body parts.)
(Initial)

____

____

____

NOTE: DO NOT initial unless you insert a limitation.

NOTE: NO AUTHORITY FOR ORGAN DONATION IS GRANTED IN THIS INSTRUMENT WITHOUT YOUR INITIALS.

7. Guardianship Provision.

If it becomes necessary for a court to appoint a guardian of my person, I nominate the persons designated in Section 1, in the order named, to be the guardian of my person, to serve without bond or security. The guardian shall act consistently with G.S. 35A-1201(a)(5).

8. Reliance of Third Parties on Health Care Agent.

A. No person who relies in good faith upon the authority of or any representations by my health care agent shall be liable to me, my estate, my heirs, successors, assigns, or personal representatives, for actions or omissions in reliance on that authority or those representations.

B. The powers conferred on my health care agent by this document may be exercised by my health care agent alone, and my health care agent's signature or action taken under the authority granted in this document may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. All acts performed in good faith by my health care agent pursuant to this power of attorney are done with my consent and shall have the same validity and effect as if I were present and exercised the powers myself, and shall inure to the benefit of and bind me, my estate, my heirs, successors, assigns, and personal representatives. The authority of my health care agent pursuant to this power of attorney shall be superior to and binding upon my family, relatives, friends, and others.

9. Miscellaneous Provisions.

A. Revocation of Prior Powers of Attorney. I revoke any prior health care power of attorney. The preceding sentence is not intended to revoke any general powers of attorney, some of the provisions of which may relate to health care; however, this power of attorney shall take precedence over any health care provisions in any valid general power of attorney I have not revoked.

B. Jurisdiction, Severability, and Durability. This Health Care Power of Attorney is intended to be valid in any jurisdiction in which it is presented. The powers delegated under this power of attorney are severable, so that the invalidity of one or more powers shall not affect any others. This power of attorney shall not be affected or revoked by my incapacity or mental incompetence.

C. Health Care Agent Not Liable. My health care agent and my health care agent's estate, heirs, successors, and assigns are hereby released and forever discharged by me, my estate, my heirs, successors, assigns, and personal representatives from all liability and from all claims or demands of all kinds arising out of my health care agent's acts or omissions, except for my health care agent's willful misconduct or gross negligence.

D. No Civil or Criminal Liability. No act or omission of my health care agent, or of any other person, entity, institution, or facility acting in good faith in reliance on the authority of my health care agent pursuant to this Health Care Power of Attorney shall be considered suicide, nor the cause of my death for any civil or criminal purposes, nor shall it be considered unprofessional conduct or as lack of professional competence. Any person, entity, institution, or facility against whom criminal or civil liability is asserted because of conduct authorized by this Health Care Power of Attorney may interpose this document as a defense.

E. Reimbursement. My health care agent shall be entitled to reimbursement for all reasonable expenses incurred as a result of carrying out any provision of this directive.

By signing here, I indicate that I am mentally alert and competent, fully informed as to the contents of this document, and understand the full import of this grant of powers to my health care agent.

This the ______ day of ________________, 20______.

__________________________ (SEAL)

I hereby state that the principal, ________________, being of sound mind, signed (or directed another to sign on the principal's behalf) the foregoing health care power of attorney in my presence, and that I am not related to the principal by blood or marriage, and I would not be entitled to any portion of the estate of the principal under any existing will or codicil of the principal or as an heir under the Intestate Succession Act, if the principal died on this date without a will. I also state that I am not the principal's attending physician, nor a licensed health care provider or mental health treatment provider who is (1) an employee of the principal's attending physician or mental health treatment provider, (2) an employee of the health facility in which the principal is a patient, or (3) an employee of a nursing home or any adult care home where the principal resides. I further state that I do not have any claim against the principal or the estate of the principal.

Date: ______________________ Witness: ______________________________

Date: ______________________ Witness: ______________________________

____________________ COUNTY, ________________ STATE

Sworn to (or affirmed) and subscribed before me this day by ____________

(type/print name of signer)

____

(type/print name of witness)

____

(type/print name of witness)

Date: __________________ __________________________

(Official Seal) *Signature of Notary Public*

__________________, Notary Public

Printed or typed name

My commission expires: ________

(b) Use of the statutory form prescribed in this section is an optional and nonexclusive method for creating a health care power of attorney and does not affect the use of other forms of health care powers of attorney, including previous statutory forms. (1991, c. 639, s. 1; 1993, c. 523, s. 3; 1998-198, s. 1; 1998-217, s. 53; 2005-351, s. 3; 2006-226, s. 32; 2007-502, s. 6(b); 2008-187, s. 37(a).)

Editor's Note. —

Session Laws 2008-187, s. 37(c) provides, in part, that: "Nothing in this section shall affect the validity of a health care power of attorney executed before, on, or after the effective date of this section [August 7, 2008]."

Effect of Amendments. — Session Laws 2008-187, s. 37(a), effective August 7, 2008, substituted "Section 5" for "Section 6" in the first paragraph of section 4 of the form. See Editor's note for applicability.

Chapter 35A.

Incompetency and Guardianship.

SUBCHAPTER II. GUARDIAN AND WARD.

Article 9.

Powers and Duties of Guardian of the Estate.

Sec.
35A-1251. Guardian's powers in administering incompetent ward's estate.

Sec.
35A-1252. Guardian's powers in administering minor ward's estate.

SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

Article 1.

Determination of Incompetence.

§ 35A-1101. Definitions.

Editor's Note. —
Session Laws 2008-181, ss. 44.1 through 44.5 created the Joint Legislative Study Commission on State Guardianship Laws to review State law pertaining to guardianship and its relationship to other laws such as health care power of attorney, right to a natural death, and durable power of attorney. The Legislative Study Commission on State Guardianship Laws may make its final report to the 2009 General Assembly, prior to its convening. The Commission shall expire upon delivering its final report, or upon the convening of the 2009 General Assembly, whichever occurs first.

§ 35A-1107. Right to counsel or guardian ad litem.

CASE NOTES

Cited in In re L.B., — N.C. App. —, 653 S.E.2d 240, 2007 N.C. App. LEXIS 2456 (2007).

§ 35A-1109. Service of notice and petition.

CASE NOTES

Cited in In re Winstead, — N.C. App. —, 657 S.E.2d 411, 2008 N.C. App. LEXIS 417 (2008).

§ 35A-1112. Hearing on petition; adjudication order.

CASE NOTES

Cited in In re L.B., — N.C. App. —, 653 S.E.2d 240, 2007 N.C. App. LEXIS 2456 (2007).

§ 35A-1115. Appeal from clerk's order.

CASE NOTES

Standing. — Husband had standing to appeal the clerk of the trial court's decision that the wife was incompetent to manage her own affairs. Pursuant to G.S. 35A-1115, the husband was an interested part because he was entitled to notice of the incompetency proceeding. In re Winstead, — N.C. App. —, 657 S.E.2d 411, 2008 N.C. App. LEXIS 417 (2008).

ARTICLE 2.

Appointment of Guardian.

§ 35A-1120. Appointment of guardian.

CASE NOTES

Cited in In re L.B., — N.C. App. —, 653 S.E.2d 240, 2007 N.C. App. LEXIS 2456 (2007).

SUBCHAPTER II. GUARDIAN AND WARD.

ARTICLE 4.

Purpose and Scope; Jurisdiction; Venue.

§ 35A-1207. Motions in the cause.

CASE NOTES

Cited in In re Winstead, — N.C. App. —, 657 S.E.2d 411, 2008 N.C. App. LEXIS 417 (2008).

ARTICLE 5.

Appointment of Guardian for Incompetent Person.

§ 35A-1210. Application before clerk.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in In re Winstead, — N.C. App. —, 657 S.E.2d 411, 2008 N.C. App. LEXIS 417 (2008).

Article 8.

Powers and Duties of Guardian of the Person.

§ 35A-1241. Powers and duties of guardian of the person.

CASE NOTES

Supervision of Guardian by Clerk of Trial Court. — In a disciplinary proceeding against an attorney for misappropriating the client's property, the attorney's explanation had to be rejected that the client wanted the attorney to hold the client's funds because the client was afraid her relatives, including the guardian, would steal the property. The guardian, once appointed, had various powers pursuant to G.S. 35A-1241, but was also subject to supervision by the clerk of the trial court and also would be responsible for any loss of her property. N.C. State Bar v. Ethridge, — N.C. App. —, 657 S.E.2d 378, 2008 N.C. App. LEXIS 283 (2008).

Article 9.

Powers and Duties of Guardian of the Estate.

§ 35A-1251. Guardian's powers in administering incompetent ward's estate.

In the case of an incompetent ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:

(1) To take possession, for the ward's use, of all the ward's estate, as defined in G.S. 35A-1202(5).

(2) To receive assets due the ward from any source.

(3) To maintain any appropriate action or proceeding to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.

(4) To complete performance of contracts entered into by the ward that continue as obligations of the ward or his estate, or to refuse to complete the contracts, as the guardian determines to be in the ward's best interests, taking into account any cause of action that might be maintained against the ward for failure to complete the contract.

(5) To abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in a condition that it is of no benefit or value to the ward or his estate.

(5a) To renounce any interest in property as provided in Chapter 31B of the General Statutes, or as otherwise allowed by law.

(6) To vote shares of stock or other securities in person or by general or limited proxy, and to pay sums chargeable or accruing against or on account of securities owned by the ward.

(7) To insure the ward's assets against damage or loss, at the expense of the ward's estate.

(8) To pay the ward's debts and obligations that were incurred prior to the date of adjudication of incompetence or appointment of a guardian when the debt or obligation was incurred for necessary living expenses or taxes; or when the debt or obligation involves a specific lien on real or personal property, if the ward has an equity in the property on which there is a specific lien; or when the guardian is convinced that payment of the debt or obligation is in the best interest of the ward or his estate.

(9) To renew the ward's obligations for the payment of money. The guardian's execution of any obligation for the payment of money pursuant to this subsection shall not be held or construed to be binding on the guardian personally.

(10) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the ward's estate.

(11) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(12) To expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal.

(13) To pay from the ward's estate necessary expenses of administering the ward's estate.

(14) To employ persons, including attorneys, auditors, investment advisors, appraisers, or agents to advise or assist him in the performance of his duties as guardian.

(15) To continue any business or venture or farming operation in which the ward was engaged, where that continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the ward's interest in the business.

(16) To acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

(17)a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order shall not exceed five thousand dollars ($5,000) per accounting period. When any item of the ward's tangible personal property has a value which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed five thousand dollars ($5,000) in the current accounting period, a guardian may sell the item only as provided in subdivision (17)b.

b. A guardian who is required by subdivision (17)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in G.S. 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon any other persons the clerk may direct, and the court may issue the order after conducting a hearing and upon any conditions that the court may require; provided that:

1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the General Statutes unless the order so requires; and
2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (12) of this section.

(18) To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed or trust, or other lien securing the bond, note or other obligation, and to bid in the property at a foreclosure sale, or to acquire the property deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(19) To borrow money for any periods of time and upon the terms and conditions as to rates, maturities, renewals, and security as the guardian shall deem advisable, including the power of a corporate guardian to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the ward, and to mortgage, pledge, or otherwise encumber that portion of the ward's estate as may be required to secure the loan or loans; provided, in respect to the borrowing of money on the security of the ward's real property, Subchapter III of this Chapter is controlling.

(20) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian.

(21) To expend estate income for the support, maintenance, and education of the ward's minor children, spouse, and dependents, and to petition the court for prior approval of expenditures from estate principal for these purposes; provided, the clerk, in the original order appointing the guardian or a subsequent order, may require that the expenditures from estate income also be approved in advance. In determining whether and in what amount to make or approve these expenditures, the guardian or clerk shall take into account the ward's legal obligations to his minor children, spouse, and dependents; the sufficiency of the ward's estate to meet the ward's needs; the needs and resources of the ward's minor children, spouse, and dependents; and the ward's conduct or expressed wishes, prior to becoming incompetent, in regard to the support of these persons.

(22) To transfer to the spouse of the ward those amounts authorized for transfer to the spouse pursuant to 42 United States Code § 1396r-5.

(23) To create a trust for the benefit of the ward pursuant to 42 United States Code § 1396p(d)(4), provided that all amounts remaining in the trust upon the death of the ward, other than those amounts which must be paid to a state government and those amounts retained by a nonprofit association as set forth in 42 United States Code § 1396p(d)(4)(C), are to be paid to the estate of the ward.

(24) To petition the court for approval of the exercise of any of the following powers with respect to a revocable trust that the ward, if competent, could exercise as settlor of the revocable trust:

a. Revocation of the trust.
b. Amendment of the trust.
c. Additions to the trust.
d. Direction to dispose of property of the trust.
e. The creation of the trust, notwithstanding the provisions of G.S. 36C-4-402(a)(1) and (2).

The exercise of the powers described in this subdivision (i) shall not alter the designation of beneficiaries to receive property on the ward's death under that ward's existing estate plan; and (ii) shall be subject to the provisions of Articles 17, 18, and 19 of this Chapter concerning gifts. (1987, c. 550, s. 1; 1989, c. 473, ss. 3, 13; 1995, c. 235, ss. 6, 8; 1999-270, s. 9; 2004-199, s. 15; 2007-106, s. 52; 2008-87, s. 1.)

Effect of Amendments. —

Session Laws 2008-87, s. 1, effective October 1, 2008, in subdivision (17)a., substituted "shall not exceed five thousand dollars ($5,000) per accounting period" for "over the duration of the estate shall not exceed one thousand five hundred dollars ($1,500)" in the first sentence, and substituted "five thousand dollars ($5,000) in the current accounting period" for "one thousand five hundred dollars ($1,500)" in the last sentence.

§ 35A-1252. Guardian's powers in administering minor ward's estate.

In the case of a minor ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:

(1) To take possession, for the ward's use, of all the ward's estate, as defined in G.S. 35A-1202(5).

(2) To receive assets due the ward from any source.

(3) To maintain any appropriate action or proceeding to obtain support to which the ward is legally entitled, to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.

(4) To abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit or value to the ward or his estate.

(4a) To renounce any interest in property as provided in Chapter 31B of the General Statutes, or as otherwise allowed by law.

(5) To vote shares of stock or other securities in person or by general or limited proxy, and to pay sums chargeable or accruing against or on account of securities owned by the ward.

(6) To insure the ward's assets against damage or loss, at the expense of the ward's estate.

(7) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the ward's estate.

(8) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(9) To expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal; provided, neither the existence of the estate nor the guardian's authority to make expenditures therefrom shall be construed as affecting the legal duty that a parent or other person may have to support and provide for the ward.

(10) To pay from the ward's estate necessary expenses of administering the ward's estate.

(11) To employ persons, including attorneys, auditors, investment advisors, appraisers, or agents to advise or assist him in the performance of his duties as guardian.

(12) To continue any business or venture or farming operation in which the ward was engaged, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the ward's interest in such business.

(13) To acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

(14)a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order shall not exceed five thousand dollars ($5,000) per accounting period. When any item of the ward's tangible personal property has a value which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed five thousand dollars ($5,000) in the current accounting period, a guardian may sell the item only as provided in subdivision (14)b.

b. A guardian who is required by subdivision (14)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in G.S. 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon such other persons as the clerk may direct, and the court may issue the order after hearing and upon such conditions as the court may require; provided that:

1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the General Statutes unless the order so requires; and
2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (9) of this section.

(15) To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed of trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclosure sale, or to acquire the property by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(16) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the guardian shall deem advisable, including the power of a corporate guardian to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the ward, and to mortgage, pledge, or otherwise encumber such portion of the ward's

estate as may be required to secure such loan or loans; provided, in respect to the borrowing of money on the security of the ward's real property, Subchapter III of this Chapter is controlling.

(17) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 4; 1995, c. 235, s. 7; 2008-87, s. 2.)

Effect of Amendments. — Session Laws 2008-87, s. 2, effective October 1, 2008, in subdivision (14)a., substituted "shall not exceed five thousand dollars ($5,000) per accounting period" for "over the duration of the estate shall not exceed one thousand five hundred dollars ($1,500)" in the first sentence, and substituted "five thousand dollars ($5,000) in the current accounting period" for "one thousand five hundred dollars ($1,500)" in the last sentence.

SUBCHAPTER III. MANAGEMENT OF WARD'S ESTATE.

Article 14.

Sale, Mortgage, Exchange or Lease of Ward's Estate.

§ 35A-1301. Special proceedings to sell, exchange, mortgage, or lease.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Appraisal Value. — Guardian complied with the requirements of G.S. 35A-1301(b) in the sale of the ward's properties because the guardian was not statutorily required to obtain an appraisal value nor did the superior court request such documentation prior to the approval of the sales. Further, the comparative market analysis used by the guardian in valuing the property was an acceptable method in North Carolina. Clay v. Monroe, — N.C. App. —, 658 S.E.2d 532, 2008 N.C. App. LEXIS 645 (Apr. 1, 2008).

Chapter 36C.

North Carolina Uniform Trust Code.

Article 4.

Creation, Validity, Modification, and Termination of Trust.

§ 36C-4-401.1. Interest of trustee as beneficiary of life insurance or other death benefit sufficient to support inter vivos or testamentary trust.

CASE NOTES

Spendthrift Trust. — Deceased Chapter 7 debtor created a valid spendthrift trust prepetition, pursuant to G.S. 36C-4-401.1 and 36C-5-501, when she designated the trust as the beneficiary of her life insurance policy, the debtor husband and a minor daughter were named as beneficiaries of the trust, and the life insurance policy was exempted from the estate. In re Singletary, — Bankr. —, 2008 Bankr. LEXIS 1892 (Bankr. E.D.N.C. June 13, 2008).

§ 36C-4-411. Modification or termination of noncharitable irrevocable trust by consent.

CASE NOTES

Bankruptcy trustee did not have authority to terminate a spendthrift trust made by a deceased debtor wife, in which a debtor husband was a beneficiary, because the debtor wife exempted her interest in the life insurance policy from the estate and that interest was not property of the estate. In re Singletary, — Bankr. —, 2008 Bankr. LEXIS 1892 (Bankr. E.D.N.C. June 13, 2008).

Article 5.

Creditors' Claims; Spendthrift and Discretionary Trusts.

§ 36C-5-501. Rights of beneficiary's creditor or assignee.

CASE NOTES

Formation of Trust. — Deceased Chapter 7 debtor created a valid spendthrift trust prepetition, pursuant to G.S. 36C-4-401.1 and 36C-5-501, when she designated the trust as the beneficiary of her life insurance policy, the debtor husband and a minor daughter were named as beneficiaries of the trust, and the life insurance policy was exempted from the estate. In re Singletary, — Bankr. —, 2008 Bankr. LEXIS 1892 (Bankr. E.D.N.C. June 13, 2008).

§ 36C-5-505. Creditor's claim against settlor.

CASE NOTES

Trial Court Properly Applied Section. — In granting partial summary judgment in favor of the administrator of a decedent's estate and creditors, a trial court did not err in finding that the Uniform Trust Act, G.S. 36C-5-505(a)(3), applied to the trustee's action seeking a declaration that trust assets were not subject to the debts of the decedent's estate because the decedent died with the power to alter, amend, revoke, or terminate the trust; therefore, the trust would be included in his gross estate for estate tax purposes, and irrespective of the fate of the trust after the decedent's death, until the moment of his death, the trust was revocable. Livesay v. Carolina First Bank, — N.C. App. —, 665 S.E.2d 158, 2008 N.C. App. LEXIS 1528 (2008).

Article 9.

Uniform Prudent Investor Act.

§ 36C-9-902. Standard of care; portfolio strategy; risk and return objectives.

CASE NOTES

No Violation of Standard Shown. — Because a bank, which was the trustee of a trust, demonstrated reasonable care by taking precautionary steps to protect the retained funds and investing the funds in a liquid and risk-free money market account until the pending litigation was resolved, there was no breach of fiduciary duty under G.S. 32-2. Heinitsh v. Wachovia Bank, — N.C. App. —, 665 S.E.2d 541, 2008 N.C. App. LEXIS 1618 (2008).

Chapter 39.

Conveyances.

ARTICLE 3A.

Uniform Fraudulent Transfer Act.

§ 39-23.1. Definitions.

CASE NOTES

V. Pleading and Practice.

V. PLEADING AND PRACTICE.

Bankruptcy court denied a debt counseling company's motion to stay a Chapter 11 debtor's adversary proceeding and compel arbitration under a Debt Mediation and Restructuring Agreement the parties entered before the debtor declared bankruptcy. The debtor's claims under 11 U.S.C.S. §§ 544, 548 and 550, G.S. 39-23.1 et seq., and G.S. 75-1.1, alleging fraudulent conveyance and unfair and deceptive trade practices, were core claims under 28 U.S.C.S. § 157(b)(2), the asset in dispute was the only asset left to be recaptured and redistributed in the debtor's Chapter 11 case, and arbitration under the terms of the parties' agreement would have caused great hardship to the debtor, as the debtor was administratively insolvent and had no available funds to pay counsel or its share of the costs of arbitration. Aeronautical Solutions, LLC v. Commer. Debt Counselling Corp. (In re Aeronautical Solutions, LLC), — Bankr. —, 2007 Bankr. LEXIS 4586 (Bankr. E.D.N.C. June 8, 2007).

Chapter 40A.

Eminent Domain.

Article 3.

Condemnation by Public Condemnors.

§ 40A-42. Vesting of title and right of possession; injunction not precluded.

Local Modification. — Cabarrus: 1991 (Reg. Sess., 1992), c. 937, s. 2; 1993 (Reg. Sess., 1994), c. 700, s. 1; Duplin: 1993 (Reg. Sess., 1994), c. 608, s. 1; Franklin: 1989, c. 432, s. 1; Guilford: 1987, c. 669, s. 4; Person: 1983, 829; Wake: 1985, c. 640, s. 2; cities of Greensboro and High Point: 1987, c. 669, s. 4; town of Holly Springs: 1985 (Reg. Sess., 1986), c. 941; town of Troy: 2003-328, s. 1, as amended by 2008-62; town of Wrightsville Beach: 1993, c. 187, s. 2.

Chapter 41.

Estates.

Article 1.

Survivorship Rights and Future Interests.

§ 41-5. Unborn infant may take by deed or writing.

CASE NOTES

Life Insurance Policies Benefitting "Then Living Children." — Under North Carolina law, a life insurance policy benefitting "then living children" of an individual included that individual's unborn child who was in esse and posthumously born. Fort Dearborn Life Ins. Co. v. Turner, 521 F. Supp. 2d 499, 2007 U.S. Dist. LEXIS 84333 (E.D.N.C. Oct. 3, 2007).

§ 41-10. Titles quieted.

CASE NOTES

II. Nature and Scope of Remedy.
  A. Purpose.

II. NATURE AND SCOPE OF REMEDY.

A. Purpose.

Equitable Estoppel. — Where a loan company sought to quiet title to real property, an equitable estoppel claim did not fail because the attorney who closed the loan did not know and had no way of knowing that the payoff amount included in the letter contained a latent $ 100,000.00 error. Since the attorney's actions were reasonable, the trial court properly concluded that the doctrine of equitable estoppel applied. Countrywide Home Loans, Inc. v. Bank One, N.A., — N.C. App. —, 661 S.E.2d 259, 2008 N.C. App. LEXIS 1004 (2008).

Chapter 42.

Landlord and Tenant.

Article 1.

General Provisions.

Sec.
42-14.3. Notice of conversion of manufactured home communities.

Article 5.

Residential Rental Agreements.

42-42. Landlord to provide fit premises.

Sec.
42-43. Tenant to maintain dwelling unit.
42-44. General remedies, penalties, and limitations.

ARTICLE 1.

General Provisions.

§ 42-3. Term forfeited for nonpayment of rent.

CASE NOTES

Lessor was entitled to summary ejectment because the lessor had a right to dispossess the lessee and the sublessee under G.S. 42-3 as the lessee, when the sublessee quit paying rent to the lessee, failed to pay the past-due rent within 10 days of the date the lessor demanded payment of all past-due rent, and forfeiture of the commercial lease was then implied. Gardner v. Ebenezer, LLC, — N.C. App. —, 660 S.E.2d 172, 2008 N.C. App. LEXIS 824 (2008).

§ 42-14.3. Notice of conversion of manufactured home communities.

(a) In the event that an owner of a manufactured home community (defined as a parcel of land, whether undivided or subdivided, that has been designed to accommodate at least five manufactured homes) intends to convert the manufactured home community, or any part thereof, to another use that will require movement of the manufactured homes, the owner of the manufactured home community shall give each owner of a manufactured home and the North Carolina Housing Finance Agency notice of the intended conversion at least 180 days before the owner of a manufactured home is required to vacate and move the manufactured home, regardless of the term of the tenancy. Failure to give notice to each manufactured home owner as required by this section is a defense in an action for possession. The respective rights and obligations of the community owner and the owner of the manufactured home under their lease shall continue in effect during the notice period.

(b) Notwithstanding subsection (a) of this section, if a manufactured home community is being closed pursuant to a valid order of any unit of State or local government, the owner of the community shall be required to give notice of the closure of the community to each resident of the community and the North Carolina Housing Finance Agency within three business days of the date on which the order is issued. (2003-400, s. 5; 2008-107, s. 28.27(c).)

Editor's Note. — Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.27(c), effective July 16, 2008, in subsection (a), inserted "and the North Carolina Housing Finance Agency" in the first sentence, and inserted "to each manufactured home owner" near the beginning of the second sentence; and inserted "and the North Carolina Housing Finance Agency" near the end of subsection (b).

ARTICLE 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.

CASE NOTES

I. In General.

I. IN GENERAL.

Jurisdiction Is Statutory. —

Trial court conducting a summary ejectment proceeding for a commercial tenant obtains the court's jurisdiction from G.S. 42-26. Gardner v. Ebenezer, LLC, — N.C. App. —, 660 S.E.2d 172, 2008 N.C. App. LEXIS 824 (2008).

ARTICLE 5.

Residential Rental Agreements.

§ 42-41. Mutuality of obligations.

CASE NOTES

Applied in Gardner v. Ebenezer, LLC, — N.C. App. —, 660 S.E.2d 172, 2008 N.C. App. LEXIS 824 (2008).

§ 42-42. Landlord to provide fit premises.

(a) The landlord shall:

(1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code.

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.

(3) Keep all common areas of the premises in safe condition.

(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations.

(5) Provide operable smoke detectors, either battery-operated or electrical, having an Underwriters' Laboratories, Inc., listing or other equivalent national testing laboratory approval, and install the smoke

detectors in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. The landlord shall replace or repair the smoke detectors within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a smoke detector is operable and in good repair at the beginning of each tenancy. Unless the landlord and the tenant have a written agreement to the contrary, the landlord shall place new batteries in a battery-operated smoke detector at the beginning of a tenancy and the tenant shall replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.

(6) If the landlord is charging for the cost of providing water or sewer service pursuant to G.S. 42-42.1 and has actual knowledge from either the supplying water system or other reliable source that water being supplied to tenants within the landlord's property exceeds a maximum contaminant level established pursuant to Article 10 of Chapter 130A of the General Statutes, provide notice that water being supplied exceeds a maximum contaminant level.

(7) **(Effective January 1, 2010)** Provide a minimum of one operable carbon monoxide detector per rental unit per level, either battery-operated or electrical, that is listed by a nationally recognized testing laboratory that is OSHA-approved to test and certify to American National Standards Institute/Underwriters Laboratories Standards ANSI/UL2034 or ANSI/UL2075, and install the carbon monoxide detectors in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. A landlord that installs one carbon monoxide detector per rental unit per level shall be deemed to be in compliance with standards under this subdivision covering the location and number of detectors. The landlord shall replace or repair the carbon monoxide detectors within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a carbon monoxide detector is operable and in good repair at the beginning of each tenancy. Unless the landlord and the tenant have a written agreement to the contrary, the landlord shall place new batteries in a battery-operated carbon monoxide detector at the beginning of a tenancy, and the tenant shall replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord. A carbon monoxide detector may be combined with smoke detectors if the combined detector does both of the following: (i) complies with ANSI/UL2034 or ANSI/UL2075 for carbon monoxide alarms and ANSI/UL217 for smoke detectors; and (ii) emits an alarm in a manner that clearly differentiates between detecting the presence of carbon monoxide and the presence of smoke. This subdivision applies only to dwelling units having a fossil-fuel burning heater or appliance, fireplace, or an attached garage. Any operable carbon monoxide detector installed before January 1, 2010, shall be deemed to be in compliance with this subdivision.

(b) The landlord is not released of his obligations under any part of this section by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with this section, whether done before the lease was made, when it was made, or after it was made, unless a governmental subdivision imposes an impediment to repair for a specific period of time not to exceed six months. Notwithstanding the provisions of this subsection, the landlord and tenant are not prohibited from making a subsequent written contract wherein the tenant agrees to perform specified work on the premises, provided that said contract is supported by adequate consideration other than the letting of the premises and is not made with the purpose or effect of evading the landlord's obligations under this Article. (1977, c. 770, s. 1; 1995, c. 111, s. 2; 1998-212, s. 17.16(i); 2004-143, s. 3; 2008-219, ss. 2, 6.)

Editor's Note. — Session Laws 2008-219, s. 6, was codified as the last sentence of subdivision (a)(7) at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2008-219, s. 2, effective January 1, 2010, and applicable to residential rental agreements in effect on and after that date, added subdivision (a)(7).

CASE NOTES

Cited in Gardner v. Ebenezer, LLC, — N.C. App. —, 660 S.E.2d 172, 2008 N.C. App. LEXIS 824 (2008).

§ 42-43. Tenant to maintain dwelling unit.

(a) The tenant shall:

(1) Keep that part of the premises that the tenant occupies and uses as clean and safe as the conditions of the premises permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the premises that the tenant uses.

(2) Dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner.

(3) Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits.

(4) **(Effective until January 1, 2010)** Not deliberately or negligently destroy, deface, damage, or remove any part of the premises, nor render inoperable the smoke detector provided by the landlord, or knowingly permit any person to do so.

(4) **(Effective January 1, 2010)** Not deliberately or negligently destroy, deface, damage, or remove any part of the premises, nor render inoperable the smoke detector or carbon monoxide detector provided by the landlord, or knowingly permit any person to do so.

(5) Comply with any and all obligations imposed upon the tenant by current applicable building and housing codes.

(6) Be responsible for all damage, defacement, or removal of any property inside a dwelling unit in the tenant's exclusive control unless the damage, defacement or removal was due to ordinary wear and tear, acts of the landlord or the landlord's agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces.

(7) **(Effective until January 1, 2010)** Notify the landlord, in writing, of the need for replacement of or repairs to a smoke detector. The landlord shall ensure that a smoke detector is operable and in good repair at the beginning of each tenancy. Unless the landlord and the tenant have a written agreement to the contrary, the landlord shall place new batteries in a battery-operated smoke detector at the beginning of a tenancy and the tenant shall replace the batteries as

needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.

(7) **(Effective January 1, 2010)** Notify the landlord, in writing, of the need for replacement of or repairs to a smoke detector or carbon monoxide detector. The landlord shall ensure that a smoke detector and carbon monoxide detector are operable and in good repair at the beginning of each tenancy. Unless the landlord and the tenant have a written agreement to the contrary, the landlord shall place new batteries in a battery-operated smoke detector and battery-operated carbon monoxide detector at the beginning of a tenancy and the tenant shall replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.

(b) The landlord shall notify the tenant in writing of any breaches of the tenant's obligations under this section except in emergency situations. (1977, c. 770, s. 1; 1995, c. 111, s. 3; 1998-212, s. 17.16(j); 2008-219, s. 3.)

Subdivisions (a)(4) and (a)(7) Set Out Twice. — The first versions of subdivisions (a)(4) and (a)(7) set out above are effective until January 1, 2010. The second versions of subdivisions (a)(4) and (a)(7) set out above are effective January 1, 2010.

Effect of Amendments. — Session Laws 2008-219, s. 3, effective January 1, 2010, and applicable to residential rental agreements in effect on and after that date, inserted "or carbon monoxide detector" in subdivision (a)(4); and in subdivision (a)(7), inserted "or carbon monoxide detector" at the end of the first sentence, substituted "and carbon monoxide detector are" for "is" in the second sentence, and inserted "and battery-operated carbon monoxide detector" in the third sentence.

CASE NOTES

Cited in Gardner v. Ebenezer, LLC, — N.C. App. —, 660 S.E.2d 172, 2008 N.C. App. LEXIS 824 (2008).

§ 42-44. General remedies, penalties, and limitations.

(a) Any right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity.

(a1) **(Effective until January 1, 2010)** If a landlord fails to provide, install, replace, or repair a smoke detector under the provisions of G.S. 42-42(a)(5) within 30 days of having received written notice from the tenant or any agent of State or local government of the landlord's failure to do so, the landlord shall be responsible for an infraction and shall be subject to a fine of not more than two hundred fifty dollars ($250.00) for each violation. The landlord may temporarily disconnect a smoke detector in a dwelling unit or common area for construction or rehabilitation activities when such activities are likely to activate the smoke detector or make it inactive.

(a1) **(Effective January 1, 2010)** If a landlord fails to provide, install, replace, or repair a smoke detector under the provisions of G.S. 42-42(a)(5) or a carbon monoxide detector under the provisions of G.S. 42-42(a)(7) within 30 days of having received written notice from the tenant or any agent of State or local government of the landlord's failure to do so, the landlord shall be responsible for an infraction and shall be subject to a fine of not more than two hundred fifty dollars ($250.00) for each violation. The landlord may temporarily disconnect a smoke detector or carbon monoxide detector in a dwelling

G.S. 42-44(a1) and (a2) are set out twice. See note.

unit or common area for construction or rehabilitation activities when such activities are likely to activate the smoke detector or carbon monoxide detector or make it inactive.

(a2) **(Effective until January 1, 2010)** If a smoke detector is disabled or damaged, other than through actions of the landlord, the landlord's agents, or acts of God, the tenant shall reimburse the landlord the reasonable and actual cost for repairing or replacing the smoke detector within 30 days of having received written notice from the landlord or any agent of State or local government of the need for the tenant to make such reimbursement. If the tenant fails to make reimbursement within 30 days, the tenant shall be responsible for an infraction and subject to a fine of not more than one hundred dollars ($100.00) for each violation. The tenant may temporarily disconnect a smoke detector in a dwelling unit to replace the batteries or when it has been inadvertently activated.

(a2) **(Effective January 1, 2010)** If a smoke detector or carbon monoxide detector is disabled or damaged, other than through actions of the landlord, the landlord's agents, or acts of God, the tenant shall reimburse the landlord the reasonable and actual cost for repairing or replacing the smoke detector or carbon monoxide detector within 30 days of having received written notice from the landlord or any agent of State or local government of the need for the tenant to make such reimbursement. If the tenant fails to make reimbursement within 30 days, the tenant shall be responsible for an infraction and subject to a fine of not more than one hundred dollars ($100.00) for each violation. The tenant may temporarily disconnect a smoke detector or carbon monoxide detector in a dwelling unit to replace the batteries or when it has been inadvertently activated.

(b) Repealed by Session Laws 1979, c. 820, s. 8.

(c) The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so.

(d) A violation of this Article shall not constitute negligence per se. (1977, c. 770, s. 1; 1979, c. 820, s. 8; 1998-212, s. 17.16(k); 2008-219, s. 4.)

Subsections (a1) and (a2) Set Out Twice. — The first versions of subsections (a1) and (a2) set out above are effective until January 1, 2010. The second versions of subsections (a1) and (a2) set out above are effective January 1, 2010.

Effect of Amendments. — Session Laws 2008-219, s. 4, effective January 1, 2010, and applicable to residential rental agreements in effect on and after that date, in subsection (a1), inserted "or a carbon monoxide detector under the provisions of G.S. 42-42(a)(7)," and inserted "or carbon monoxide detector" twice; and inserted "or carbon monoxide detector" three times in subsection (a2).

Chapter 43.

Land Registration.

Article 5.

Adverse Claims and Corrections after Registration.

§ 43-26. Limitations.

CASE NOTES

Time Limitation Barred Relief. — In a quiet title action instituted in 2006, the trial court did not err by ruling that the one-year statute of limitations set out in G.S. 43-26 had expired when defendants filed their motion to set aside a 1979 judgment and, therefore, barred their motion. Adams Creek Assocs. v. Davis, — N.C. App. —, 652 S.E.2d 677, 2007 N.C. App. LEXIS 2302 (2007).

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

§ 44A-1. Definitions.

CASE NOTES

Priority of Liens. —
Debtor's motion for summary judgment on the adversary proceeding of the Chapter 44A claimants to recover on liens for unpaid labor and materials was denied because the motion relied on G.S. 25-9-334, which was not applicable to priority questions involving nonpossessory statutory liens under Chapter 44A. All Points Capital Corp. v. Laurel Hill Paper Co. (In re Laurel Hill Paper Co.), 387 B.R. 677, 2008 Bankr. LEXIS 854 (Bankr. M.D.N.C. 2008).

Article 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers, and Materialmen Dealing with Owner.

§ 44A-7. Definitions.

CASE NOTES

Cited in Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC, 362 N.C. 262, 658 S.E.2d 924, 2008 N.C. LEXIS 335 (2008).

§ 44A-12. Filing claim of lien on real property.

CASE NOTES

Cited in Park East Sales, LLC v. Clark-Langley, Inc., 186 N.C. App. 198, 651 S.E.2d 235, 2007 N.C. App. LEXIS 2120 (2007).

Part 2. Liens of Mechanics, Laborers, and Materialmen Dealing with One Other Than Owner.

§ 44A-18. Grant of lien upon funds; subrogation; perfection.

CASE NOTES

Summary Judgment Improper. — Genuine issue of material fact existed on whether an unpaid contract balance remained between a contractor and a subcontractor thereby precluding summary judgment on a claim of lien made by the supplier, a second-tier subcontractor, on the subcontractor's funds under G.S. 44A-18. Park East Sales, LLC v. Clark-Langley, Inc., 186 N.C. App. 198, 651 S.E.2d 235, 2007 N.C. App. LEXIS 2120 (2007).

Cited in Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC, 362 N.C. 262, 658 S.E.2d 924, 2008 N.C. LEXIS 335 (2008).

§ 44A-19. Notice of claim of lien upon funds.

CASE NOTES

Cited in Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC, 362 N.C. 262, 658 S.E.2d 924, 2008 N.C. LEXIS 335 (2008).

§ 44A-20. Duties and liability of obligor.

CASE NOTES

Cited in Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC, 362 N.C. 262, 658 S.E.2d 924, 2008 N.C. LEXIS 335 (2008).

§ 44A-23. Contractor's claim of lien on real property; perfection of subrogation rights of subcontractor.

CASE NOTES

Default Judgment Against General Contractor Does Not Extinguish Subcontractor's Lien. — Default judgment against a general contractor cannot be used to form the basis for extinguishing a subcontractor's lien on property under G.S. 44A-23. Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC, 362 N.C. 262, 658 S.E.2d 924, 2008 N.C. LEXIS 335 (2008).

Genuine Issue as to Whether Unpaid Contract Balance Remained. — Summary judgment could not be sustained based on a claim of lien on property because a genuine issue of material fact existed on whether an unpaid contract balance remained between the subcontractor and the supplier, a second-tier subcontractor. Park East Sales, LLC v. Clark-Langley, Inc., 186 N.C. App. 198, 651 S.E.2d 235, 2007 N.C. App. LEXIS 2120 (2007).

Article 3.

Model Payment and Performance Bond.

§ 44A-25. Definitions.

CASE NOTES

Cited in Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co., — N.C. App. —, 665 S.E.2d 505, 2008 N.C. App. LEXIS 1628 (2008).

Chapter 45.

Mortgages and Deeds of Trust.

Article 2A.

Sales Under Power of Sale.

Part 2. Procedure for Sale.

Sec.
45-21.16. Notice and hearing.
45-21.16B. (Effective January 1, 2009) Suspension of foreclosure proceedings.

Article 10.

Mortgage Debt Collection and Servicing.

45-91. Assessment of fees; processing of payments; publication of statements.
45-94. Remedies.
45-96 through 45-99. [Reserved].

Article 11.

Emergency Program to Reduce Home Foreclosures.

45-100. (For expiration date, see note) Title.
45-101. (For expiration date, see note) Definitions.

Sec.
45-102. (For expiration date, see note) Preforeclosure notice for subprime loans.
45-103. (For expiration date, see note) Preforeclosure information to be filed with the Administrative Office of the Courts for certain subprime loans.
45-104. (For expiration date, see note) State Home Foreclosure Prevention Project.
45-105. (For expiration date, see note) Extension of foreclosure process.
45-106. (For expiration date, see note) Use and privacy of records.
45-107. (For expiration date, see note) Foreclosure filing.

ARTICLE 2A.

Sales Under Power of Sale.

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

(a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall file with the clerk of court a notice of hearing in accordance with the terms of this section. After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section. The notice shall specify a time and place for the hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. However, in those instances that publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of the hearing, and if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting the notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of hearing. Service by posting may run concurrently with any other effort to effect service. The notice shall be posted by the sheriff. In the event that the service is obtained by posting, an affidavit shall be filed with the clerk of court showing the circumstances warranting the use of service by posting.

If any party is not served or is not timely served prior to the date of the hearing, the clerk shall order the hearing continued to a date and time certain, not less than 10 days from the date scheduled for the original hearing. All notices already timely served remain effective. The mortgagee or trustee shall satisfy the notice requirement of this section with respect to those parties not served or not timely served with respect to the original hearing. Any party timely served, who has not received actual notice of the date to which the hearing has been continued, shall be sent the order of continuance by first-class mail at his last known address.

(b) Notice of hearing shall be served in a manner authorized in subsection (a) upon:

(1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.

(2) Any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale.

(3) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county. The term "record owner" means any person owning a present or future interest in the real property, which interest is of record at the time that the notice of hearing is filed and would be affected by the foreclosure proceeding, but does not mean or include the trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, judgment, mechanic's or materialman's lien, or other lien or security interest in the real property. Tenants in possession under unrecorded leases or rental agreements shall not be considered record owners.

(c) Notice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following:

(1) The particular real estate security interest being foreclosed, with such a description as is necessary to identify the real property, including the date, original amount, original holder, and book and page of the security instrument.

(2) The name and address of the holder of the security instrument at the time that the notice of hearing is filed.

(3) The nature of the default claimed.

(4) The fact, if such be the case, that the secured creditor has accelerated the maturity of the debt.

(5) Any right of the debtor to pay the indebtedness or cure the default if such is permitted.

(5a) The holder has confirmed in writing to the person giving the notice, or if the holder is giving the notice, the holder shall confirm in the notice, that, within 30 days of the date of the notice, the debtor was sent by first-class mail at the debtor's last known address a detailed written statement of the amount of principal, interest, and any other fees, expenses, and disbursements that the holder in good faith is claiming to be due as of the date of the written statement, together with a daily interest charge based on the contract rate as of the date of the written statement. Nothing herein is intended to authorize any fees, charges, or methods of charging interest which is not otherwise permitted under contract between the parties and other applicable law.

(5b) To the knowledge of the holder, or the servicer acting on the holder's behalf, whether in the two years preceding the date of the statement any requests for information have been made by the borrower to the servicer pursuant to G.S. 45-93 and, if so, whether such requests have been complied with. If the time limits set forth in G.S. 45-93 for complying with any such requests for information have not yet expired as of the date of the notice, the notice shall so state. If the holder is not giving the notice, the holder shall confirm in writing to the person giving the notice the information required by this subsection to be stated in the notice.

(6) Repealed by Session Laws 1977, c. 359, s. 7.

(7) The right of the debtor (or other party served) to appear before the clerk of court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain all of the following:

a. A statement that if the debtor does not intend to contest the creditor's allegations of default, the debtor does not have to appear at the hearing and that the debtor's failure to attend the hearing will not affect the debtor's right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should the debtor elect to do so.

b. A statement that the trustee, or substitute trustee, is a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding.

c. A statement that the debtor has the right to apply to a judge of the superior court pursuant to G.S. 45-21.34 to enjoin the sale, upon any legal or equitable ground that the court may deem sufficient prior to the time that the rights of the parties to the sale or resale become fixed, provided that the debtor complies with the requirements of G.S. 45-21.34.

d. A statement that the debtor has the right to appear at the hearing and contest the evidence that the clerk is to consider under G.S. 45-21.16(d), and that to authorize the foreclosure the clerk must find the existence of: (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to notice.

e. A statement that if the debtor fails to appear at the hearing, the trustee will ask the clerk for an order to sell the real property being foreclosed.

f. A statement that the debtor has the right to seek the advice of an attorney and that free legal services may be available to the debtor by contacting Legal Aid of North Carolina or other legal services organizations.

(8) That if the foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date of delivery of his deed, and that the debtor, if still in possession, can then be evicted.

(8a) The name, address, and telephone number of the trustee or mortgagee.

(9) That the debtor should keep the trustee or mortgagee notified in writing of his address so that he can be mailed copies of the notice of foreclosure setting forth the terms under which the sale will be held, and notice of any postponements or resales.

(10) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. 45-21.16A.

(11) That the hearing may be held on a date later than that stated in the notice and that the party will be notified of any change in the hearing date.

(c1) The person giving the notice of hearing, if other than the holder, may rely on the written confirmation received from the holder under subdivisions (c)(5a) and (c)(5b) of this section and is not liable for inaccuracies in the written confirmation.

(c2) **(Expires October 31, 2010)** In any foreclosure filed on or after November 15, 2008, where the underlying mortgage debt is a subprime loan as defined in G.S. 45-101(4), the notice required by subsection (b) of this section shall contain a certification by the filing party that the pre-foreclosure notice and information required by G.S. 45-102 and G.S. 45-103 were provided in all material respects and that the periods of time established by Article 11 of this Chapter have elapsed.

(d) **(Effective until October 31, 2010)** The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. In the event that the property to be sold consists of separate tracts situated in different counties or a single tract in more than one county, only one hearing shall be necessary. However, prior to that hearing, the mortgagee or trustee shall file the notice of hearing in any other county where any portion of the property to be sold is located. Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), and (v) that the underlying mortgage debt is not a subprime loan as defined in G.S. 45-101(4), or if the loan is a subprime loan under G.S. 45-101(4), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. A certified copy of any authorization or order by the clerk shall be filed in any other county where any portion of the property to be sold is located before the mortgagee or trustee may proceed to advertise and sell any property located in that county. In the event that sales are to be held in more than one county, the provisions of G.S. 45-21.7 apply.

(d) **(Effective October 31, 2010)** The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. In the event that the property to be sold consists of separate tracts situated in different counties or a single tract in more than one county, only one hearing shall be necessary. However, prior to that hearing, the mortgagee or trustee shall file the notice of hearing in any other county where any portion of the property to be sold is located. Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b), then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. A certified copy of any authorization or order by the clerk shall be filed in any other county where any portion of the property to be sold is located before the mortgagee or trustee may proceed to advertise and sell any property located in that county. In the event that sales are to be held in more than one county, the provisions of G.S. 45-21.7 apply.

(d1) The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo. If an appeal is taken from the clerk's findings, the appealing party shall post a bond with sufficient surety as the clerk deems adequate to protect the opposing party from any probable loss by reason of appeal; and upon posting of the bond the clerk shall stay the foreclosure pending appeal.

(e) In the event of an appeal, either party may demand that the matter be heard at the next succeeding term of the court to which the appeal is taken which convenes 10 or more days after the hearing before the clerk, and such hearing shall take precedence over the trial of other cases except cases of exceptions to homesteads and appeals in summary ejectment actions, provided the presiding judge may in his discretion postpone such hearing if the rights of the parties or the public in any other pending case require that such case be heard first. In those counties where no session of court is scheduled within 30 days from the date of hearing before the clerk, either party may petition any regular or special superior court judge resident in a district or assigned to hold courts in a district where any part of the real estate is located, or the chief district judge of a district where any part of the real estate is located, who shall be authorized to hear the appeal. A certified copy of any order entered as a result of the appeal shall be filed in all counties where the notice of hearing has been filed.

(f) Waiver of the right to notice and hearing provided herein shall not be permitted except as set forth herein. In any case in which the original principal amount of indebtedness secured was one hundred thousand dollars ($100,000), or more, any person entitled to notice and hearing may waive after default the right to notice and hearing by written instrument signed and duly acknowledged by such party. In all other cases, at any time subsequent to service of the notice of hearing provided above, the clerk, upon the request of the mortgagee or trustee, shall mail to all other parties entitled to notice of such hearing a form by which such parties may waive their rights to the hearing. Upon the return of the forms to the clerk bearing the signatures of each such party and that of a witness to each such party's signature (which witness shall not be an agent or employee of the mortgagee or trustee), the clerk in his discretion may dispense with the necessity of a hearing and proceed to issue the order authorizing sale as set forth above.

(g) Any notice, order, or other papers required by this Article to be filed in the office of the clerk of superior court shall be filed in the same manner as a special proceeding. (1975, c. 492, s. 2; 1977, c. 359, ss. 2-10; 1983, c. 335, s. 1; 1983 (Reg. Sess., 1984), c. 1108, ss. 1, 2; 1993, c. 305, s. 8; 1995, c. 509, s. 135.1(g); 1999-137, ss. 1, 2; 2007-351, s. 4; 2008-226, ss. 2, 3.)

Subsection (d) Set Out Twice. — The first version of subsection (d) set out above is effective until October 31, 2010. The second version of subsection (d) set out above is effective October 31, 2010.

Editor's Note. —

Session Laws 2008-226, s. 5, provides: "The Office of the Commissioner of Banks shall report to the General Assembly describing the operation of the program established by this act not later than May 1 of each year until the funds are completely disbursed from the reserve. Information in the report shall be presented in aggregate form and may include the number of clients helped, the effectiveness of the funds in preventing home foreclosure, recommendations for further efforts needed to reduce foreclosures, and provide any other aggregated information the Commissioner determines is pertinent or that the General Assembly requests."

Effect of Amendments. —

Session Laws 2008-226, ss. 2 and 3, effective November 1, 2008, and expiring October 31, 2010, added subsection (c2); and in the fifth sentence of subsection (d), inserted clause (v), and made related stylistic changes.

CASE NOTES

Cited in Citifinancial Mortg. Co. v. Gray, — N.C. App. —, 652 S.E.2d 321, 2007 N.C. App. LEXIS 2316 (2007).

§ 45-21.16B. (Effective January 1, 2009) Suspension of foreclosure proceedings.

(a) The Clerk of Superior Court shall suspend foreclosure proceedings, including any hearing or order for sale, for 60 days if notified by the Commissioner of Banks as provided in G.S. 53-243.12(n). During the suspension period, all deadlines under this Article are tolled.

(b) When a clerk enters a suspension order pursuant to subsection (a) of this section prior to a hearing required under G.S. 45-21.16, upon completion of the 60-day suspension period, the trustee or mortgagee may proceed with the hearing by providing written notice to all parties of the new hearing date, not less than 10 days prior to the hearing date.

(c) When a clerk enters a suspension order pursuant to subsection (a) of this section, after entry of any authorization by the clerk pursuant to G.S. 45-21.16 and before the expiration of the 10-day upset bid period, the trustee or mortgagee shall not be required to comply with the provisions of G.S. 45-21.16, but shall advertise and hold the sale in accordance with G.S. 45-21.16A, 45-21.17, and 45-21.17A. (2008-228, s. 18.)

Editor's Note. — Session Laws 2008-228, s. 21, makes this section effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date.

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

CASE NOTES

Cited in Carolina Bank v. Chatham Station, Inc., 186 N.C. App. 424, 651 S.E.2d 386, 2007 N.C. App. LEXIS 2195 (2007).

ARTICLE 4.

Satisfaction.

§ 45-36.5. Notification: manner of giving and effective date.

CASE NOTES

Cited in Egen v. Excalibur Resort Prof'l, — N.C. App. —, 663 S.E.2d 914, 2008 N.C. App. LEXIS 1469 (Aug. 5, 2008).

ARTICLE 10.

Mortgage Debt Collection and Servicing.

§ 45-91. Assessment of fees; processing of payments; publication of statements.

A servicer must comply as to every home loan, regardless of whether the loan is considered in default or the borrower is in bankruptcy or the borrower has been in bankruptcy, with the following requirements:

(1) Any fee that is incurred by a servicer shall be both:

  a. Assessed within 45 days of the date on which the fee was incurred. Provided, however, that attorney or trustee fees and costs incurred as a result of a foreclosure action shall be assessed within 45 days of the date they are charged by either the attorney or trustee to the servicer.

  b. Explained clearly and conspicuously in a statement mailed to the borrower at the borrower's last known address within 30 days after assessing the fee, provided the servicer shall not be required to take any action in violation of the provisions of the federal bankruptcy code. The servicer shall not be required to send such a statement for a fee that: (i) results from a service that is affirmatively requested by the borrower, (ii) is paid for by the borrower at the time the service is provided, and (iii) is not charged to the borrower's loan account.

(2) All amounts received by a servicer on a home loan at the address where the borrower has been instructed to make payments shall be accepted and credited, or treated as credited, within one business day of the date received, provided that the borrower has made the full contractual payment and has provided sufficient information to credit the account. If a servicer uses the scheduled method of accounting, any regularly scheduled payment made prior to the scheduled due date shall be credited no later than the due date. Provided, however, that if any payment is received and not credited, or treated as credited, the borrower shall be notified within 10 business days by mail at the borrower's last known address of the disposition of the payment, the reason the payment was not credited, or treated as credited to the account, and any actions necessary by the borrower to make the loan current.

(2a) The notification required by subdivision (2) of this section is not necessary if (i) the servicer complies with the terms of any agreement or plan made with the borrower and has applied and credited payments received in the manner required, and (ii) the servicer is applying and crediting payments to the borrower's account in compliance with all applicable State and federal laws, including bankruptcy laws, and if at least one of the following occurs:

  a. The borrower has entered into a written loss mitigation, loan modification, or forebearance agreement with the servicer that itemizes all amounts due and specifies how payments will be applied and credited;

  b. The borrower has elected to participate in an alternative payment plan, such as a biweekly payment plan, that specifies as part of a written agreement how payments will be applied and credited; or

  c. The borrower is making payments pursuant to a bankruptcy plan.

(3) Failure to charge the fee or provide the information within the allowable time and in the manner required under subdivision (1) of subsection (a) of this section constitutes a waiver of such fee.

(4) All fees charged by a servicer must be otherwise permitted under applicable law and the contracts between the parties. Nothing herein is intended to permit the application of payments or method of charging interest which is less protective of the borrower than the contracts between the parties and other applicable law.

(5) **(Effective January 1, 2009)** The obligations of mortgage servicers set forth in G.S. 53-243.11. (2007-351, s. 5; 2008-227, s. 1; 2008-228, s. 19.)

Effect of Amendments. — Session Laws 2008-227, s. 1, effective October 1, 2008, in subdivision (1)b, substituted "within 30 days" for "at least 30 days," and added the last sentence; and added subdivision (2a).

Session Laws 2008-228, s. 19, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, added subdivision (5).

§ 45-94. Remedies.

(Effective until January 1, 2009) In addition to any equitable remedies and any other remedies at law, any borrower injured by any violation of this Article may bring an action for recovery of actual damages, including reasonable attorneys' fees. The Commissioner of Banks, the Attorney General, or any party to a home loan may enforce the provisions of this section. With the exception of an action by the Commissioner of Banks or the Attorney General, at least 30 days before a borrower or a borrower's representative institutes a civil action for damages against a servicer for a violation of this Article, the borrower or a borrower's representative shall notify the servicer in writing of any claimed errors or disputes regarding the borrower's home loan that forms the basis of the civil action. The notice must be sent to the address as designated on any of the servicer's bills, statements, invoices, or other written communication, and must enable the servicer to identify the name and loan account of the borrower. For purposes of this section, notice shall not include a complaint or summons. Nothing in this section shall limit the rights of a borrower to enjoin a civil action, or make a counterclaim, cross-claim, or plead a defense in a civil action. A servicer will not be in violation of this Article if the servicer shows by a preponderance of evidence that:

(Effective January 1, 2009) In addition to any equitable remedies and any other remedies at law, any borrower injured by any violation of this Article may bring an action for recovery of actual damages, including reasonable attorneys' fees. The Commissioner of Banks, the Attorney General, or any party to a home loan may enforce the provisions of this section. The Clerk of Superior Court shall also suspend foreclosure proceedings for 60 days if notified by the Commissioner of Banks as provided in G.S. 53-243.12(n). With the exception of an action by the Commissioner of Banks or the Attorney General, at least 30 days before a borrower or a borrower's representative institutes a civil action for damages against a servicer for a violation of this Article, the borrower or a borrower's representative shall notify the servicer in writing of any claimed errors or disputes regarding the borrower's home loan that forms the basis of the civil action. The notice must be sent to the address as designated on any of the servicer's bills, statements, invoices, or other written communication, and must enable the servicer to identify the name and loan account of the borrower. For purposes of this section, notice shall not include a complaint or summons. Nothing in this section shall limit the rights of a borrower to enjoin a civil action, or make a counterclaim, cross-claim, or plead a defense in a civil action. A servicer will not be in violation of this Article if the servicer shows by a preponderance of evidence that:

(1) The violation was not intentional or the result of bad faith; and

(2) Within 30 days after discovering or being notified of an error, and prior to the institution of any legal action by the borrower against the servicer under this section, the servicer corrected the error and compensated the borrower for any fees or charges incurred by the borrower as a result of the violation. (2007-351, s. 5; 2008-228, s. 20.)

Introductory Paragraph Set Out Twice. — The first version of the introductory paragraph set out above is effective until January 1, 2009. The second version of the introductory paragraph set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-228, s. 20, effective January 1, 2009, and applicable to foreclosure proceedings filed on or after that date, added the third sentence in the introductory paragraph.

§§ 45-96 through 45-99: Reserved for future codification purposes.

ARTICLE 11.

Emergency Program to Reduce Home Foreclosures.

(For expiration date, see note)

§ 45-100. (For expiration date, see note) Title.

This Article shall be known as the Emergency Program to Reduce Home Foreclosures Act. (2008-226, s. 1.)

Article Has an Expiration Date. — Session Laws 2008-226, which enacted this Article, provides for its expiration on October 31, 2010.

Editor's Note. — Session Laws 226, s. 6, made this Article effective November 1, 2008, and provides for its expiration on October 31, 2010.

Session Laws 2008-226, s. 5, provides: "The Office of the Commissioner of Banks shall report to the General Assembly describing the operation of the program established by this act not later than May 1 of each year until the funds are completely disbursed from the reserve. Information in the report shall be presented in aggregate form and may include the number of clients helped, the effectiveness of the funds in preventing home foreclosure, recommendations for further efforts needed to reduce foreclosures, and provide any other aggregated information the Commissioner determines is pertinent or that the General Assembly requests."

§ 45-101. (For expiration date, see note) Definitions.

The following definitions apply throughout this Article:

(1) Act as a mortgage servicer. — To engage, whether for compensation or gain from another or on its own behalf, in the business of receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the mortgage loan, the mortgage servicing loan documents, or servicing contract.

(2) Mortgage lender. — A person engaged in the business of making mortgage loans for compensation or gain.

(3) Mortgage servicer. — A person who directly or indirectly acts as a mortgage servicer as that term is defined in subdivision (1) of this section or who otherwise meets the definition of the term 'servicer' in the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(i), with respect to mortgage loans.

(4) Subprime loan. — A loan, originated on or after January 1, 2005, but before December 31, 2007, that would meet the definition of a rate spread home loan under G.S. 24-1.1F(a)(7), if that section had been in effect when the loan was originated. A mortgage servicer may rely on a chart reflecting the appropriate interest rate triggers for rate spread home loans for each day of the period covered by this Article provided by the Commissioner of Banks for the purposes of determining if a loan is a subprime loan covered by this Article. The Commissioner shall provide the chart at least 60 days prior to the effective date of this act. (2008-226, s. 1.)

Article Has an Expiration Date. — For expiration of this Article, see Editor's note under G.S. 45-100.

§ 45-102. (For expiration date, see note) Pre-foreclosure notice for subprime loans.

At least 45 days prior to the filing of a notice of hearing in a foreclosure proceeding on a primary residence, mortgage servicers of subprime loans shall send written notice by mail to the last known address of the borrower to inform the borrower of the availability of resources to avoid foreclosure, including:

(1) An itemization of all past due amounts causing the loan to be in default.

(2) An itemization of any other charges that must be paid in order to bring the loan current.

(3) A statement that the borrower may have options available other than foreclosure and that the borrower may discuss available options with the mortgage lender, the mortgage servicer, or a counselor approved by the U.S. Department of Housing and Urban Development.

(4) The address, telephone number, and other contact information for the mortgage lender, the mortgage servicer, or the agent for either of them who is authorized to attempt to work with the borrower to avoid foreclosure.

(5) The name, address, telephone number, and other contact information for one or more HUD-approved counseling agencies operating to assist borrowers in North Carolina to avoid foreclosure.

(6) The address, telephone number, and other contact information for the consumer complaint section of the Office of Commissioner of Banks. (2008-226, s. 1.)

Article Has an Expiration Date. — For expiration of this Article, see Editor's note under G.S. 45-100.

§ 45-103. (For expiration date, see note) Pre-foreclosure information to be filed with the Administrative Office of the Courts for certain subprime loans.

(a) Within three business days of mailing the notice required by G.S. 45-102, the mortgage servicer shall file certain information with the Administrative Office of the Courts. The filing shall be in an electronic format, as designated by the Administrative Office of the Courts, and shall contain the name and address of the borrower and the date the notice was mailed to the borrower.

(b) As permitted by applicable State and federal law, optional information may be requested from the mortgage servicer to facilitate further review by the

State Home Foreclosure Prevention Project described in G.S. 45-104. The nature of the optional information requested shall be determined in connection with the design of the database established by subsection (c) of this section. This optional information shall be used by the State Home Foreclosure Prevention Project to prioritize efforts to reach borrowers most likely to avoid foreclosure and to prevent delay for defaults where foreclosure is unavoidable.

(c) No later than October 1, 2008, the Administrative Office of the Courts shall establish an internal database to track information provided in this section. The Commissioner of Banks shall design and develop this database, in consultation with the Administrative Office of the Courts, in a manner to promote the efforts of the State Home Foreclosure Prevention Project. Only the Administrative Office of the Courts, the Office of Commissioner of Banks, and the clerk of court as provided by G.S. 45-107 shall have access to the database. (2008-226, s. 1.)

Article Has an Expiration Date. — For expiration of this Article, see Editor's note under G.S. 45-100.

§ 45-104. (For expiration date, see note) State Home Foreclosure Prevention Project.

The Commissioner of Banks is authorized to establish the State Home Foreclosure Prevention Project. The purpose of the Project is to seek solutions to avoid foreclosures for certain subprime loans. In developing the Project, the Commissioner may include input from HUD-approved housing counselors, community organizations, state agencies, mortgage lenders, mortgage servicers, and other partners. (2008-226, s. 1.)

Article Has an Expiration Date. — For expiration of this Article, see Editor's note under G.S. 45-100.

§ 45-105. (For expiration date, see note) Extension of foreclosure process.

The Commissioner of Banks shall review information provided in the database created by G.S. 45-103 to determine which subprime loans are appropriate for efforts to avoid foreclosure. If the Commissioner reasonably believes, based on a full review of the loan information, the mortgage servicer's loss mitigation efforts, the borrower's capacity and interest in staying in the home, and other appropriate factors, that further efforts by the State Home Foreclosure Prevention Project offer a reasonable prospect to avoid foreclosure on primary residences, the Commissioner shall have the authority to extend one time under this Article the allowable filing date for any foreclosure proceeding on a primary residence by up to 30 days beyond the earliest filing date established by the pre-foreclosure notice. If the Commissioner makes the determination that a loan is subject to this section, the Commissioner shall notify the borrower, mortgage servicer, and the Administrative Office of the Courts. (2008-226, s. 1.)

Article Has an Expiration Date. — For expiration of this Article, see Editor's note under G.S. 45-100.

§ 45-106. (For expiration date, see note) Use and privacy of records.

The data provided to the Administrative Office of the Courts pursuant to G.S. 45-103 shall be exclusively for the use and purposes of the State Home Foreclosure Prevention Project developed by the Commissioner of Banks in accordance with G.S. 45-104. The information provided to the database is not a public record, except that a mortgage lender and a mortgage servicer shall have access to the information submitted only with regard to its own loans. Provision of information to the Administrative Office of the Courts for use by the State Home Foreclosure Prevention Project shall not be considered a violation of G.S. 53B-8. A mortgage servicer shall be held harmless for any alleged breach of privacy rights of the borrower with respect to the information the mortgage servicer provides in accordance with this Article. (2008-226, s. 1.)

Article Has an Expiration Date. — For expiration of this Article, see Editor's note under G.S. 45-100.

§ 45-107. (For expiration date, see note) Foreclosure filing.

(a) For the duration of the program authorized by this Article, foreclosure notices filed on subprime loans on or after November 15, 2008, shall contain a certification by the filing party that the pre-foreclosure notice required by G.S. 45-102 and the pre-foreclosure information required by G.S. 45-103 were provided in accordance with this Article and that the periods of time established by the Article have elapsed.

(b) The clerk of superior court or other judicial officer may have access to the pre-foreclosure database to confirm information provided in subsection (a) of this section. A materially inaccurate statement in the certification shall be cause for dismissal without prejudice of any foreclosure proceeding on a primary residence initiated by the mortgage servicer and for payment by the filing party of costs incurred by the borrower in defending the foreclosure proceeding. (2008-226, s. 1.)

Article Has an Expiration Date. — For expiration of this Article, see Editor's note under G.S. 45-100.

Chapter 46.

Partition.

Article 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

Editor's Note. — Session Laws 2008-181, ss. 42.1 and 42.2, created the Partition Sales Study Committee to address the issue of the impact of the partition sale procedures on the economic use and loss of heir property and farmland by heirs in North Carolina and provided for membership of the committee.

Session Laws 2008-181, s. 42.3, provides: "The Committee shall study the laws and procedures concerning partition sales in North Carolina and how these laws affect landowners in the State, examining both the effectiveness and equity of the current law and exploring potential alternatives. Specifically, the Committee shall:

"(1) Review information about partition sales and examine current trends in partition sales in the State, especially related to sales initiated by strangers in interest to heirs or related cotenants.

"(2) Analyze research and information from North Carolina and other states and jurisdictions regarding the effect of partition laws on desired land retention and economic development.

"(3) Analyze information concerning the comparative frequency of partition sales vs. partition-in-kind in North Carolina.

"(4) Identify and assess alternative partition sales laws from other states.

"(5) Explore how best to balance competing interests of the tenants in common in the partition sales context.

"(6) Identify and consult with academics who have studied partition sales nationally to determine their recommendations concerning best practices in partition proceedings.

"(7) Identify current barriers to the adoption of best practices recommendations and to alternative laws adopted by other states and potential options to address these barriers.

"(8) Prepare a report with a statement of the issues and a summary of the research including the Committee's recommendations concerning any needed improvements and draft legislation to address any inequities presented by partition sales in North Carolina.

Session Laws 2008-181, s. 42.4, provided for expenses, staffing, and powers and duties of committee members.

Session Laws 2008-181, s. 42.5, provides: "The Committee shall submit a final report of the results of its study, including any legislative recommendations, to the 2009 General Assembly no later than March 1, 2009. The Committee shall terminate on March 1, 2009, or upon the filing of its final report, whichever occurs first."

Chapter 47.

Probate and Registration.

Article 1.

Probate.

Sec.
47-14. Register of deeds to verify the presence of proof or acknowledgement and register instruments and electronic documents; order by judge; instruments to which register of deeds is a party.

Article 2.

Registration.

Sec.
47-30. Plats and subdivisions; mapping requirements.
47-31. Certified copies may be registered; used as evidence.
47-36.1. Correction of errors in recorded instruments.

ARTICLE 1.

Probate.

§ 47-14. Register of deeds to verify the presence of proof or acknowledgement and register instruments and electronic documents; order by judge; instruments to which register of deeds is a party.

(a) Verification of Instruments. — The register of deeds shall not accept for registration any instrument that requires proof or acknowledgement unless the execution of the instrument by one or more signers appears to have been proved or acknowledged before an officer with the apparent authority to take proofs or acknowledgements, and the proof or acknowledgement includes the officer's signature, commission expiration date, and official seal, if required. The register of deeds shall accept an instrument for registration that does not require proof or acknowledgement if the instrument otherwise satisfies the requirements of G.S. 161-14. Any instrument previously recorded or any certified copy of any instrument previously recorded may be rerecorded provided the instrument is conspicuously marked on the first page as a rerecording. The register of deeds may rely on the marking and the appearance of the original recording office's recording information to determine that an instrument is being presented as it was previously recorded. The register of deeds is not required to further verify the proof or acknowledgement of or determine whether any changes or alterations have been made after the original recording to an instrument presented for rerecording. The register of deeds is not required to verify or make inquiry concerning any of the following:

(1) The legal sufficiency of any proof or acknowledgement.
(2) The authority of any officer who took a proof or acknowledgement.
(3) The legal sufficiency of any document presented for registration.

(a1) Verification of Electronic Documents. — The requirements of subsection (a) of this section for verification of the execution of an instrument are satisfied with respect to an electronic document if all of the conditions in this subsection are met. For purposes of this subsection, the term "electronic document" is as defined in G.S. 47-16.2(3). The conditions are:

(1) The register of deeds has authorized the submitter to electronically register the electronic document.
(2) The document is submitted by a United States federal or state governmental unit or instrumentality or a trusted submitter. For purposes of this subsection, "a trusted submitter" means a person or

entity that has entered into a memorandum of understanding regarding electronic recording with the register of deeds in the county in which the electronic document is to be submitted.

(3) The execution of the instrument by one or more signers appears to have been proved or acknowledged before an officer with the apparent authority to take proofs or acknowledgements, and the proof or acknowledgment includes the officer's signature, commission expiration date, and official seal, if required, based on the appearance of these elements on the digitized image of the document as it will appear on the public record.

(4) Evidence of other required governmental certification or annotation appears on the digitized image of the document as it will appear on the public record.

(5) With respect to a document submitted by a trusted submitter, the digitized image of the document as it will appear on the public record contains the submitter's name in the following completed statement on the first page of the document image: "Submitted electronically by ______ (submitter's name) in compliance with North Carolina statutes governing recordable documents and the terms of the submitter agreement with the ______ (insert county name) County Register of Deeds."

(6) Except as otherwise provided in this subsection, the digitized image of the electronic document conforms to all other applicable laws and rules that prescribe recordation.

(a2) Verification of Officer's Signature. — Submission to a register of deeds of an electronic document requiring proof or acknowledgement is a representation by the submitter that, prior to submission, the submitter verified the officer's signature required under subdivision (a1)(3) of this section to be one of the types of signatures listed in this subsection. The register of deeds may rely on this representation for purposes of determining compliance with the signature requirements of this section. The electronic registration of a document with a register of deeds prior to the effective date of this statute is not invalid based on whether the register verified the officer's signature in accordance with this subsection. The types of signatures are:

(1) A signature in ink by hand.

(2) An electronic signature as defined in G.S. 10B-101(7).

(b) Order by Judge. — If a register of deeds denies registration pursuant to subsection (a), the person offering the instrument for registration may apply to any judge of the district court in the district, including the county in which the instrument is to be registered, for an order for registration. Upon finding all of the requirements in this subsection, the judge shall order the instrument to be registered, together with the certificates, and the register of deeds shall register them accordingly. The requirements are:

(1) If the instrument requires proof or acknowledgement, that the signature of one or more signers has been proved or acknowledged before an officer authorized to take proofs and acknowledgements.

(2) That the proof or acknowledgement includes the officer's signature and commission expiration date and official seal, if required.

(c) Repealed by Session Laws 2008-194, s. 7(a), effective October 1, 2008.

(d) Scope. — Registration of an instrument pursuant to this section is not effective with regard to parties who have not executed the instrument or whose execution thereof has not been duly proved or acknowledged.

(e) Register of Deeds as Party. — Any instrument required or permitted by law to be registered in which the register of deeds of the county of registration is a party may be proved or acknowledged before any magistrate or any notary public. The clerk of superior court of the county of registration shall examine any instrument presented for registration. If it appears that the execution and acknowledgment are in due form, the clerk shall so certify and the instrument shall then be recorded in the office of the register of deeds.

(f) Presumption of Notarial Seal. — The acceptance of a record for registration by the register of deeds shall give rise to a presumption that, at the time the record was presented for registration, a clear and legible image of the notary's official seal was affixed or embossed on the record near the notary's official signature. This presumption applies regardless of whether the image is legible or photographically reproduced in the records maintained by the register of deeds. A register of deeds may not refuse to accept a record for registration because a notarial seal does not satisfy the requirements of G.S. 10B-37. (1899, c. 235, s. 7; 1905, c. 414; Rev., s. 999; C.S., s. 3305; 1921, c. 91; 1939, c. 210, s. 2; 1967, c. 639, s. 1; 1969, c. 664, s. 2; 1973, c. 60; 2005-123, s. 2; 2006-59, s. 26; 2006-259, s. 52(a)-(b); 2006-264, s. 40(c); 2008-194, s. 7(a).)

Effect of Amendments. —
Session Laws 2008-194, s. 7(a), effective October 1, 2008, inserted "and electronic documents" following "instruments" in the section heading; and rewrote the section.

ARTICLE 2.

Registration.

§ 47-30. Plats and subdivisions; mapping requirements.

(a) Size Requirements. — All land plats presented to the register of deeds for recording in the registry of a county in North Carolina after September 30, 1991, having an outside marginal size of either 18 inches by 24 inches, 21 inches by 30 inches, or 24 inches by 36 inches, and having a minimum one and one-half inch border on the left side and a minimum one-half inch border on the other sides shall be deemed to meet the size requirements for recording under this section. Where size of land areas, or suitable scale to assure legibility require, plats may be placed on two or more sheets with appropriate match lines. Counties may specify either:

(1) Only 18 inches by 24 inches;
(2) A combination of 18 inches by 24 inches and 21 inches by 30 inches;
(3) A combination of 18 inches by 24 inches and 24 inches by 36 inches; or
(4) A combination of all three sizes.

Provided, that all registers of deeds where specific sizes other than the combination of all three sizes have been specified, shall be required to submit said size specifications to the North Carolina Association of Registers of Deeds for inclusion on a master list of all such counties. The list shall be available in each register of deeds office by October 1, 1991. For purposes of this section, the terms "plat " and "map" are synonymous.

(b) Plats to Be Reproducible. — Each plat presented for recording shall be a reproducible plat, either original ink on polyester film (mylar), or a reproduced drawing, transparent and archival (as defined by the American National Standards Institute), and submitted in this form. The recorded plat must be such that the public may obtain legible copies. A direct or photographic copy of each recorded plat shall be placed in the plat book or plat file maintained for that purpose and properly indexed for use. In those counties in which the register has made a security copy of the plat from which legible copies can be made, the original may be returned to the person indicated on the plat.

(c) Information Contained in Title of Plat. —

(d) Certificate; Form. — There shall appear on each plat a certificate by the person under whose supervision the survey or plat was made, stating the origin of the information shown on the plat, including recorded deed and plat references shown thereon. The ratio of precision before any adjustments must be shown. Any lines on the plat that were not actually surveyed must be clearly indicated and a statement included revealing the source of information. Where a plat consists of more than one sheet, only one sheet must contain the certification and all other sheets must be signed and sealed.

The certificate required above shall include the source of information for the survey and data indicating the ratio of precision of the survey before adjustments and shall be in substantially the following form:

"I, ____________, certify that this plat was drawn under my supervision from an actual survey made under my supervision (deed description recorded in Book ________, page ________, etc.) (other); that the boundaries not surveyed are clearly indicated as drawn from information found in Book ________, page ________; that the ratio of precision as calculated is 1: ________; that this plat was prepared in accordance with G.S. 47-30 as amended. Witness my original signature, registration number and seal this ________ day of ________, A.D., ________.

Seal or Stamp

____
Surveyor
Registration Number"

Nothing in this requirement shall prevent the recording of a map that was prepared in accordance with a previous version of G.S. 47-30 as amended, properly signed, and notarized under the statutes applicable at the time of the signing of the map. However, it shall be the responsibility of the person presenting the map to prove that the map was so prepared.

(e) Method of Computation. — An accurate method of computation shall be used to determine the acreage and ratio of precision shown on the plat. Area by estimation is not acceptable nor is area by planimeter, area by scale, or area copied from another source, except in the case of tracts containing inaccessible sections or areas. In such case the surveyor may make use of aerial photographs or other appropriate aids to determine the acreage of any inaccessible areas when the areas are bounded by natural and visible monuments. In such case the methods used must be stated on the plat and all accessible areas of the tract shall remain subject to all applicable standards of this section.

(f) Plat to Contain Specific Information. — Every plat shall contain the following specific information:

(1) An accurately positioned north arrow coordinated with any bearings shown on the plat. Indication shall be made as to whether the north index is true, magnetic, North Carolina grid ("NAD 83" or "NAD 27"), or is referenced to old deed or plat bearings. If the north index is magnetic or referenced to old deed or plat bearings, the date and the source (if known) the index was originally determined shall be clearly indicated.

(2) The azimuth or course and distance of every property line surveyed shall be shown. Distances shall be in feet or meters and decimals thereof. The number of decimal places shall be appropriate to the class of survey required.

(3) All plat distances shall be by horizontal or grid measurements. All lines shown on the plat shall be correctly plotted to the scale shown. Enlargement of portions of a plat are acceptable in the interest of clarity, where shown as inserts. Where the North Carolina grid system is used the grid factor shall be shown on the face of the plat. If grid distances are used, it must be shown on the plat.

(4) Where a boundary is formed by a curved line, the following data must be given: actual survey data from the point of curvature to the point

of tangency shall be shown as standard curve data, or as a traverse of bearings and distances around the curve. If standard curve data is used the bearing and distance of the long chord (from point of curvature to point of tangency) must be shown on the plat.

(5) Where a subdivision of land is set out on the plat, all streets and lots shall be accurately plotted with dimension lines indicating widths and all other information pertinent to reestablishing all lines in the field. This shall include bearings and distances sufficient to form a continuous closure of the entire perimeter.

(6) Where control corners have been established in compliance with G.S. 39-32.1, 39-32.2, 39-32.3, and 39-32.4, as amended, the location and pertinent information as required in the reference statute shall be plotted on the plat. All other corners which are marked by monument or natural object shall be so identified on all plats, and where practical all corners of adjacent owners along the boundary lines of the subject tract which are marked by monument or natural object shall be shown.

(7) The names of adjacent landowners, or lot, block, parcel, subdivision designations or other legal reference where applicable, shall be shown where they could be determined by the surveyor.

(8) All visible and apparent rights-of-way, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown.

(9) Where the plat is the result of a survey, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to and coordinated with a horizontal control monument of some United States or State Agency survey system, such as the North Carolina Geodetic Survey where the monument is within 2,000 feet of the subject property. Where the North Carolina Grid System coordinates of the monument are on file in the North Carolina Office of State Budget and Management, the coordinates of both the referenced corner and the monuments used shall be shown in X (easting) and Y (northing) coordinates on the plat. The coordinates shall be identified as based on "NAD 83," indicating North American Datum of 1983, or as "NAD 27,"indicating North American Datum of 1927. The tie lines to the monuments shall also be sufficient to establish true north or grid north bearings for the plat if the monuments exist in pairs. Within a previously recorded subdivision that has been tied to grid control, control monuments within the subdivision may be used in lieu of additional ties to grid control. Within a previously recorded subdivision that has not been tied to grid control, if horizontal control monuments are available within 2,000 feet, the above requirements shall be met; but in the interest of bearing consistency with previously recorded plats, existing bearing control should be used where practical. In the absence of Grid Control, other appropriate natural monuments or landmarks shall be used. In all cases, the tie lines shall be sufficient to accurately reproduce the subject lands from the control or reference points used.

(10) A vicinity map (location map) shall appear on the plat.

(11) Notwithstanding any other provision contained in this section, it is the duty of the surveyor, by a certificate on the face of the plat, to certify to one of the following:

a. That the survey creates a subdivision of land within the area of a county or municipality that has an ordinance that regulates parcels of land;

b. That the survey is located in a portion of a county or municipality that is unregulated as to an ordinance that regulates parcels of land;

c. Any one of the following:
   1. That the survey is of an existing parcel or parcels of land and does not create a new street or change an existing street;
   2. That the survey is of an existing building or other structure, or natural feature, such as a watercourse; or
   3. That the survey is a control survey.

d. That the survey is of another category, such as the recombination of existing parcels, a court-ordered survey, or other exception to the definition of subdivision;

e. That the information available to the surveyor is such that the surveyor is unable to make a determination to the best of the surveyor's professional ability as to provisions contained in (a) through (d) above.

However, if the plat contains the certificate of a surveyor as stated in a., d., or e. above, then the plat shall have, in addition to said surveyor's certificate, a certification of approval, or no approval required, as may be required by local ordinance from the appropriate government authority before the plat is presented for recordation. If the plat contains the certificate of a surveyor as stated in b. or c. above, nothing shall prevent the recordation of the plat if all other provisions have been met.

(g) Recording of Plat. — In certifying a plat for recording pursuant to G.S. 47-30.2, the Review Officer shall not be responsible for reviewing or certifying as to any of the following requirements of this section:

(1) Subsection (b) of this section as to archival.
(2) Repealed by Session Laws 1997-309, s. 2.
(3) Subsection (e) of this section.
(4) Subdivisions (1) through (10) of subsection (f) of this section.

A plat, when certified pursuant to G.S. 47-30.2 and presented for recording, shall be recorded in the plat book or plat file and when so recorded shall be duly indexed. Reference in any instrument hereafter executed to the record of any plat herein authorized shall have the same effect as if the description of the lands as indicated on the record of the plat were set out in the instrument.

(h) Nothing in this section shall be deemed to prevent the filing of any plat prepared by a registered land surveyor but not recorded prior to the death of the registered land surveyor. However, it is the responsibility of the person presenting the map to the Review Officer pursuant to G.S. 47-30.2 to prove that the plat was so prepared. For preservation these plats may be filed without signature, notary acknowledgement or probate, in a special plat file.

(i) Nothing in this section shall be deemed to invalidate any instrument or the title thereby conveyed making reference to any recorded plat.

(j) The provisions of this section shall not apply to boundary plats of areas annexed by municipalities nor to plats of municipal boundaries, whether or not required by law to be recorded.

(k) The provisions of this section shall apply to all counties in North Carolina.

(*l*) This section does not apply to the registration of highway right-of-way plans provided for in G.S. 136-19.4 or G.S. 136-89.184, nor to the registration of roadway corridor official maps provided for in Article 2E of Chapter 136 of the General Statutes.

(m) Maps attached to deeds or other instruments and submitted for recording in that form must be no larger than 8 1/2 inches by 14 inches and comply with either this subsection or subsection (n) of this section. Such a map shall either (i) have the original signature of a registered land surveyor and the surveyor's seal as approved by the State Board of Registration for Professional Engineers and Land Surveyors, or (ii) be a copy of a map, already on file in the public records, that is certified by the custodian of the public record to be a true and accurate copy of a map bearing an original personal signature and original seal. The presence of the original personal signature and seal shall constitute a certification that the map conforms to the standards of practice for land surveying in North Carolina, as defined in the rules of the North Carolina State Board of Registration for Professional Engineers and Land Surveyors.

(n) A map that does not meet the requirements of subsection (m) of this section may be attached to a deed or other instrument submitted for recording in that form for illustrative purposes only if it meets both of the following requirements:

(1) It is no larger than 8 1/2 inches by 14 inches.

(2) It is conspicuously labelled, "THIS MAP IS NOT A CERTIFIED SURVEY AND HAS NOT BEEN REVIEWED BY A LOCAL GOVERNMENT AGENCY FOR COMPLIANCE WITH ANY APPLICABLE LAND DEVELOPMENT REGULATIONS." (1911, c. 55, s. 2; C.S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1; 1967, c. 228, s. 2; c. 394; 1971, c. 658; 1973, cc. 76, 848, 1171; c. 1262, s. 86; 1975, c. 192; c. 200, s. 1; 1977, c. 50, s. 1; c. 221, s. 1; c. 305, s. 2; c. 771, s. 4; 1979, c. 330, s. 1; 1981, c. 138, s. 1; c. 140, s. 1; c. 479; 1983, c. 473; 1987, c. 747, s. 20; 1989, c. 727, s. 218(6); 1991, c. 268, s. 3; 1993, c. 119, ss. 1, 2; 1997-309, s. 2; 1997-443, s. 11A.119(a); 1998-228, ss. 11, 12; 1999-456, s. 59; 2000-140, s. 93.1(b); 2001-424, s. 12.2(b); 2008-225, s. 9.)

Effect of Amendments. — Session Laws 2008-225, s. 9, effective August 17, 2008, rewrote subsection (*l*).

§ 47-31. Certified copies may be registered; used as evidence.

(a) A duly certified copy of any deed or writing required or allowed to be registered may be registered in any county. The register of deeds may rely on the record keeper's certification on a presented document that the document is a certified copy and is not required to further verify the proof or acknowledgement otherwise required by G.S. 47-14 or to determine whether the document has been changed or altered after it was certified. The registered or duly certified copy of any deed or writing that has been registered in the county where the land is situate may be given in evidence in any court of the State.

(b) Instruments registered pursuant to this section prior to July 6, 1993 that were not further certified pursuant to G.S. 47-14 at the time of registration are hereby validated. (1858-9, c. 18, s. 2; Code, s. 1253; Rev., s. 988; C. S., s. 3319; 1993, c. 288, ss. 2, 3; 2008-194, s. 7(b).)

Effect of Amendments. — Session Laws 2008-194, s. 7(b), effective August 8, 2008, substituted "The register of deeds may rely on the record keeper's certification on a presented document that the document is a certified copy and is not required to further verify the proof or acknowledgement otherwise required by G.S. 47-14 or to determine whether the document has been changed or altered after it was certified. The" for "without further certification pursuant to G.S. 47-14; and the" in subsection (a).

§ 47-36.1. Correction of errors in recorded instruments.

Notwithstanding G.S. 47-14 and G.S. 47-17, notice of typographical or other minor error in a deed or other instrument recorded with the register of deeds may be given by recording an affidavit. If an affidavit is conspicuously identified as a corrective or scrivener's affidavit in its title, the register of deeds shall index the name of the affiant, the names of the original parties in the instrument, the recording information of the instrument being corrected, and the original parties as they are named in the affidavit. A copy of the previously recorded instrument to which the affidavit applies may be attached to the affidavit and need not be a certified copy. Notice of the corrective information as provided by the affiant is deemed to have been given as of the time the corrective affidavit is registered. Nothing in this section invalidates or otherwise alters the legal effect of any instrument of correction authorized by statute in effect on the date the instrument was registered. (1985 (Reg. Sess., 1986), c. 842, s. 1; 1987, c. 360, s. 1; 2008-194, s. 7(c).)

Effect of Amendments. — Session Laws 2008-194, s. 7(c), effective October 1, 2008, rewrote the section.

CASE NOTES

Cited in Citifinancial Mortg. Co. v. Gray, — N.C. App. —, 652 S.E.2d 321, 2007 N.C. App. LEXIS 2316 (2007).

Chapter 47C.

North Carolina Condominium Act.

Article 3.

Management of the Condominium.

Sec.
47C-3-122. Irrigation of landscaping.

Article 1.

General Provisions.

§ 47C-1-101. Short title.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-1-104. Variation; power of attorney or proxy to declarant.

CASE NOTES

Substantial Compliance. — Real estate firm could rely on the substantial compliance clause of the North Carolina Condominium Act, G.S. 47C-1-101 et seq., in G.S. 47C-1-104(c) to excuse the omission of a development time limit in a condominium declaration because, other than the omission of the time limit for the exercise of reserved development rights, as was required by G.S. 47C-2-105(a)(8), it appeared that the real estate firm's condominium declaration contained every relevant component either mandated by the North Carolina Condominium Act or considered to be material by the firm and the buyers of the condominiums built by the firm. In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

Article 2.

Creation, Alteration, and Termination of Condominiums.

§ 47C-2-101. Execution and recordation of declaration.

CASE NOTES

Applied in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-2-103. Construction and validity of declaration and bylaws.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-2-105. Contents of declaration.

CASE NOTES

Substantial Compliance. — Real estate firm could rely on the substantial compliance clause of the North Carolina Condominium Act, G.S. 47C-1-101 et seq., in G.S. 47C-1-104(c) to excuse the omission of a development time limit in a condominium declaration because, other than the omission of the time limit for the exercise of reserved development rights, as was required by G.S. 47C-2-105(a)(8), it appeared that the real estate firm's condominium declaration contained every relevant component either mandated by the North Carolina Condominium Act or considered to be material by the firm and the buyers of the condominiums built by the firm. In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-2-107. Allocation of common element, interests, votes, and common expense liabilities.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-2-109. Plats and plans.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-2-110. Exercise of development rights.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-2-111. Alterations of units.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-2-112. Relocation of boundaries between adjoining units.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-2-118. Termination of condominium.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

Article 3.

Management of the Condominium.

§ 47C-3-101. Organization of unit owners' association.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-3-102. Powers of unit owners' association.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-3-103. Executive board members and officers.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-3-106. Bylaws.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-3-107. Upkeep; damages; assessments for damages, fines.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-3-108. Meetings.

CASE NOTES

Cited in Egen v. Excalibur Resort Prof'l, — N.C. App. —, 663 S.E.2d 914, 2008 N.C. App. LEXIS 1469 (Aug. 5, 2008).

§ 47C-3-113. Insurance.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-3-115. Assessments for common expense.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-3-116. Lien for assessments.

CASE NOTES

Cited in In re Williamson Vill. Condos., — N.C. App. —, 653 S.E.2d 900, 2007 N.C. App. LEXIS 2554 (2007).

§ 47C-3-122. Irrigation of landscaping.

Notwithstanding any provision in any declaration of covenants, no requirement to irrigate landscaping shall be construed to:

(1) Require the irrigation of landscaping, during any period in which the U.S. Drought Monitor, as defined in G.S. 143-350, or the Secretary of Environment and Natural Resources has designated an area in which the association is located as an area of severe, extreme, or exceptional drought and the Governor, a State agency, or unit of local government has imposed water conservation measures applicable to the area unless:

  a. For covenants registered prior to October 1, 2008, the covenant specifically requires the irrigation of landscaping notwithstanding water conservation measures imposed by the Governor, a State agency, or unit of local government. The association may not fine or otherwise penalize an owner of land for violation of an irrigation requirement during a period of drought as designated under this subdivision, unless the covenant specifically authorizes fines or other penalties.

b. For covenants registered on or after October 1, 2008, the covenant must specifically state that any requirement to irrigate landscaping is suspended to the extent the requirement would otherwise be prohibited during any period in which the Governor, a State agency, or unit of local government has imposed water conservation measures. The association may not fine or otherwise penalize an owner of land for violation of an irrigation requirement during a drought designated under this subdivision, unless the covenant authorizes the fines or other penalties. This authorization must be written on the first page of the covenant in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the declarations of covenants.

(2) For purposes of this section, the term "landscaping" includes lawns, trees, shrubbery, and other ornamental or decorative plants. (2008-143, s. 19(a).)

Editor's Note. — Session Laws 2008-143, s. 21, made this section effective October 1, 2008.

Session Laws 2008-143, s. 20, effective July 31, 2008, provides: "Nothing in this act shall be construed to expand or limit the authority of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well."

Chapter 47F.

North Carolina Planned Community Act.

Article 3.

Management of Planned Community.

Sec.
47F-3-122. Irrigation of landscaping.

Article 1.

General Provisions.

§ 47F-1-102. Applicability.

CASE NOTES

Fines for Covenant Violations. — Court erred in issuing an order preventing a homeowners association's foreclosure on liens imposed on an owner's property based on fines for the owner's covenant violations because, under G.S. 47F-3-102, the homeowners association had the enumerated powers unless its documents expressly provided to the contrary; the homeowners association's articles of incorporation and declaration did not expressly provide that it may not fine residents who violated its rules and regulations. All of the events in question occurred after July 17, 2004, when the G.S. 47F-3-102 was amended. RiverPointe Homeowners Ass'n v. Mallory, — N.C. App. —, 656 S.E.2d 659, 2008 N.C. App. LEXIS 262 (2008).

Retroactive Provision. — Although under G.S. 47F-1-102(c), G.S. 47F-3-116 was retroactive and a subdivision's declaration did not provide otherwise, a homeowners association's suit seeking to recover under contract law a special assessment for attorney's fees incurred in a dispute with the homeowners was not the type of action that allowed the association to collect mandatory attorney's fees under G.S. 47F-3-116(e). Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008).

Article 3.

Management of Planned Community.

§ 47F-3-102. Powers of owners' association.

CASE NOTES

Homeowners' Associations. —
Court erred in issuing an order preventing a homeowners association's foreclosure on liens imposed on an owner's property based on fines for the owner's covenant violations because, under G.S. 47F-3-102, the homeowners association had the enumerated powers unless its documents expressly provided to the contrary; the homeowners association's articles of incorporation and declaration did not expressly provide that it may not fine residents who violated its rules and regulations. All of the events in question occurred after July 17, 2004, when the G.S. 47F-3-102 was amended. RiverPointe Homeowners Ass'n v. Mallory, — N.C. App. —, 656 S.E.2d 659, 2008 N.C. App. LEXIS 262 (2008).

§ 47F-3-116. Lien for assessments.

CASE NOTES

Attorney Fees. —

Although under G.S. 47F-1-102(c), G.S. 47F-3-116 was retroactive and a subdivision's declaration did not provide otherwise, a homeowners association's suit seeking to recover under contract law a special assessment for attorney's fees incurred in a dispute with the homeowners was not the type of action that allowed the association to collect mandatory attorney's fees under G.S. 47F-3-116(e). Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008).

§ 47F-3-122. Irrigation of landscaping.

Notwithstanding any provision in any declaration of covenants, no requirement to irrigate landscaping shall be construed to:

(1) Require the irrigation of landscaping, during any period in which the U.S. Drought Monitor, as defined in G.S. 143-350, or the Secretary of Environment and Natural Resources has designated an area in which the association is located as an area of severe, extreme, or exceptional drought and the Governor, a State agency, or unit of local government has imposed water conservation measures applicable to the area unless:

  a. For declarations of covenants registered prior to October 1, 2008, the covenant specifically requires the irrigation of landscaping notwithstanding water conservation measures imposed by the Governor, a State agency, or unit of local government. The association may not fine or otherwise penalize an owner of land for violation of an irrigation requirement during a period of a drought as designated under this subdivision, unless the covenant specifically authorizes fines or other penalties.

  b. For covenants registered on or after October 1, 2008, the covenant must specifically state that any requirement to irrigate landscaping is suspended to the extent the requirement would otherwise be prohibited during any period in which the Governor, a State agency, or unit of local government has imposed water conservation measures. The association may not fine or otherwise penalize an owner of land for violation of an irrigation requirement during a drought designated under this subdivision, unless the covenant authorizes the fines or other penalties. This authorization must be written on the first page of the covenant in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the declarations of covenants.

(2) For purposes of this section, the term "landscaping" includes lawns, trees, shrubbery, and other ornamental or decorative plants. (2008-143, s. 19(b).)

Editor's Note. — Session Laws 2008-143, s. 21, made this section effective October 1, 2008.

Session Laws 2008-143, s. 20, effective July 31, 2008, provides: "Nothing in this act shall be construed to expand or limit the authority of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well."

Chapter 48.

Adoptions.

Article 1.

General Provisions.

§ 48-1-100. Legislative findings and intent; construction of Chapter.

CASE NOTES

Chapter Exclusive. —
District court in North Carolina is without authority to confer parental status upon a person who is not the biological parent of a child. The sole means of creating the legal relationship of parent and child is pursuant to the provisions of Chapter 48 of the General Statutes (Adoptions), G.S. 48-1-100 et seq. Heatzig v. MacLean, — N.C. App. —, 664 S.E.2d 347, 2008 N.C. App. LEXIS 1480 (2008).

Chapter 49.

Bastardy.

Article 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.

CASE NOTES

In a termination of parental rights proceeding, etc.

Termination of a father's parental rights was upheld on appeal since the father failed to challenge any of the findings of fact made by the trial court, namely that prior to the date the motion to terminate his parental rights was filed, he never established paternity over the minor child at issue, never legitimated the child by statute or marriage, nor had he provided any financial support. In re A.R.H.B., 186 N.C. App. 211, 651 S.E.2d 247, 2007 N.C. App. LEXIS 2086 (2007).

Article 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

CASE NOTES

Award of Attorney's Fees to the Putative Father. — Trial court erred by awarding a putative father attorney's fees under G.S. 50-13.6, once the putative father was proven not to be the biological father of a child because G.S. 50-13.6 did not apply to civil actions to establish paternity under G.S. 49-14. Instead, costs, including attorney's fees, involved in prosecuting a paternity action were to be awarded under G.S. 6-21(10). Guilford County ex rel. Holt v. Puckett, — N.C. App. —, 664 S.E.2d 362, 2008 N.C. App. LEXIS 1471 (2008).

Paternity Not Required for Child to Inherit Under Life Insurance Policy. — While paternity had to be established for an illegitimate child to inherit from a father who died intestate, North Carolina had no statute requiring that paternity be established for an illegitimate child to benefit from a life insurance policy, and the policy at issue in defendant claimant's case did not exclude illegitimate children unless paternity had been judicially established. Fort Dearborn Life Ins. Co. v. Turner, 521 F. Supp. 2d 499, 2007 U.S. Dist. LEXIS 84333 (E.D.N.C. Oct. 3, 2007).

Chapter 50.

Divorce and Alimony.

Article 1.

Divorce, Alimony, and Child Support, Generally.

Sec.
50-13.4. Action for support of minor child.

Article 1.

Divorce, Alimony, and Child Support, Generally.

§ 50-6. Divorce after separation of one year on application of either party.

CASE NOTES

IV. Domicile or Residence.

IV. DOMICILE OR RESIDENCE.

Finding of Court as to Residence. — District court properly exercised jurisdiction over the subject matter of the parties' divorce action as in the State of North Carolina subject matter jurisdiction for divorce involves not only bringing the matter in the correct court, but also the court's finding residence by one of the parties for the requisite length of time and verification of the pleadings. In the case at issue, the plaintiff husband sufficiently alleged that he was a citizen and resident of North Carolina for more than six months next preceding the institution of the action and had lived separate and apart from the wife for more than one year next preceding the institution of the action without resuming the marital relationship, with those district court findings being supported by the husband's verified complaint, which was treated as an affidavit. Wilson v. Wilson, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1479 (Aug. 5, 2008).

§ 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.

CASE NOTES

I. In General.
IV. Residence and Domicile.

I. IN GENERAL.

Cited in Hawkins v. Hawkins, — N.C. App. —, 664 S.E.2d 616, 2008 N.C. App. LEXIS 1520 (2008).

IV. RESIDENCE AND DOMICILE.

Residency Established Via Verified Complaint. — District court properly exercised jurisdiction over the subject matter of the parties' divorce action as in the State of North Carolina subject matter jurisdiction for divorce involves not only bringing the matter in the correct court, but also the court's finding residence by one of the parties for the requisite length of time and verification of the pleadings. In the case at issue, the plaintiff husband sufficiently alleged that he was a citizen and resident of North Carolina for more than six months next preceding the institution of the action and had lived separate and apart from the wife for more than one year next preceding the institution of the action without resuming the marital relationship, with those district court findings being supported by the husband's verified complaint, which was treated as an affidavit. Wilson v. Wilson, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1479 (Aug. 5, 2008).

§ 50-10. Material facts found by judge or jury in divorce or annulment proceedings; when notice of trial not required; procedure same as ordinary civil actions.

CASE NOTES

Rendering of Default Judgment as Sanction in Annulment Action Improper. — Default judgment was incorrectly entered pursuant to G.S. 1A-1, N.C. R. Civ. P. 37, due to a purported wife's failure to comply with the trial court's discovery orders in an annulment proceeding because a judgment for annulment could not be entered by default under G.S. 50-10(a), which gave the trial court subject matter jurisdiction over the annulment action. Hawkins v. Hawkins, — N.C. App. —, 664 S.E.2d 616, 2008 N.C. App. LEXIS 1520 (2008).

Default Judgment Improper in Annulment of Marriage. — Trial court erred as the court based all of the court's findings relevant to an annulment of a marriage between a decedent and a caretaker upon the allegations of the guardian's complaint, which the trial court deemed admitted because the court struck the caretaker's answer, even though G.S. 50-10(a) required that the allegations of the complaint were "deemed to be denied" even in the absence of an answer; although the trial court had discretion to render a judgment of default for failure to comply with an order made pursuant to G.S. 1A-1, N.C. R. Civ. P. 37(b)(2) so long as that judgment was just, Rule 37 did not trump G.S. 50-10(a). Jones v. Wiseman (In re Estate of Hawkins), — N.C. App. —, 662 S.E.2d 693, 2008 N.C. App. LEXIS 1192 (2008).

§ 50-11. Effects of absolute divorce.

CASE NOTES

Equitable Distribution After Judgment of Absolute Divorce. —

In proceedings in which a former husband was granted an absolute divorce, the former wife was not entitled to compel an equitable distribution affidavit from the former husband because the wife failed to properly file her equitable distribution claim pursuant to G.S. 50-21(a) as a separate action, cross-action, or motion in the cause within six months after the husband dismissed his own equitable distribution claim as required by G.S. 50-11(e) and (f); an oral motion by the wife for such a claim did not constitute the required motion. Webb v. Webb, — N.C. App. —, 656 S.E.2d 334, 2008 N.C. App. LEXIS 203 (2008).

§ 50-13.1. Action or proceeding for custody of minor child.

CASE NOTES

Standing of Other Persons to Bring Actions. —

Former domestic partner's allegations that she was an "other person" who had standing to seek custody were sufficient under Ellison to support a trial court's denial of a biological mother's motion to dismiss the partner's petition for custody. The partner established standing under G.S. 50-13.1 by alleging that she and the mother: (1) jointly raised the child; (2) entered into a parenting agreement in which they each acknowledged that the partner was a de facto parent; (3) the partner had formed a psychological parenting relationship with the child; and (4) the child had lived all his life enjoying the equal participation of the mother and the partner in his emotional and financial care and support, guidance and decision-making. Mason v. Dwinnell, — N.C. App. —, 660 S.E.2d 58, 2008 N.C. App. LEXIS 908 (2008).

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

CASE NOTES

II. Welfare of Child.
III. Right of Parents to Custody.
  A. As Against Third Persons.
  B. As Between Parents.

II. WELFARE OF CHILD.

Acts of Domestic Violence Between Parties. — Trial court's best interests of the children determination under G.S. 50-13.2(a) was supported by its findings of fact, including its finding that the father had "body slammed" the mother 20 to 50 times during the marriage, and threatened to punch his brother-in-law in the nose. Hall v. Hall, — N.C. App. —, 655 S.E.2d 901, 2008 N.C. App. LEXIS 202 (Feb. 5, 2008).

III. RIGHT OF PARENTS TO CUSTODY.

A. As Against Third Persons.

Due Process. —

Child's biological mother voluntarily relinquished her paramount parental right to make decisions under the due process clause when she entered into a parenting agreement with her former domestic partner to hold herself, the partner, and the child out as a family unit. The voluntary relinquishment of rights was inconsistent with her paramount rights under the due process clause. Mason v. Dwinnell, — N.C. App. —, 660 S.E.2d 58, 2008 N.C. App. LEXIS 908 (2008).

Fitness and Actions of Parent in Relationship with Domestic Partner Relevant. — While a district court could have concluded that the fitness of a child's biological mother warranted that she have sole custody, the district court was not required to do so where evidence indicated that the mother had voluntarily relinquished her due process rights to solely make decisions in the child's life, intended that her former domestic partner become a de facto parent, and the partner had established a significant bond with the child. Mason v. Dwinnell, — N.C. App. —, 660 S.E.2d 58, 2008 N.C. App. LEXIS 908 (2008).

Domestic Partner Denied Custody, Parental Status, and Reinstatement of Visitation Schedule. — Trial court properly denied defendant's claims for joint custody, recognition of parental status, and reinstatement of the original visitation schedule because plaintiff, defendant's former domestic partner, did not engage in conduct inconsistent with plaintiff's constitutionally protected status as the legal parent and did not allow defendant to function as a parent. Estroff v. Chatterjee, — N.C. App. —, 660 S.E.2d 73, 2008 N.C. App. LEXIS 905 (2008).

Intervention by Foster Parents. —

It was improper for a trial court to apply a G.S. 50-13.2(a) best interest analysis to a domestic partner's application for joint custody without first determining that a natural parent's conduct was inconsistent with her constitutionally protected status as a parent. Heatzig v. MacLean, — N.C. App. —, 664 S.E.2d 347, 2008 N.C. App. LEXIS 1480 (2008).

B. As Between Parents.

Joint Legal Authority. — Trial court erred in dividing decision-making responsibilities between the parties after awarding joint legal custody because the trial court had not made the necessary findings of fact to warrant a division of joint legal authority; the trial court's mere findings that the parties had a tumultuous relationship did not satisfy the required findings. Hall v. Hall, — N.C. App. —, 655 S.E.2d 901, 2008 N.C. App. LEXIS 202 (Feb. 5, 2008).

§ 50-13.4. Action for support of minor child.

(a) Any parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child as hereinafter provided.

(b) In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child. In the absence of pleading and proof that the circumstances otherwise warrant, parents of a minor, unemancipated child who is the custodial or noncustodial parent of a child shall share this primary liability for their grandchild's support with the minor parent, the court determining the proper share, until the minor parent reaches the age of 18 or becomes emancipated. If both the parents of the child requiring support were unemancipated minors at the time of the child's conception, the parents of both minor parents share primary liability for their grandchild's support until both minor parents reach the age of 18 or become emancipated. If only one parent of the child requiring support was an unemancipated minor at the time of the child's conception, the parents of both parents are liable for any arrearages in child support owed by the adult or emancipated parent until the other parent reaches the age of 18 or becomes emancipated. In the absence of pleading and proof that the circumstances otherwise warrant, any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support. However, the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing. The preceding sentence shall not be construed to prevent any court from ordering the support of a child by an agency of the State or county which agency may be responsible under law for such support.

The judge may order responsible parents in a IV-D establishment case to perform a job search, if the responsible parent is not incapacitated. This includes IV-D cases in which the responsible parent is a noncustodial mother or a noncustodial father whose affidavit of parentage has been filed with the court or when paternity is not at issue for the child. The court may further order the responsible parent to participate in work activities, as defined in 42 U.S.C. § 607, as the court deems appropriate.

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. Payments ordered for the support of a minor child shall be on a monthly basis, due and payable on the first day of each month. The requirement that orders be established on a monthly basis does not affect the availability of garnishment of disposable earnings based on an obligor's pay period.

The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except:

(1) If the child is otherwise emancipated, payments shall terminate at that time;

(2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

In the case of graduation, or attaining age 20, payments shall terminate without order by the court, subject to the right of the party receiving support to show, upon motion and with notice to the opposing party, that the child has not graduated or attained the age of 20.

If an arrearage for child support or fees due exists at the time that a child support obligation terminates, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court.

(c1) Effective July 1, 1990, the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent as provided in Chapter 50 or elsewhere in the General Statutes and shall develop criteria for determining when, in a particular case, application of the guidelines would be unjust or inappropriate. Prior to May 1, 1990 these guidelines and criteria shall be reported to the General Assembly by the Administrative Office of the Courts by delivering copies to the President Pro Tempore of the Senate and the Speaker of the House of Representatives. The purpose of the guidelines and criteria shall be to ensure that payments ordered for the support of a minor child are in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. The guidelines shall include a procedure for setting child support, if any, in a joint or shared custody arrangement which shall reflect the other statutory requirements herein.

Periodically, but at least once every four years, the Conference of Chief District Judges shall review the guidelines to determine whether their application results in appropriate child support award amounts. The Conference may modify the guidelines accordingly. The Conference shall give the Department of Health and Human Services, the Administrative Office of the Courts, and the general public an opportunity to provide the Conference with information relevant to the development and review of the guidelines. Any modifications of the guidelines or criteria shall be reported to the General Assembly by the Administrative Office of the Courts before they become effective by delivering copies to the President Pro Tempore of the Senate and the Speaker of the House of Representatives. The guidelines, when adopted or modified, shall be provided to the Department of Health and Human Services and the Administrative Office of the Courts, which shall disseminate them to the public through local IV-D offices, clerks of court, and the media.

Until July 1, 1990, the advisory guidelines adopted by the Conference of Chief District Judges pursuant to this subsection as formerly written shall operate as presumptive guidelines and the factors adopted by the Conference of Chief District Judges pursuant to this subsection as formerly written shall constitute criteria for varying from the amount of support determined by the guidelines.

(d) In non-IV-D cases, payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the State Child Support Collection and Disbursement Unit, for the benefit of the child. In IV-D cases, payments for the support of a minor child shall be ordered to be paid to the State Child Support Collection and Disbursement Unit for the benefit of the child.

(d1) For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) shall apply.

(e) Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order. The court may order the transfer of title to real property solely owned by the obligor in payment of arrearages of child support so long as the net value of the interest in the property being transferred does not exceed the amount of the arrearage being satisfied. In every case in which payment for the support of a minor child is ordered and alimony or postseparation support is also ordered, the order shall separately state and identify each allowance.

(e1) In IV-D cases, the order for child support shall provide that the clerk shall transfer the case to another jurisdiction in this State if the IV-D agency requests the transfer on the basis that the obligor, the custodian of the child, and the child do not reside in the jurisdiction in which the order was issued. The IV-D agency shall provide notice of the transfer to the obligor by delivery of written notice in accordance with the notice requirements of Chapter 1A-1, Rule 5(b) of the Rules of Civil Procedure. The clerk shall transfer the case to the jurisdiction requested by the IV-D agency, which shall be a jurisdiction in which the obligor, the custodian of the child, or the child resides. Nothing in this subsection shall be construed to prevent a party from contesting the transfer.

(f) Remedies for enforcement of support of minor children shall be available as herein provided.

(1) The court may require the person ordered to make payments for the support of a minor child to secure the same by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.

(2) If the court requires the transfer of real or personal property or an interest therein as provided in subsection (e) as a part of an order for payment of support for a minor child, or for the securing thereof, the court may also enter an order which shall transfer title as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(3) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for child-support payments as in other cases.

(4) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, shall be available in an action for child-support payments as in other cases, and for such purposes the child or person bringing an action for child support shall be deemed a creditor of the defendant. Additionally, in accordance with the provisions of G.S. 110-136, a continuing wage garnishment proceeding for wages due or to become due may be instituted by motion in the original child support proceeding or by independent action through the filing of a petition.

(5) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for child support as in other cases.

(6) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in action for child support as in other cases.

(7) A minor child or other person for whose benefit an order for the payment of child support has been entered shall be a creditor within the meaning of Article 3A of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(8) Except as provided in Article 15 of Chapter 44 of the General Statutes, a judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments and may include provisions for periodic payments.

(9) An order for the periodic payments of child support or a child support judgment that provides for periodic payments is enforceable by proceedings for civil contempt, and disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A of the General Statutes.

Notwithstanding the provisions of G.S. 1-294, an order for the payment of child support which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child support until the appeal is decided, if justice requires.

(10) The remedies provided by Chapter 1 of the General Statutes, Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for child support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 16 of Chapter 1C of the General Statutes.

(11) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available.

(g) An individual who brings an action or motion in the cause for the support of a minor child, and the individual who defends the action, shall provide to the clerk of the court in which the action is brought or the order is issued, the individual's social security number.

(h) Child support orders initially entered or modified on and after October 1, 1998, shall contain the name of each of the parties, the date of birth of each party, and the court docket number. The Administrative Office of the Courts shall transmit to the Department of Health and Human Services, Child Support Enforcement Program, on a timely basis, the information required to be included on orders under this subsection and the social security number of each party as required under subsection (g) of this section. (1967, c. 1153, s. 2; 1969, c. 895, s. 17; 1975, c. 814; 1977, c. 711, s. 26; 1979, c. 386, s. 10; 1981, c. 472; c. 613, ss. 1, 3; 1983, c. 54; c. 530, s. 1; 1985, c. 689, s. 17; 1985 (Reg. Sess., 1986), c. 1016; 1989, c. 529, ss. 1, 2; 1989 (Reg. Sess., 1990), c. 1067, s. 2; 1993, c. 335, s. 1; c. 517, s. 5; 1995, c. 319, s. 9; c. 518, s. 1; 1997-433, ss. 2.1(a), 2.2, 4.4, 7.1; 1997-443, ss. 11A.118(a), 11A.122; 1998-17, s. 1; 1998-176, s. 1; 1999-293, ss. 3, 4; 1999-456, s. 13; 2001-237, s. 1; 2003-288, s. 1; 2008-12, s. 1.)

Effect of Amendments. — Session Laws 2008-12, s. 1, effective October 1, 2008, deleted the last sentence in subsection (g), which read: "The child support order shall contain the social security number of the parties as evidenced in the support proceeding"; and, in subsection (h), deleted "the social security number of each party," following "date of birth of each party" in the first sentence, and added "and the social security number of each party as required under subsection (g) of this section" at the end of the second sentence.

CASE NOTES

- I. In General.
- IV. Amount of Support.
  - A. In General.

I. IN GENERAL.

Applied in Guilford County ex rel. Holt v. Puckett, — N.C. App. —, 664 S.E.2d 362, 2008 N.C. App. LEXIS 1471 (2008).

IV. AMOUNT OF SUPPORT.

A. In General.

Alimony and Child Support Considered Together. — Trial court reasonably could have concluded that the wife's alimony award needed to be increased because the wife's reasonable expenses had increased after the husband was no longer obligated to pay child support because the parties, minor child had turned 18-years-old. The original alimony award calculated the wife's reasonable expenses by attributing some of those expenses to the minor child, but the wife's reasonable expenses increased when the minor child attained the age of majority and those expenses were no longer attributed to the minor child. Harris v. Harris, — N.C. App. —, 656 S.E.2d 316, 2008 N.C. App. LEXIS 228 (2008).

Imputed Income. —

Trial court's determination that a husband, who worked as a school teacher, could continue to earn a minimum amount each month from a grading business was reasonably based on the court's findings of fact regarding the husband's actual earnings during the year prior to the hearing. Hartsell v. Hartsell, — N.C. App. —, 657 S.E.2d 724, 2008 N.C. App. LEXIS 428 (2008).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

CASE NOTES

- I. In General.

I. IN GENERAL.

Applicability in Action Involving Illegitimate Child. —

G.S. 50-13.6 did not apply to a civil action to establish paternity under G.S. 49-14. Guilford County ex rel. Holt v. Puckett, — N.C. App. —, 664 S.E.2d 362, 2008 N.C. App. LEXIS 1471 (2008).

§ 50-13.7. Modification of order for child support or custody.

CASE NOTES

- I. In General.
- III. Change in Circumstances.
- V. Findings and Discretion of Trial Court.
- VII. Procedure.

I. IN GENERAL.

Custody orders are never permanent, but rather are always subject to revision based upon changes in circumstances pursuant to G.S. 50-13.7(a). Heatzig v. MacLean, — N.C. App. —, 664 S.E.2d 347, 2008 N.C. App. LEXIS 1480 (2008).

III. CHANGE IN CIRCUMSTANCES.

Change Must Be Substantial. — Reduction of the monthly child support award was error because the trial court did not make a finding pursuant to G.S. 50-13.7(a) that there had been a substantial change in circumstances affecting the welfare of the husband and wife's three minor children. A reduction could not be based on the fact that the husband remarried and had a child born to the new marriage, as the remarriage and obligation of also supporting a new child was a voluntary undertaking on the husband's part. Frey v. Best, — N.C. App. —, 659 S.E.2d 60, 2008 N.C. App. LEXIS 715 (2008).

Decrease in Father's Income. — Because the changes in circumstances necessary to support a modification should be determined from the date of the most recent child support order which addressed the obligation in question, and an allegation of a change to the parties' income, without more, was not sufficient to support a motion to modify child support; thus, the ex-husband's motion to modify child support was properly dismissed. Devaney v. Miller, — N.C. App. —, 662 S.E.2d 672, 2008 N.C. App. LEXIS 1226 (July 1, 2008).

Showing of Changed Circumstances Held Insufficient. — Where an initial custody order awarded custody of a child to the paternal grandmother, the mother's motion to modify custody was properly denied under G.S. 50-13.7(a) because: (1) the "substantial change in circumstances" standard was properly applied to the motion to modify since the initial custody order was not on appeal; and (2) the mother did not present evidence that the mother's substantial change in circumstances affected the child. Warner v. Brickhouse, — N.C. App. —, 658 S.E.2d 313, 2008 N.C. App. LEXIS 649 (Apr. 1, 2008).

V. FINDINGS AND DISCRETION OF TRIAL COURT.

Findings Held Insufficient. — Trial court impermissibly modified child custody without finding a substantial change in circumstances; despite re-captioning the contempt order as one modifying custody, the trial court denied both parties an opportunity to submit evidence or present arguments regarding custody modification. In addition, the trial court made no findings of fact or conclusion of law regarding a substantial change in circumstances affecting the welfare of the minor child, only a best interest conclusion. Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008).

VII. PROCEDURE.

Appeal. — Where an initial custody order awarded custody of a child to the paternal grandmother and the mother's motion to modify custody was denied, the appellate court could not consider the mother's challenge to the initial custody order because the mother's notice of appeal from the denial of the motion to modify made no reference to the initial order and did not properly present the underlying judgment for review. Warner v. Brickhouse, — N.C. App. —, 658 S.E.2d 313, 2008 N.C. App. LEXIS 649 (Apr. 1, 2008).

§ 50-16.1A. Definitions.

CASE NOTES

Postseparation Support. — Because the trial court failed to make factual findings as to the parties' financial needs, accustomed standard of living, separate and marital debt obligations, and the expenses reasonably necessary to support each of them, its post-separation support and alimony awards to the husband under G.S. 50-16.3A(a), (b), and (c) were reversed. Crocker v. Crocker, — N.C. App. —, 660 S.E.2d 212, 2008 N.C. App. LEXIS 874 (2008).

Dependent Spouse. — Evidence supported the finding that the wife was a dependent spouse and the husband was a supporting spouse pursuant to G.S. 50-16.1A, where the findings of fact demonstrated that, during the marriage and at the time of the hearing, the wife had an income-expenses deficit of $627.00 per month and the husband had an income-expense surplus. Helms v. Helms, — N.C. App. —, 661 S.E.2d 906, 2008 N.C. App. LEXIS 1173 (June 17, 2008).

Cited in Harris v. Harris, — N.C. App. —, 656 S.E.2d 316, 2008 N.C. App. LEXIS 228 (2008).

§ 50-16.2A. Postseparation support.

CASE NOTES

Findings of Fact Lacking. — Because the trial court failed to make factual findings as to the parties' financial needs, accustomed standard of living, separate and marital debt obligations, and the expenses reasonably necessary to support each of them, its post-separation support and alimony awards to the husband under G.S. 50-16.3A(a), (b), and (c) were reversed. Crocker v. Crocker, — N.C. App. —, 660 S.E.2d 212, 2008 N.C. App. LEXIS 874 (2008).

§ 50-16.3A. Alimony.

CASE NOTES

Findings of Fact. —

Trial court's findings of fact were more than sufficient to demonstrate the court's consideration of the statutory factors under G.S. 50-16.3A because the court considered: (1) the duration of the parties' marriage; (2) the status of the parties' minor children; (3) the parties' ages and education levels; (4) the parties' relative incomes and earning capacities; (5) the parties' expenses, debts, and financial obligations; (6) the parties' standard of living; and (7) the marital misconduct of one of the parties. Hartsell v. Hartsell, — N.C. App. —, 657 S.E.2d 724, 2008 N.C. App. LEXIS 428 (2008).

Because the trial court failed to make factual findings as to the parties' financial needs, accustomed standard of living, separate and marital debt obligations, and the expenses reasonably necessary to support each of them, its post-separation support and alimony awards to the husband under G.S. 50-16.3A(a), (b), and (c) were reversed. Crocker v. Crocker, — N.C. App. —, 660 S.E.2d 212, 2008 N.C. App. LEXIS 874 (2008).

Remand Where Court Made Unsupported Findings. —

Case was remanded for further findings of fact because the trial court did not provide the basis for the amount and duration of the alimony award pursuant to G.S. 50-16.3A(b). Hartsell v. Hartsell, — N.C. App. —, 657 S.E.2d 724, 2008 N.C. App. LEXIS 428 (2008).

Raised Standard of Living. — Because it was unclear what amount each child used for his or her own needs, and what amount was used to supplement plaintiff's needs, which also hinged on a determination of the change in standard of living, the matter was remanded for the court to determine if the dependent spouse had raised her standard of living, and whether the contributions by the adult children should be a means of supporting that increase. Dodson v. Dodson, — N.C. App. —, 660 S.E.2d 93, 2008 N.C. App. LEXIS 899 (2008).

Cited in Harris v. Harris, — N.C. App. —, 656 S.E.2d 316, 2008 N.C. App. LEXIS 228 (2008); Helms v. Helms, — N.C. App. —, 661 S.E.2d 906, 2008 N.C. App. LEXIS 1173 (June 17, 2008).

§ 50-16.7. How alimony and postseparation support paid; enforcement of decree.

CASE NOTES

I. In General.

I. IN GENERAL.

Alimony and Child Support Considered Together. — Although alimony and child support were normally subjects to be considered separately, there might be circumstances that would warrant considering them together. Such was true in the wife's case where she sought and the trial court granted an increase in alimony because the original award attributed only half of some reasonable expenses to the wife because some expenses were attributed to the minor child, and those reasonable expenses increased for the wife after the minor child turned 18-years-old and the child support award was terminated. Harris v. Harris, — N.C. App. —, 656 S.E.2d 316, 2008 N.C. App. LEXIS 228 (2008).

§ 50-16.9. Modification of order.

CASE NOTES

I. In General.
II. Change of Circumstances.
III. Separation Agreements, Consent Judgments, etc.

I. IN GENERAL.

Applied in Dodson v. Dodson, — N.C. App. —, 660 S.E.2d 93, 2008 N.C. App. LEXIS 899 (2008).

II. CHANGE OF CIRCUMSTANCES.

Change Must Relate to Financial Needs or Ability to Pay. —
Trial court properly modified an alimony judgment pursuant to G.S. 50-16.9(a) because the court made findings of fact demonstrating that there had been a substantial change of circumstances warranting a modification of alimony based upon: (1) the former husband's financial situation having improved so that he was then able to pay the former wife's entire monthly financial shortfall; and (2) the wife's overall financial situation had, in fact, worsened. Pierce v. Pierce, — N.C. App. —, 655 S.E.2d 863, 2008 N.C. App. LEXIS 229 (2008).

Increase in Wife's Needs or Decrease in Estate. —
Trial court could determine that the wife's circumstances had changed substantially when the wife and husband's minor child turned 18-years-old, and grant the wife's motion for an increase in alimony, because the original alimony award attributed some expenses to the minor child, and the wife was forced to take on those expenses when the minor child turned 18-years-old. At the same time, the trial court could determine that the husband was not entitled to decrease the husband's alimony payment, as the husband was still able to make the original alimony payments ordered despite a decrease in income. Harris v. Harris, — N.C. App. —, 656 S.E.2d 316, 2008 N.C. App. LEXIS 228 (2008).

Effect of Change in Income. —
Increase in wife's income alone did not warrant the modification of the original alimony order that reduced the husband's monthly alimony payments to $0. Pursuant to G.S. 50-16.9(a), the trial court was obligated to make findings of fact showing changes in circumstances regarding the wife's reasonable current needs and the husband's ability to pay. Frey v. Best, — N.C. App. —, 659 S.E.2d 60, 2008 N.C. App. LEXIS 715 (2008).

III. SEPARATION AGREEMENTS, CONSENT JUDGMENTS, ETC.

Summary Judgment Inappropriate in Light of Conflicting Evidence as to Wife's Cohabitation. — In a former wife's suit against her former husband for breach of a separation agreement in which the husband raised cohabitation as an affirmative defense, it was error to grant the wife summary judgment in light of the conflicting evidence as to her cohabitation with a male friend. This conflicting evidence, which included evidence of how often the friend stayed overnight at the wife's residence, whether he permanently kept his clothes there, and to what extent he used the wife's residence as his base of operations for his business, required evaluation of subjective intent, which was inappropriate for summary judgment. Craddock v. Craddock, — N.C. App. —, 656 S.E.2d 716, 2008 N.C. App. LEXIS 273 (2008).

§ 50-20. Distribution by court of marital and divisible property.

CASE NOTES

II. Marital and Separate Property.
  E. Pension and Retirement Benefits.
V. Agreements.
X. Discretion of Trial Court and Appeallate Review.

II. MARITAL AND SEPARATE PROPERTY.

E. Pension and Retirement Benefits.

Failure to Rebut Presumption Spouse was Entitled to Half of 401K. — Wife was entitled to half the husband's 401(k) retirement account because the husband failed to rebut the presumption that the wife was entitled to half of the account and failed to meet the burden of showing what portion of the account was separate property. Helms v. Helms, — N.C. App. —, 661 S.E.2d 906, 2008 N.C. App. LEXIS 1173 (June 17, 2008).

V. AGREEMENTS.

Effect of Subsection (d). — Trial court did not err by allowing equitable distribution of property acquired during the parties' marriage as the parties' prenuptial agreement did not waive their claims to equitable distribution, G.S. 50-20(d); based on the former husband's stated intentions regarding the creation of the agreement, his discussions with an attorney, and the actual language of the agreement, the trial court could properly find that the agreement constituted a "free trader" agreement that did not waive the parties' rights to equitable distribution. McIntyre v. McIntyre, — N.C. App. —, 654 S.E.2d 798, 2008 N.C. App. LEXIS 85 (2008).

Failure to Consider Property Agreement Improper. — Because a husband neither disputed a property contract nor brought any new claim of his own, it would not have been appropriate for the wife to specifically plead an affirmative defense under G.S. 1A-1, N.C. R. Civ. P. 8(c); accordingly, the property contract was improperly disregarded by the trial court. Street v. Street, — N.C. App. —, 664 S.E.2d 69, 2008 N.C. App. LEXIS 1488 (2008).

X. DISCRETION OF TRIAL COURT AND APPEALLATE REVIEW.

Standard of Review. — Trial court orders for equitable distribution are accorded substantial deference by appellate courts and appellate review is limited to a determination of whether there was a clear abuse of discretion. Hartsell v. Hartsell, — N.C. App. —, 657 S.E.2d 724, 2008 N.C. App. LEXIS 428 (2008).

§ 50-21. Procedures in actions for equitable distribution of property; sanctions for purposeful and prejudicial delay.

CASE NOTES

Pleadings. — In divorce proceedings, a former wife was not entitled to compel an equitable distribution affidavit from the former husband because the wife failed to properly file her equitable distribution claim pursuant to G.S. 50-21(a) as a separate action, cross-action, or motion in the cause within six months after the husband dismissed his own equitable distribution claim as required by G.S. 50-11(e) and (f); an oral motion by the wife for such a claim did not constitute the required motion. Webb v. Webb, — N.C. App. —, 656 S.E.2d 334, 2008 N.C. App. LEXIS 203 (2008).

Article 5.

Parenting Coordinator.

§ 50-90. Definitions.

CASE NOTES

Necessary Findings. — Trial court erred in appointing a parenting coordinator without making the necessary specific findings. Hall v. Hall, — N.C. App. —, 655 S.E.2d 901, 2008 N.C. App. LEXIS 202 (Feb. 5, 2008).

§ 50-91. Appointment of parenting coordinator.

CASE NOTES

Necessary Findings. — Trial court erred in appointing a parenting coordinator without making the necessary specific findings. Hall v. Hall, — N.C. App. —, 655 S.E.2d 901, 2008 N.C. App. LEXIS 202 (Feb. 5, 2008).

Appointment Proper. — Trial court permissibly appointed a parenting coordinator after finding that the case involved a high degree of conflict, the parties were able to pay for a coordinator, and such appointment was in the best interest of the child. Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008).

Chapter 50A.

Uniform Child-Custody Jurisdiction and Enforcement Act.

Article 2.

Uniform Child-Custody Jurisdiction and Enforcement Act.

Part 1. General Provisions.

§ 50A-102. Definitions.

CASE NOTES

Cited in In re M.G., — N.C. App. —, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007).

Part 2. Jurisdiction.

§ 50A-201. Initial child-custody jurisdiction.

CASE NOTES

Exercise of Jurisdiction Declined. — In an abuse and neglect action, the evidence was insufficient to support jurisdiction as to the father's biological children as neither child had lived in North Carolina for at least six months immediately before the commencement of the proceedings and no other basis for jusdiction was provided. In re M.G., — N.C. App. —, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007).

Proper Determination of Home State. — Home state jurisdiction existed over a county department of social service's petition to terminate parental rights to two minor children since the trial court had emergency jurisdiction to enter the initial nonsecure custody orders, the children and mother had been physically in North Carolina for two years by the time of the filing of the petition and motion for termination of parental rights, there had been no prior custody proceedings or court orders entered with regard to the children in another state, and the father's residency in another state did not change the children's home state. In re E.X.J., — N.C. App. —, 662 S.E.2d 24, 2008 N.C. App. LEXIS 1172 (June 17, 2008).

§ 50A-204. Temporary emergency jurisdiction.

CASE NOTES

Agency Had Standing Since No Other Court Had Exercised Jurisdiction. — County department of social services had standing to file a termination petition under G.S. 7B-1103(a)(3) since the record established that emergency jurisdiction under G.S. 50A-204 existed at the time the department filed its juvenile petition, as a result, the department had been awarded custody by a court of competent jurisdiction, and those orders remained in effect pursuant to G.S. 50A-204(b) because no other orders had been entered by another state with jurisdiction. In re E.X.J., — N.C. App. —, 662 S.E.2d 24, 2008 N.C. App. LEXIS 1172 (June 17, 2008).

Cited in In re M.G., — N.C. App. —, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007).

§ 50A-205. Notice; opportunity to be heard; joinder.

CASE NOTES

Notice Held Sufficient. — Father's argument that he did not receive notice was rejected where although the county department of social services did not ultimately file a motion in the initial adjudication proceeding to terminate his rights, it had filed a separate petition to terminate those rights and properly served him with a summons, and the petition. In re E.X.J., — N.C. App. —, 662 S.E.2d 24, 2008 N.C. App. LEXIS 1172 (June 17, 2008).

§ 50A-207. Inconvenient forum.

CASE NOTES

Forum Appropriate. — Trial court did not abuse the court's discretion in denying a mother's motion to transfer, pursuant to G.S. 50A-207, a custody matter from North Carolina to California because the trial court's findings showed that the court considered relevant factors in determining whether jurisdiction was to be transferred and the findings were sufficient. Velasquez v. Ralls, — N.C. App. —, 665 S.E.2d 825, 2008 N.C. App. LEXIS 1611 (2008).

§ 50A-209. Information to be submitted to court.

CASE NOTES

Subject Matter Jurisdiction. — Inaccuracy in address information for the children named in an affidavit supporting an abuse and neglect petition did not lead to lack of subject matter jurisdiction because the required information was known to the parents and was provided during the course of the hearing. In re M.G., — N.C. App. —, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007).

Chapter 50B.

Domestic Violence.

Sec.
50B-4.1. Violation of valid protective order.

§ 50B-1. Domestic violence; definition.

Editor's Note. — Session Laws 2008-4, s. 2 provides: "The North Carolina Domestic Violence Commission, in consultation with the North Carolina Coalition Against Domestic Violence, the North Carolina Attorney General's Office, and the Governor's Crime Commission, shall study the adoption of a statewide automated victim notification system for persons who have received a protective order under Chapter 50B of the General Statutes. As part of its study of this issue, the Domestic Violence Commission shall review:

"(1) Automated notification systems used in other state jurisdictions to notify protective order holders of critical dates, e.g., the date the respondent, if incarcerated, will be released from custody.

"(2) Data, if any, on the effectiveness of other state systems.

"(3) The current statewide system which provides automated notice to crime victims (SAVAN), to determine if it could be enhanced to include the proposed system.

"(4) Sources of grant funding that are available to implement the system.

"(5) Methods utilized for registering into the system, and whether the information should be accessible to the general public, in addition to the person or persons protected by the order.

"(6) Methods to ensure that information relating to the respondent of an order is uploaded in a timely manner and to confirm that notification has been sent to registrants.

"The North Carolina Domestic Violence Commission shall report with the results of its study, and any recommendations, to the Joint Legislative Committee on Domestic Violence and the General Assembly on or before January 1, 2009."

Former G.S. 14-277.3, referred to in subdivision (a)(2), was repealed by Session Laws 2008-167, s. 1, effective December 1, 2008. For current provisions as to stalking, see G.S. 14-277.3A.

§ 50B-3. Relief.

Editor's Note. —

Session Laws 2008-4, s. 2 provides: "The North Carolina Domestic Violence Commission, in consultation with the North Carolina Coalition Against Domestic Violence, the North Carolina Attorney General's Office, and the Governor's Crime Commission, shall study the adoption of a statewide automated victim notification system for persons who have received a protective order under Chapter 50B of the General Statutes. As part of its study of this issue, the Domestic Violence Commission shall review:

"(1) Automated notification systems used in other state jurisdictions to notify protective order holders of critical dates, e.g., the date the respondent, if incarcerated, will be released from custody.

"(2) Data, if any, on the effectiveness of other state systems.

"(3) The current statewide system which provides automated notice to crime victims (SAVAN), to determine if it could be enhanced to include the proposed system.

"(4) Sources of grant funding that are available to implement the system.

"(5) Methods utilized for registering into the system, and whether the information should be accessible to the general public, in addition to the person or persons protected by the order.

"(6) Methods to ensure that information relating to the respondent of an order is uploaded in a timely manner and to confirm that notification has been sent to registrants.

"The North Carolina Domestic Violence Commission shall report with the results of its study, and any recommendations, to the Joint Legislative Committee on Domestic Violence and the General Assembly on or before January 1, 2009."

§ 50B-4.1. Violation of valid protective order.

(a) Except as otherwise provided by law, a person who knowingly violates a valid protective order entered pursuant to this Chapter or who knowingly violates a valid protective order entered by the courts of another state or the courts of an Indian tribe shall be guilty of a Class A1 misdemeanor.

(b) A law enforcement officer shall arrest and take a person into custody without a warrant or other process if the officer has probable cause to believe that the person knowingly has violated a valid protective order excluding the person from the residence or household occupied by a victim of domestic violence or directing the person to refrain from doing any or all of the acts specified in G.S. 50B-3(a)(9).

(c) When a law enforcement officer makes an arrest under this section without a warrant, and the party arrested contests that the out-of-state order or the order issued by an Indian court remains in full force and effect, the party arrested shall be promptly provided with a copy of the information applicable to the party which appears on the National Crime Information Center registry by the sheriff of the county in which the arrest occurs.

(d) Unless covered under some other provision of law providing greater punishment, a person who commits a felony at a time when the person knows the behavior is prohibited by a valid protective order as provided in subsection (a) of this section shall be guilty of a felony one class higher than the principal felony described in the charging document. This subsection shall not apply to a person who is charged with or convicted of a Class A or B1 felony or to a person charged under subsection (f) or subsection (g) of this section.

(e) An indictment or information that charges a person with committing felonious conduct as described in subsection (d) of this section shall also allege that the person knowingly violated a valid protective order as described in subsection (a) of this section in the course of the conduct constituting the underlying felony. In order for a person to be punished as described in subsection (d) of this section, a finding shall be made that the person knowingly violated the protective order in the course of conduct constituting the underlying felony.

(f) Unless covered under some other provision of law providing greater punishment, any person who knowingly violates a valid protective order as provided in subsection (a) of this section, after having been previously convicted of two offenses under this Chapter, shall be guilty of a Class H felony.

(g) Unless covered under some other provision of law providing greater punishment, any person who, while in possession of a deadly weapon on or about his or her person or within close proximity to his or her person, knowingly violates a valid protective order as provided in subsection (a) of this section by failing to stay away from a place, or a person, as so directed under the terms of the order, shall be guilty of a Class H felony. (1997-471, s. 3; 1997-456, s. 27; 1999-23, s. 4; 2001-518, s. 5; 2007-190, s. 1; 2008-93, s. 1.)

Editor's Note. —

Session Laws 2008-93, s. 2, provides: "This act becomes effective December 1, 2008, and applies to offenses committed on or after that date, but offenses committed before that date count in determining the total prior offenses."

Effect of Amendments. —

Session Laws 2008-93, s. 1, effective December 1, 2008, substituted "two offenses" for "three offenses" in subsection (f). See Editor's note for applicability.

Chapter 50C.

Civil No-Contact Orders.

§ 50C-1. Definitions.

Editor's Note. —

Former G.S. 14-277.3, referred to in the introductory paragraph of subdivision (6), was repealed by Session Laws 2008-167, s. 1, effective December 1, 2008. For current provisions as to stalking, see G.S. 14-277.3A.

CASE NOTES

Harassment Could Not Support Civil No-Contact Order. — Finding that a blogger had harassed the victims under G.S. 50C-1(6) and (7) by knowingly publishing electronic or computerized transmissions directed at the victims that tormented, terrorized, or terrified the victims and served no legitimate purpose could not support a civil no-contact order, even though the correct definition of harassment under G.S. 14-277.3(c) was used. Ramsey v. Harman, — N.C. App. —, 661 S.E.2d 924, 2008 N.C. App. LEXIS 1146 (June 17, 2008).

Civil No-Contact Order Improper. — Civil no-contact order was improperly entered for stalking under G.S. 50C-1(6) since there was no evidence that a blogger intended to cause and caused the victims to suffer substantial emotional distress as: (1) the trial court found that the messages on a website did not contain language "threatening to inflict bodily harm" or "physical injury"; (2) a claim that a child became "embarrassed" when the child had allegedly observed teachers viewing the blogger's website in the school library was implausible; (3) the blogger never had any communication with the victim or the child, and the child's name was not mentioned on the website; and (4) the blog was posted in retaliation for messages posted by the victim on a rival website, and an alleged threatening phone call from the victim's mother. Ramsey v. Harman, — N.C. App. —, 661 S.E.2d 924, 2008 N.C. App. LEXIS 1146 (June 17, 2008).

Chapter 51.

Marriage.

ARTICLE 1.

General Provisions.

§ 51-3. Want of capacity; void and voidable marriages.

CASE NOTES

Applied in Hawkins v. Hawkins, — N.C. App. —, 664 S.E.2d 616, 2008 N.C. App. LEXIS 1520 (2008).

Chapter 52.

Powers and Liabilities of Married Persons.

§ 52-10. Contracts between husband and wife generally; releases.

CASE NOTES

Prenuptial agreement. — Trial court did not err by allowing equitable distribution of property acquired during the parties' marriage, as the parties' prenuptial agreement, G.S. 52-10(a), did not waive their claims to equitable distribution; based on the former husband's stated intentions regarding the creation of the agreement, his discussions with an attorney, and the actual language of the agreement, the trial court could properly find that the agreement constituted a "free trader" agreement that did not waive the parties' rights to equitable distribution. McIntyre v. McIntyre, — N.C. App. —, 654 S.E.2d 798, 2008 N.C. App. LEXIS 85 (2008).

Applied in In re Estate of Potts, 186 N.C. App. 460, 651 S.E.2d 297, 2007 N.C. App. LEXIS 2188 (2007).

§ 52-12. Postnuptial crimes and torts.

CASE NOTES

Applied in Hinson v. Jarvis, — N.C. App. —, 660 S.E.2d 604, 2008 N.C. App. LEXIS 990 (2008).

Chapter 52B.

Uniform Premarital Agreement Act.

§ 52B-1. Short title.

CASE NOTES

Cited in McIntyre v. McIntyre, — N.C. App. —, 654 S.E.2d 798, 2008 N.C. App. LEXIS 85 (2008).

Chapter 52C.

Uniform Interstate Family Support Act.

Article 6.

Enforcement and Modification of Support Order After Registration.

Part 2. Contest of Validity of Enforcement.

§ 52C-6-607. Contest of registration or enforcement.

CASE NOTES

Enforcement of foreign support orders under the Uniform Interstate Family Support Act is not an equitable remedy; the Act provides a legal remedy, not an equitable remedy. Accordingly, in an action to register Florida support orders against a father in North Carolina, any equitable defenses to the child support obligations that the father might wish to raise could be raised only in Florida. State ex rel. Lively v. Berry, — N.C. App. —, 653 S.E.2d 192, 2007 N.C. App. LEXIS 2452 (2007).

Registration Improperly Denied. — Trial court erred under the Uniform Interstate Family Support Act in denying registration of foreign child support orders against a father as to arrears because the father had not presented evidence to establish at least one of the seven enumerated defenses under G.S. 52C-6-607; furthermore, the trial court's refusal to register the arrears portion of the orders affected their amount and thus effectively modified the orders, which the trial court did not have the authority to do under the Full Faith and Credit for Child Support Orders Act. State ex rel. Lively v. Berry, — N.C. App. —, 653 S.E.2d 192, 2007 N.C. App. LEXIS 2452 (2007).

Part 3. Registration and Modification of Child Support Order.

§ 52C-6-611. Modification of child support order of another state.

CASE NOTES

Applied in Devaney v. Miller, — N.C. App. —, 662 S.E.2d 672, 2008 N.C. App. LEXIS 1226 (July 1, 2008).

Chapter 53.

Banks.

Article 19A.

Mortgage Lending Act.

Sec.
53-243.01. (Effective January 1, 2009) Definitions.
53-243.02. (Effective January 1, 2009) License required; licensee records.
53-243.05. (Effective January 1, 2009) Qualifications for licensure; issuance.
53-243.06. (Effective January 1, 2009) License renewal; termination.
53-243.08. (Effective January 1, 2009) Qualifying individuals and branch managers.
53-243.09. (Effective January 1, 2009) Offices; address changes; display of license.
53-243.10. (Effective January 1, 2009) Mortgage broker duties; mortgage servicer duties.
53-243.11. (Effective until January 1, 2009) Prohibited activities.
53-243.11. (Effective January 1, 2009) Prohibited activities.
53-243.12. (Effective January 1, 2009) Disciplinary authority.
53-243.13. Records; escrow funds or trust accounts.
53-243.14. (Effective January 1, 2009) Criminal penalty.
53-243.15. Filing required for exempt persons; civil penalty.
53-243.16. Criminal history record checks.
53-243.17. Participation in national mortgage licensing system; licensing proprietary software.

ARTICLE 8.

Commissioner of Banks and State Banking Commission.

§ 53-92. Appointment of Commissioner of Banks; State Banking Commission.

CASE NOTES

Compliance with Notice of Appeal Requirements. — Dismissal of a finance company's appeal from a decision of the North Carolina State Bank Commission was reversed because the company complied with the requirements under G.S. 53-92(d) for appeals from the Commission by submitting a notice of appeal to the North Carolina Commissioner of Banks within 20 days of the Commission's order. In re Advance Am., Cash Advance Ctrs. of N.C. Inc., — N.C. App. —, 657 S.E.2d 405, 2008 N.C. App. LEXIS 426 (2008).

ARTICLE 12.

Joint Deposits.

§ 53-146.1. Joint accounts.

CASE NOTES

Executor Holding Joint Tenancy with Decedent Could Not Be Liable for Converting Funds Contained in Joint Account. — Beneficiary could not legally establish a claim of conversion against an executor, as the executor was a true and rightful owner of the funds held with the decedent as a joint tenant and no evidence was presented that the decedent and the executor agreed with or required the bank to demand that withdrawals contain both owners' signatures. Horry v. Woodbury, — N.C. App. —, 659 S.E.2d 88, 2008 N.C. App. LEXIS 706 (2008).

ARTICLE 15.

North Carolina Consumer Finance Act.

§ 53-164. Title.

CASE NOTES

Cited in In re Advance Am., Cash Advance Ctrs. of N.C. Inc., — N.C. App. —, 657 S.E.2d 405, 2008 N.C. App. LEXIS 426 (2008).

§ 53-166. Scope of Article; evasions; penalties; loans in violation of Article void.

CASE NOTES

Litigation Lending Agreement Violated Section. — Litigation lender violated G.S. 53-166(a) since it was undisputed that it did not have the requisite license and it had contracted with an injured driver for a payment of interest that exceeded the amount permitted under G.S. 24-1.1. Odell v. Legal Bucks, LLC, — N.C. App. —, 665 S.E.2d 767, 2008 N.C. App. LEXIS 1619 (2008).

Cited in Kucan v. Advance Am., — N.C. App. —, 660 S.E.2d 98, 2008 N.C. App. LEXIS 902 (2008).

ARTICLE 16A.

Money Transmitters Act.

§ 53-208.1. Citation of Article.

CASE NOTES

Federal Preemption. — Bankruptcy court held that the disputed issues of fact regarding tracing were immaterial, and that summary judgment was appropriate because the North Carolina Money Transmitters Act (NCMTA), G.S. 53-208.1 et seq., eliminated the need for a tracing analysis by creating a floating trust; however, the North Carolina legislature could not alter a federal tracing requirement. Even if the NCMTA established a floating trust as the bankruptcy court held, the floating nature of the trust conflicted with federal law and was preempted. Callaway v. Memo Money Order Co., 381 B.R. 650, 2008 U.S. Dist. LEXIS 8478 (E.D.N.C. 2008).

§ 53-208.20. Authorized delegate conduct.

CASE NOTES

Federal Preemption. — Bankruptcy court held that the disputed issues of fact regarding tracing were immaterial, and that summary judgment was appropriate because the North Carolina Money Transmitters Act (NCMTA), G.S. 53-208.1 et seq., eliminated the need for a tracing analysis by creating a floating trust; however, the North Carolina legislature could not alter a federal tracing requirement. Even if the NCMTA established a floating trust as the bankruptcy court held, the floating nature of the trust conflicted with federal law and was preempted. Callaway v. Memo Money Order Co., 381 B.R. 650, 2008 U.S. Dist. LEXIS 8478 (E.D.N.C. 2008).

Article 19A.

Mortgage Lending Act.

§ 53-243.01. (Effective January 1, 2009) Definitions.

The following definitions apply in this Article:

(1) Act as a mortgage broker. — To act, for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly, by accepting or offering to accept an application for a mortgage loan, soliciting or offering to solicit a mortgage loan, negotiating the terms or conditions of a mortgage loan, issuing mortgage loan commitments or interest rate guarantee agreements to borrowers, or engaging in tablefunding of mortgage loans, whether such acts are done through contact by telephone, by electronic means, by mail, or in person with the borrowers or potential borrowers.

(2) Act as a mortgage lender. — To engage in the business of making mortgage loans for compensation or gain.

(3) Act as a mortgage servicer. — To engage, whether for compensation or gain from another or on its own behalf, in the business of receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage loan, the mortgage servicing loan documents, or servicing contract.

(4) Affiliate. — Any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. § 1841), et seq., as amended from time to time. For purposes of this subdivision, the term control means ownership of all of the voting stock or comparable voting interest of the controlled person.

(5) Affiliated mortgage banker. — A licensed mortgage banker that meets the criteria of either sub-subdivisions a., b., and c. of this subdivision or sub-subdivisions d. and e. of this subdivision:

a. The licensee, by itself or with its affiliates, is licensed in five or more states to engage in the mortgage lending business and (i) is supervised by a state or federal regulatory agency whose regulatory scheme has been determined by the Commissioner to be substantially similar to that of North Carolina, (ii) is organized and supervised under the laws of a state that has adopted a model licensing law endorsed by the Commissioner; or (iii) is supervised by a state or federal agency that is a party to an interstate compact, or has otherwise entered into a cooperative reciprocal agreement by which the state or federal regulatory agency and the State of North Carolina, directly or by duly authorized act of the Commissioner, have mutually agreed to recognize state licensing laws which have specific enumerated criteria.

b. The licensee, including its affiliates and wholly owned subsidiaries, has more than 100 employees that are licensed pursuant to this Article.

c. The licensee has a consolidated net worth of one hundred million dollars ($100,000,000) or more, or if the licensee does not have the required net worth, its parent shall provide to the Commissioner (i) evidence satisfactory to the Commissioner that the parent has a net worth of one hundred million dollars ($100,000,000) or

G.S. 53-243.01 is set out twice. See notes.

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more, and (ii) an unconditional guarantee or comparable instrument of surety satisfactory to the Commissioner of the performance of the licensee of its obligations under this Article.

   d. The licensee is a direct or indirect wholly owned subsidiary of a bank holding company or financial services holding company subject to regulation by the Federal Reserve Board or the Office of Thrift Supervision.

   e. The licensee has a net worth of one hundred million dollars ($100,000,000) or, if the licensee does not have the required net worth, (i) its parent, if it is not a bank holding company or financial holding company, meets the requirements of sub-subdivision c. of this subdivision or (ii) its parent, if such parent is a bank holding company or financial holding company, has total assets in excess of ten billion dollars ($10,000,000,000) and provides the Commissioner with the unconditional guarantee or comparable instrument of surety required by sub-subdivision c. of this subdivision.

(6) Branch manager. — The individual whose principal office is physically located in, who is in charge of, and who is responsible for the business operations of a branch office of a mortgage broker or mortgage banker.

(7) Branch office. — An office of the licensee acting as a mortgage broker or mortgage banker that is separate and distinct from the licensee's principal office. A branch office shall not be located at an individual's home or residence.

(8) Commissioner. — The North Carolina Commissioner of Banks and the Commissioner's designees. For purposes of compliance with this Article by credit unions, Commissioner means the Administrator of the Credit Union Division of the Department of Commerce.

(9) Control. — The power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. Any person that (i) is a director, general partner, or executive officer; (ii) directly or indirectly has the right to vote ten percent (10%) or more of a class of a voting security or has the power to sell or direct the sale of ten percent (10%) or more of a class of voting securities; (iii) in the case of a Limited Liability Company, is a managing member; or (iv) in the case of a partnership, has the right to receive upon dissolution, or has contributed, ten percent (10%) or more of the capital, is presumed to control the company.

(10) Employee. — An individual, who has an employment relationship, acknowledged by both the individual and the mortgage broker or mortgage banker or mortgage servicer and is treated as a common law employee for purposes of compliance with the federal income tax laws and whose income is reported on IRS Form W-2.

(11) Exclusive mortgage broker. — An individual who acts as a mortgage broker exclusively for a single mortgage banker or single exempt person and who is licensed under the provisions of G.S. 53-243.05(c)(1a).

(12) Exempt person. — The term includes any of the following:

   a. Any agency of the federal government or any state or municipal government granting or servicing mortgage loans under specific authority of the laws of any state or the United States.

   b. Any employee of a licensee whose responsibilities are limited to clerical and administrative tasks for his or her employer and who does not solicit borrowers, accept applications, or negotiate the terms of loans on behalf of the employer.

G.S. 53-243.01 is set out twice. See notes.

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c. Any person authorized to engage in business as a bank or a wholly owned subsidiary of a bank, a farm credit system, savings institution, or a wholly owned subsidiary of a savings institution, or credit union or a wholly owned subsidiary of a credit union, under the laws of the United States, this State, or any other state. Except for G.S. 53-243.11 and G.S. 53-243.15, this Article does not apply to the exempt persons set forth in this sub-subdivision.
d. Any licensed real estate agent or broker who is performing those activities subject to the regulation of the North Carolina Real Estate Commission. Notwithstanding the above, an exempt person does not include a real estate agent or broker who receives compensation of any kind in connection with the referral, placement, or origination of a mortgage loan.
e. Any officer or employee of an exempt person described in sub-subdivision c. of this subdivision when acting in the scope of employment for the exempt person.
f. Any person who, acting as seller and lender and servicer in a residential real estate transaction, receives and services in one calendar year no more than five purchase money notes secured by mortgages, deeds of trust, or other security instruments on the real estate sold as security for the purchase money obligation.
g. The North Carolina Housing Finance Agency as established by Article 122A of the General Statutes and the North Carolina Agricultural Finance Authority as established by Article 122D of the General Statutes.
h. Any nonprofit corporation qualifying under section 501(c)(3) of the Internal Revenue Code which makes or services mortgage loans to promote home ownership or home improvements for the disadvantaged, provided that such corporation is not primarily in the business of soliciting or brokering or servicing mortgage loans.
i. Any life insurance companies licensed to do business in North Carolina with regard to provisions concerning mortgage lenders.
j. A North Carolina licensed attorney who, in the practice of law or in performing as a trustee, accepts payments related to a loan closing, default, foreclosure, loss mitigation, or litigation or settlement of a dispute or legal claim related to a loan.
k. A mortgage banker licensed under this Article and any employee of a mortgage banker licensed under this Article are exempt from the requirement to obtain a separate license as a mortgage servicer, provided, however, that all provisions of this Article applicable to mortgage servicers are applicable to any mortgage banker or any employee of a mortgage banker acting as a mortgage servicer, except as provided in G.S. 53-243.15(c).

(13) Licensee. — A loan officer, limited loan officer, mortgage broker, mortgage banker, or mortgage servicer who is licensed pursuant to this Article.

(14) Loan officer. — An individual who, in exchange for compensation as an employee of another person, accepts or offers to accept applications for mortgage loans, or who solicits or offers to solicit a mortgage loan, negotiates the terms or conditions of a mortgage loan, issues mortgage loan commitments or interest rate guarantee agreements to borrowers, whether such acts are done through contact by telephone, by electronic means, by mail, or in person with the borrowers or potential

G.S. 53-243.01 is set out twice. See notes.

borrowers. The definition of loan officer shall not include any exempt person described in sub-subdivision (12)b. of this section.

(15) Limited loan officer. — An individual who, in exchange for compensation as an employee of an affiliated mortgage banker, directly solicits, negotiates, offers, or makes commitments for mortgage loans. The definition of limited loan officer shall not include any exempt person described in sub-subdivision (12)b. of this section.

(16) Make a mortgage loan. — To close a mortgage loan, to advance funds, to offer to advance funds, or to make a commitment to advance funds to a borrower under a mortgage loan.

(17) Mortgage banker. — A person who acts as a mortgage lender as that term is defined in subdivision (2) of this section. However, the definition does not include a person who acts as a mortgage lender only in tablefunding transactions.

(18) Mortgage broker. — A person who acts as a mortgage broker as that term is defined in subdivision (1) of this section. The term "mortgage broker" includes an exclusive mortgage broker, except when expressly provided otherwise.

(19) Mortgage loan. — A loan made to a natural person or persons primarily for personal, family, or household use, primarily secured by either a mortgage or a deed of trust on residential real property located in North Carolina.

(20) Mortgage servicer. — A person who directly or indirectly acts as a mortgage servicer as that term is defined in subdivision (3) of this section or who otherwise meets the definition of 'servicer' in RESPA, 12 U.S.C. § 2605(i), with respect to mortgage loans.

(21) Parent. — The person that controls an affiliated mortgage banker, mortgage broker, or mortgage servicer, as control is defined in subdivision (4) of this section.

(22) Person. — An individual, partnership, limited liability company, limited partnership, corporation, association, or other group engaged in joint business activities, however organized.

(23) Qualified lender. — A person who is engaged as a mortgage lender in North Carolina and is either a supervised or a nonsupervised institution, as these terms are defined in 24 C.F.R. § 202.2, approved by the United States Department of Housing and Urban Development.

(24) Qualified person. — A person who is employed as a loan officer by a qualified lender, or by a mortgage banker or broker registered with the Commissioner under former Article 19 of this Chapter, or who is a general partner, manager, or officer of a qualified lender, registered mortgage banker, or registered mortgage broker.

(25) Qualified servicer. — A person who is engaged in the business of acting as a mortgage servicer in North Carolina and who has been approved by the United States Department of Housing and Urban Development to service FHA loans or has been approved as a servicer by either the Federal National Mortgage Association or by the Federal Home Loan Mortgage Corporation.

(26) Qualifying individual. — A person who meets the requirements of G.S. 53-243.05(c) and who agrees to be primarily responsible for the operations of a licensed mortgage broker or mortgage banker or mortgage servicer.

(27) Residential real property. — Real property located in the State of North Carolina upon which there is located or is to be located one or more single-family dwellings or dwelling units.

G.S. 53-243.01 is set out twice. See notes.

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(28) RESPA. — The Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, et seq., as it may be hereafter amended.

(29) Tablefunding. — A transaction where a licensee closes a loan in its own name with funds provided by others, and the loan is assigned simultaneously to the mortgage lender providing the funding within one business day of the funding of the loan. (2001-393, s. 2; 2002-169, ss. 1, 2; 2005-316, s. 1; 2008-228, s. 1.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-228, s. 1, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, rewrote the section.

§ 53-243.02. (Effective January 1, 2009) License required; licensee records.

(a) Other than an exempt person, it is unlawful for any person in this State to act as a mortgage broker, mortgage banker, or mortgage servicer, or directly or indirectly to engage in the business of a mortgage broker, mortgage banker, or mortgage servicer, without first obtaining a license from the Commissioner under the provisions of this Article. This Article shall apply to any person who seeks to avoid its application by any direct or indirect device, subterfuge, artifice, or pretense whatsoever.

(b) It is unlawful for any natural person to engage in the solicitation and acceptance of applications for mortgage loans without first obtaining a license as a loan officer, limited loan officer, mortgage banker, or mortgage broker issued by the Commissioner under the provisions of this Article. It is unlawful for any person to employ, to compensate, or to appoint as its agent a loan officer unless the loan officer is licensed as a loan officer under this Article. Exempt persons shall not be subject to this subsection.

(c) The license of a loan officer or limited loan officer is not effective during any period when that person is not employed by a mortgage broker, affiliated mortgage banker, or mortgage banker licensed under this Article. The license of an exclusive mortgage broker is not effective during any period when that person is not authorized to act as a single licensee or exempt person pursuant to G.S. 53-243.05(c)(1a).

When a loan officer or a limited loan officer ceases to be employed by a mortgage broker, affiliated mortgage banker, or mortgage banker licensed under this Article, the loan officer, limited loan officer, and the mortgage broker, affiliated mortgage banker, or mortgage banker licensed under this Article by whom that person is employed shall promptly notify the Commissioner in writing. When the authority of an exclusive mortgage broker to act on behalf of the principal licensee or exempt person identified in G.S. 53-243.05(c)(1a) has been terminated, the exclusive mortgage broker and the licensee or exempt person for whom the exclusive mortgage broker is an agent shall promptly notify the Commissioner in writing. The mortgage broker, affiliated mortgage banker, mortgage banker, or exempt person's notice shall include a statement of the specific reason or reasons for, as applicable, the termination of the loan officer's or limited loan officer's employment or exclusive mortgage broker's authority.

A loan officer or limited loan officer shall not be employed simultaneously by more than one affiliated mortgage banker, mortgage broker, or mortgage banker licensed under this Article.

G.S. 53-243.02 is set out twice. See notes.

(d) Each affiliated mortgage banker, mortgage broker, and mortgage banker licensed under this Article shall maintain on file with the Commissioner a list of all loan officers or limited loan officers who are employed with the affiliated mortgage banker, mortgage broker, or mortgage banker.

(e) No person, other than an exempt person, shall hold himself or herself out as a mortgage banker, an affiliated mortgage banker, a mortgage broker, a mortgage servicer, a limited loan officer, or a loan officer unless such person is licensed in accordance with this Article.

(f) Any person who has completed and filed with the Commissioner the application and all documents required for licensure as a loan officer other than documents relating to the required examination and the mortgage lending fundamentals course may act as a loan officer during the period before action is taken on the application by the Commissioner, if:

(1) The Commissioner has not denied, revoked, or taken any adverse action with respect to an application filed by or license held by such person during the five-year period ending on the date of filing of the application;

(2) The loan officer is employed by a licensed mortgage broker or mortgage banker, and the qualifying individual of such mortgage broker or mortgage banker (i) certifies to the Commissioner in writing that the qualifying individual reasonably believes that the application of the person for licensure as a loan officer meets or exceeds all of the relevant requirements of this Article for licensure and (ii) undertakes in writing that the qualifying individual and the employer will be responsible for the acts of the applicant during the period that such application is pending; and

(3) The person is currently or has within the six-month period prior to the date of the application been employed as and acting as a loan officer for an exempt entity which entity is exempt by virtue of an exemption claimed under G.S. 53-243.01(12)c.

(g) The Commissioner may deny or suspend the rights of a mortgage broker or mortgage banker to employ a loan officer acting under subsection (f) of this section if the Commissioner finds that the mortgage broker or mortgage banker, or the qualifying individual thereof, makes the certification or undertaking set forth in subdivision (2) of subsection (f) of this section not in good faith. (2001-393, s. 2; 2004-171, s. 7; 2005-316, s. 2; 2008-228, s. 2.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-228, s. 2, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, rewrote subsection (a); inserted "a mortgage servicer" in subsection (e); substituted "qualifying individual" for "managing principal" three times in subdivision (f)(2); substituted "53-243.01(12)c" for "53-243.01(8)c" in subdivision (f)(3); substituted "qualifying individual" for "managing principal" in subsection (g); and made minor stylistic changes.

§ 53-243.05. (Effective January 1, 2009) Qualifications for licensure; issuance.

(a) Any person, other than an exempt person, desiring to obtain a license pursuant to this Article shall make written application for licensure to the Commissioner on forms prescribed by the Commissioner. In accordance with rules adopted by the Commission, the application shall contain any information the Commissioner deems necessary regarding the following:

G.S. 53-243.05 is set out twice. See notes.

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(1) The applicant's name and address (including street address, mailing address, e-mail, and telephone contact information) and social security number or taxpayer identification number.

(2) The applicant's form and place of organization, if applicable.

(3) The applicant's proposed method of and locations for doing business, if applicable.

(4) The qualifications and business history of the applicant and, if applicable, the business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the applicant, including: (i) a description of any injunction or administrative order by any state or federal authority to which the person is or has been subject; (ii) a conviction, within the past 10 years, of a misdemeanor involving moral turpitude or any fraud, false statement or omission, any theft or wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or conspiracy to commit any of these offenses; or involving any financial service or financial service-related business; (iii) any felony convictions.

(5) With respect to an application for licensing as a mortgage banker, mortgage broker, or mortgage servicer, the applicant's financial condition, credit history, and business history; and with respect to the application for licensing as a loan officer, the applicant's credit history and business history.

(6) The applicant's consent to a federal and State criminal history record check and a set of the applicant's fingerprints in a form acceptable to the Commissioner. In the case of an applicant that is a corporation, partnership, limited liability company, association, or trust, each individual who has control of the applicant or who is the qualifying individual or a branch manager shall consent to a federal and State criminal history record check and submit a set of that individual's fingerprints pursuant to this subdivision. Refusal to consent to a criminal history record check constitutes grounds for the Commissioner to deny licensure to the applicant as well as to any entity (i) by whom or by which the applicant is employed, (ii) over which the applicant has control, or (iii) as to which the applicant is the current or proposed qualifying individual or a current or proposed branch manager.

(b) In addition to the requirements imposed by the Commissioner under subsection (a) of this section, each individual applicant for licensure as a loan officer shall:

(1) Be at least 18 years of age.

(2) Have satisfactorily completed, within the three years immediately preceding the date application is made, a mortgage lending fundamentals course approved by the Commissioner. The course shall consist of at least eight hours of classroom instruction in subjects related to mortgage lending approved by the Commissioner. In addition, the applicant shall have satisfactorily completed a written examination approved by the Commissioner or possess residential mortgage lending education or experience in residential mortgage lending transactions that the Commissioner deems equivalent to the course.

(c) In addition to the requirements under subsection (a) of this section, each applicant for licensure as a mortgage broker or mortgage banker or mortgage servicer at the time of application and at all times thereafter shall comply with the following requirements:

G.S. 53-243.05 is set out twice. See notes.

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(1) Except as provided for in subdivision (1a) of this subsection, if the applicant is a sole proprietor, the applicant shall have at least three years of experience in residential mortgage lending or other experience or competency requirements as the Commissioner may impose. Experience as an exclusive mortgage broker or as a limited loan officer shall not constitute mortgage-lending experience under this subdivision.

(1a) If an individual applicant to be licensed as a mortgage broker meets all other requirements for licensure under this section but does not meet the requirements of subdivision (1) of this subsection, the individual applicant may be licensed as an exclusive mortgage broker upon compliance with all of the following:

a. Successfully complete both a residential mortgage-lending course approved by the Commissioner of not less than 40 hours of classroom instruction, and a written examination approved by the Commissioner.

b. Act exclusively as a mortgage broker for a single mortgage banker licensee or single exempt mortgage banker for whom the broker shall be deemed an agent, who shall be responsible for supervising the broker as required by this Article, who shall sign the license application of the applicant, and who shall be jointly and severally liable with the broker for any claims arising out of the broker's mortgage lending activities.

c. Shall be compensated for the broker's mortgage brokering activities on a basis that is not dependent upon the loan amount, interest rate, fees, or other terms of the loans brokered.

d. Shall not handle borrower or other third-party funds in connection with the brokering or closing of mortgage loans.

(2) If the applicant is a general or limited partnership, at least one of its general partners shall have the experience as described under subdivision (1) of this subsection.

(3) If the applicant is a corporation, at least one of its principal officers shall have the experience as described under subdivision (1) of this subsection.

(4) If the applicant is a limited liability company, at least one of its managers shall have the experience as described under subdivision (1) of this subsection.

(d) Each applicant shall identify one person meeting the requirements of subsection (c) of this section to serve as the applicant's qualifying individual.

(e) Every applicant for initial licensure shall pay a filing fee not to exceed one thousand two hundred fifty dollars ($1,250) for licensure as a mortgage broker, mortgage banker, or mortgage servicer or sixty-seven dollars and fifty cents ($67.50) for licensure as a loan officer or limited loan officer, in addition to the actual cost of obtaining credit reports and State and national criminal history record checks.

(f) A mortgage banker or mortgage servicer shall post a surety bond in the amount of one hundred fifty thousand dollars ($150,000), and a mortgage broker shall post a surety bond in the amount of fifty thousand dollars ($50,000). The surety bond shall be in a form satisfactory to the Commissioner and shall run to the State for the benefit of any claimants against the licensee to secure the faithful performance of the obligations of the licensee under this Article. The aggregate liability of the surety shall not exceed the principal sum of the bond. A party having a claim against the licensee may bring suit directly on the surety bond, or the Commissioner may bring suit on behalf of any claimants, either in one action or in successive actions. Consumer claims shall be given priority in recovering from the bond. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond that is required. An audited financial statement from a qualified lender or qualified servicer showing a net worth of two hundred fifty thousand dollars ($250,000) or more shall be accepted in lieu of any bond required.

(g) Any general partner, manager of a limited liability company, or officer of a corporation who individually meets the requirements under subsection (b) of this section shall, upon payment of the applicable fee, meet the qualifications for licensure as a loan officer subject to the provisions of subsection (i) of this section.

(h) Each principal office and each branch office of a mortgage broker or mortgage banker licensed under the provisions of this Article shall be issued a separate license. A licensed mortgage broker or mortgage banker shall file with the Commissioner an application on a form prescribed by the Commissioner that identifies the address of the principal office and each branch office and branch manager. A filing fee not to exceed one hundred twenty-five dollars ($125.00) shall be assessed by the Commissioner for each branch office issued a license.

(i) If the Commissioner determines that an applicant meets the qualifications for licensure and finds that the financial responsibility, character, and general fitness of the applicant are such as to command the confidence of the community and to warrant belief that the business will be operated honestly and fairly, the Commissioner shall issue a license to the applicant. In addition, for an applicant qualifying as an exclusive mortgage broker, the Commissioner shall determine if the mortgage broker/mortgage banker relationship is in the public interest. (2001-393, s. 2; 2002-169, ss. 3-6; 2004-171, s. 8; 2005-316, ss. 3, 4; 2006-239, s. 1; 2008-228, s. 3.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-228, s. 3, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, in subsection (a), rewrote subdivision (1) and clause (ii) of subdivision (4), substituted "banker, mortgage broker, or mortgage servicer" for "banker or broker" in subdivision (5), and substituted "qualifying individual" for "managing principal" twice in subdivision (6); inserted "or mortgage servicer" in the introductory language of subsection (c); substituted "qualifying individual" for "managing principal" in subsection (d); substituted "mortgage broker, mortgage banker, or mortgage servicer" for "mortgage broker or mortgage banker" in subsection (e); and, in (f), inserted "or mortgage servicer" near the beginning of the first sentence, and inserted "or qualified servicer" near the middle of the last sentence.

§ 53-243.06. (Effective January 1, 2009) License renewal; termination.

(a) All licenses issued by the Commissioner under the provisions of this Article shall expire annually on the 31st day of December following issuance or on any other date that the Commissioner may determine. The license shall become invalid after that date unless renewed. A license may be renewed on or after November 1 by compliance with subsection (b1) of this section and by paying to the Commissioner, in addition to the actual cost of obtaining credit reports and State and national criminal history record checks and of processing fees of the nationwide system as the Commissioner may require, a renewal fee as follows:

G.S. 53-243.06 is set out twice. See notes.

(1) Licensed mortgage bankers and licensed mortgage servicers shall pay an annual fee not to exceed six hundred twenty-five dollars ($625.00) and one hundred twenty-five dollars ($125.00) for each branch office.

(2) Licensed mortgage brokers shall pay an annual fee not to exceed six hundred twenty-five dollars ($625.00) and one hundred twenty-five dollars ($125.00) for each branch office. Licensed exclusive mortgage brokers shall pay an annual fee not to exceed six hundred twenty-five dollars ($625.00).

(3) Licensed loan officers shall pay an annual fee not to exceed sixty-seven dollars and fifty cents ($67.50).

(b) If a mortgage banker, mortgage servicer, or mortgage broker license is not renewed prior to the applicable expiration date, then two hundred fifty dollars ($250.00) in addition to the renewal fee under subsection (a) of this section shall be assessed as a late fee to any renewal. If a loan officer or limited loan officer license is not renewed prior to the applicable expiration date, then one hundred dollars ($100.00) in addition to the renewal fee under subsection (a) of this section shall be assessed as a late fee to any renewal. In the event a licensee fails to obtain a reinstatement of the license prior to March 1, the Commissioner may require the licensee to comply with the requirements for the initial issuance of a license under the provisions of this Article.

(b1) When required by the Commissioner, each individual described in G.S. 53-245.05(a)(6) shall furnish to the Commissioner his or her consent to a criminal history record check and a set of his or her fingerprints in a form acceptable to the Commissioner. Refusal to consent to a criminal history record check may constitute grounds for the Commissioner to deny renewal of the license of the person as well as the license of any other person by which he or she is employed, over which he or she has control, or as to which he or she is the current or proposed qualifying individual or a current or proposed branch manager.

(c) Licenses issued under this Article are not assignable. Control of a licensee shall not be acquired through a stock purchase or other device without the prior written consent of the Commissioner. The Commissioner shall not give written consent if the Commissioner finds that any of the grounds for denial, revocation, or suspension of a license pursuant to G.S. 53-243.12 are applicable to the acquiring person. (2001-393, s. 2; 2002-169, s. 7; 2004-171, s. 9; 2006-239, s. 2; 2008-228, s. 4.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-228, s. 4, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, in subsection (a), substituted "31st day of December" for "30th day of June," substituted "on or after November 1" for "45 days prior to the expiration date," and inserted "and of processing fees of the nationwide system"; inserted "and licensed mortgage servicers" in subdivision (a)(1); in subsection (b), inserted "mortgage servicer" and deleted "an additional" before "two hundred fifty" in the first sentence, substituted "one hundred dollars ($100.00)" for "an additional fiftfy dollars ($50.00)" in the second sentence and "prior to March 1" for "within 90 days after the date the license expires" in the last sentence; andsubstituted "qualifying individual" for "managing principal" in subsection (b1).

§ 53-243.08. (Effective January 1, 2009) Qualifying individuals and branch managers.

Each mortgage broker or mortgage banker or mortgage servicer licensed under this Article shall have a qualifying individual who operates the business under that person's full charge, control, and supervision. Mortgage bankers and mortgage brokers, other than exclusive mortgage brokers, may operate branch offices subject to the requirements of this Article. Each principal and branch office of a mortgage broker or mortgage banker licensed under this Article, shall have a branch manager who meets the experience requirements under G.S. 53-243.05(c)(1); provided, that an affiliated mortgage banker may designate a branch manager who does not meet the experience requirements so long as at or before the designation, it certifies that the person has been employed by the affiliated mortgage banker for at least one year as a loan officer, limited loan officer, or in a comparable position in another state. The qualifying individual for a licensee's business may also serve as the branch manager of one of the licensee's branch offices. Each mortgage broker or mortgage banker licensed under this Article shall file a form as prescribed by the Commissioner indicating the business's designation of qualifying individual and branch manager for each branch and each individual's acceptance of the responsibility. Each mortgage broker or mortgage banker licensed under this Article shall notify the Commissioner of any change in its qualifying individual or branch manager designated for each branch. Each mortgage servicer licensed under this Article shall file a form prescribed by the Commissioner indicating the business's designation of its qualifying individual and shall notify the Commissioner of any change in its qualifying individual. Any licensee who does not comply with this provision shall have the licensee's license suspended pursuant to G.S. 53-243.12 until the licensee complies with this section. Any individual licensee who operates as a sole proprietorship shall be considered a qualifying individual for the purposes of this Article. (2001-393, s. 2; 2002-169, s. 9; 2005-316, s. 6; 2008-228, s. 5.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-228, s. 5, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, substituted "Qualifying individuals" for "Managing principals" in the section heading; substituted "qualifying individual" for "managing principal" throughout the section, inserted "or mortgage servicer" near the beginning, and added the seventh sentence.

§ 53-243.09. (Effective January 1, 2009) Offices; address changes; display of license.

(a) Each mortgage broker licensee shall maintain and transact business from a principal place of business in this State. A principal place of business in this State shall consist of at least one enclosed room or building of stationary construction in which negotiations of mortgage loan transactions of others may be conducted and carried on in privacy and in which all of the books, records, and files pertaining to mortgage loan transactions relating to borrowers in this State are maintained. However, the Commissioner may, by rule, impose terms and conditions under which the records and files may be maintained outside of this State. A principal place of business shall not be located at an individual's home or residence.

(b) A mortgage banker or mortgage broker or mortgage servicer licensee shall report any change of address of the principal place of business or any branch office within 15 days after the change.

(c) Each mortgage broker or mortgage banker licensed under this Article shall display in plain public view the certificate of licensure issued by the Commissioner in its principal office and in each branch office. Each loan officer licensed under this Article shall display, in plain public view, in each branch office in which the officer acts as a loan officer the certificate of licensure issued by the Commissioner. (2001-393, s. 2; 2008-228, s. 6.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-228, s. 6, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, added the last sentence in subsection (a); inserted "or mortgage servicer" in subsection (b); and in subsection (c), inserted "public" in the first sentence and inserted "in plain public view" in the last sentence."

§ 53-243.10. (Effective January 1, 2009) Mortgage broker duties; mortgage servicer duties.

(a) A mortgage broker, including any mortgage broker licensee and any person acting as a mortgage broker under this Article, in addition to duties imposed by other statutes or at common law, shall do all of the following:

(1) Safeguard and account for any money handled for the borrower.
(2) Follow reasonable and lawful instructions from the borrower.
(3) Act with reasonable skill, care, and diligence.
(4) Make reasonable efforts to secure a loan that is reasonably advantageous to the borrower considering all the circumstances, including the rates, charges, and repayment terms of the loan.
(5) Timely and clearly disclose to the borrower material information as specified by the Commission that may be expected to influence the borrower's decision and is reasonably accessible to the mortgage broker, including the total compensation the mortgage broker expects to receive from any and all sources in connection with each loan option presented to the borrower.
(6) Notify before closing each lender of the particulars of each of the other lender's loans if the mortgage broker knows that more than one mortgage loan will be made by different lenders contemporaneously to a borrower secured by the same real property.
(7) Ensure that any services offered to any applicant shall be available and offered to all similarly situated applicants on an equal basis.
(8) In transactions where the broker has the ability to make credit decisions, use reasonable means to provide the borrower with prompt credit decisions on its loan applications and, where the credit is denied, to comply fully with the notification requirements of applicable state and federal law.
(9) Ensure that advertising materials are designed to make customers and potential customers aware that the mortgage broker does not discriminate on any prohibited basis.

(b) A mortgage servicer licensed or acting under this Article, in addition to duties imposed by other statutes or at common law, shall do all of the following:

(1) Safeguard and account for any money handled for the borrower.
(2) Follow reasonable and lawful instructions from the borrower.
(3) Act with reasonable skill, care, and diligence.
(4) With its application and renewal and with its supplemental filings made from time to time, file with the Commissioner a complete, current schedule of the ranges of costs and fees it charges borrowers for its servicing-related activities.

G.S. 53-243.10 is set out twice. See notes.

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(5) File with the Commissioner upon request a report in a form and format acceptable to the Commissioner detailing the servicer's activities in this State, including:
  a. The number of mortgage loans the servicer is servicing.
  b. The type and characteristics of such loans in this State.
  c. The number of serviced loans in default, along with a breakdown of 30-, 60-, and 90-day delinquencies.
  d. Information on loss mitigation activities, including details on workout arrangements undertaken.
  e. Information on foreclosures commenced in this State.

(6) At the time a servicer accepts assignment of servicing rights for a mortgage loan, the servicer shall disclose to the borrower all of the following:
  a. Any notice required by RESPA or by regulations promulgated thereunder.
  b. A schedule of the ranges and categories of its costs and fees for its servicing-related activities, which shall comply with North Carolina law and which shall not exceed those reported to the Commissioner.
  c. A notice in a form and content acceptable to the Commissioner that the servicer is licensed by the Commissioner and that complaints about the servicer may be submitted to the Commissioner.
  d. Any notice required by Article 2A, Article 4, or Article 10 of Chapter 45 of the General Statutes.

(7) In the event of a delinquency or other act of default on the part of the borrower, the servicer shall act in good faith to inform the borrower of the facts concerning the loan and the nature and extent of the delinquency or default, and, if the borrower replies, to negotiate with the borrower, subject to the servicer's duties and obligations under the mortgage servicing contract, if any, to attempt a resolution or workout to the delinquency. (2001-393, s. 2; 2007-352, s. 7; 2007-484, ss. 43.8G(a), (b); 2008-228, s. 7.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-228, s. 7, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, inserted "mortgage servicer duties" in the section heading; designated the previously existing provisions as subsection (a), and in the introductory language in subsection (a), substituted "acting" for "required to be licensed" and deleted "shall" following "this Article"; made minor grammatical changes in subdivision (a)(9); and added subsection (b).

§ 53-243.11. (Effective until January 1, 2009) Prohibited activities.

In addition to the activities prohibited under other provisions of this Article, it shall be unlawful for any person in the course of any mortgage loan transaction:

(1) To misrepresent or conceal the material facts or make false promises likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan, or to pursue a course of misrepresentation through agents or otherwise.

(2) To refuse improperly to issue a satisfaction of a mortgage.

(3) To fail to account for or to deliver to any person any funds, documents, or other thing of value obtained in connection with a mortgage loan,

G.S. 53-243.11 is set out twice. See notes.

including money provided by a borrower for a real estate appraisal or a credit report, which the mortgage banker, broker, or loan officer is not entitled to retain under the circumstances.

(4) To pay, receive, or collect in whole or in part any commission, fee, or other compensation for brokering a mortgage loan in violation of this Article, including a mortgage loan brokered by any unlicensed person other than an exempt person.

(5) To charge or collect any fee or rate of interest or to make or broker any mortgage loan with terms or conditions or in a manner contrary to the provisions of Chapter 24 of the General Statutes.

(6) To advertise mortgage loans, including rates, margins, discounts, points, fees, commissions, or other material information, including material limitations on the loans, unless the person is able to make the mortgage loans available to a reasonable number of qualified applicants.

(7) To fail to disburse funds in accordance with a written commitment or agreement to make a mortgage loan.

(8) To engage in any transaction, practice, or course of business that is not in good faith or fair dealing or that constitutes a fraud upon any person, in connection with the brokering or making of, or purchase or sale of, any mortgage loan.

(9) To fail promptly to pay when due reasonable fees to a licensed appraiser for appraisal services that are:
  a. Requested from the appraiser in writing by the mortgage broker or mortgage banker or an employee of the mortgage broker or mortgage banker; and
  b. Performed by the appraiser in connection with the origination or closing of a mortgage loan for a customer or the mortgage broker or mortgage banker.

(10) To broker a mortgage loan that contains a prepayment penalty if the principal amount of the loan is one hundred fifty thousand dollars ($150,000) or less or if the loan is a rate spread home loan as defined in G.S. 24-1.1F.

(11) To improperly influence or attempt to improperly influence the development, reporting, result, or review of a real estate appraisal sought in connection with a mortgage loan. Nothing in this subdivision shall be construed to prohibit a mortgage broker or mortgage banker from asking the appraiser to do one or more of the following:
  a. Consider additional appropriate property information.
  b. Provide further detail, substantiation, or explanation for the appraiser's value conclusion.
  c. Correct errors in the appraisal report.

(12) To fail to comply with the mortgage loan servicing transfer, escrow account administration, or borrower inquiry response requirements imposed by sections 6 and 10 of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2605 and § 2609, and regulations adopted thereunder by the Secretary of the Department of Housing and Urban Development.

(13) To broker a rate spread adjustable rate mortgage loan without disclosing to the borrower the terms and costs associated with a fixed rate loan from the same lender at the lowest annual percentage rate for which the borrower qualifies.

(14) To fail to comply with applicable federal laws and regulations related to mortgage lending.

G.S. 53-243.11 is set out twice. See notes.

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(15) To engage in unfair, misleading, or deceptive advertising related to a solicitation for a mortgage loan.

(16A) In connection with the brokering or making of a rate-spread home loan as defined under G.S. 24-1.1F, no lender shall provide nor shall any broker receive any compensation that changes based on the terms of the loan. This subdivision shall not prohibit compensation based on the principal balance of the loan. (2001-393, s. 2; 2001-399, s. 3; 2004-171, s. 10; 2007-352, s. 8; 2008-187, s. 49.6; 2008-227, s. 3.)

Section Set Out Twice. — The section above is effective until January 1, 2009. For the section as amended January 1, 2009, see the following section, also numbered G.S. 53-243.11.

Editor's Note. —

Session Laws 2008-187, s. 49.6, recodified G.S. 53-243.11(16) as enacted by Session Laws 2008-227, s. 3, as G.S. 53-243.11(16A).

Effect of Amendments. —

Session Laws 2008-227, s. 3, effective October 1, 2008, added subdivision (16).

§ 53-243.11. (Effective January 1, 2009) Prohibited activities.

In addition to the activities prohibited under other provisions of this Article, it shall be unlawful for any person in the course of any mortgage loan transaction:

(1) To misrepresent or conceal the material facts or make false promises likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan, or to pursue a course of misrepresentation through agents or otherwise.

(2) To refuse improperly to issue a satisfaction of a mortgage.

(3) To fail to account for or to deliver to any person any funds, documents, or other thing of value obtained in connection with a mortgage loan, including money provided by a borrower for a real estate appraisal or a credit report, which the mortgage banker, servicer, broker, or loan officer is not entitled to retain under the circumstances.

(4) To pay, receive, or collect in whole or in part any commission, fee, or other compensation for brokering a mortgage loan in violation of this Article, including a mortgage loan brokered by any unlicensed person other than an exempt person.

(5) To charge or collect any fee or rate of interest or to make or broker or service any mortgage loan with terms or conditions or in a manner contrary to the provisions of Chapter 24, Chapter 45, or Chapter 54 of the General Statutes.

(6) To advertise mortgage loans, including rates, margins, discounts, points, fees, commissions, or other material information, including material limitations on the loans, unless the person is able to make the mortgage loans available to a reasonable number of qualified applicants.

(7) To fail to disburse funds in accordance with a written commitment or agreement to make a mortgage loan.

(8) To engage in any transaction, practice, or course of business that is not in good faith or fair dealing or that constitutes a fraud upon any person, in connection with the brokering or making or servicing of, or purchase or sale of, any mortgage loan.

(9) To fail promptly to pay when due reasonable fees to a licensed appraiser for appraisal services that are:

G.S. 53-242.11 is set out twice. See notes.

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a. Requested from the appraiser in writing by the mortgage broker or mortgage banker or an employee of the mortgage broker or mortgage banker; and

b. Performed by the appraiser in connection with the origination or closing of a mortgage loan for a customer or the mortgage broker or mortgage banker.

(10) To broker a mortgage loan that contains a prepayment penalty if the principal amount of the loan is one hundred fifty thousand dollars ($150,000) or less or if the loan is a rate spread home loan as defined in G.S. 24-1.1F.

(11) To improperly influence or attempt to improperly influence the development, reporting, result, or review of a real estate appraisal sought in connection with a mortgage loan. Nothing in this subdivision shall be construed to prohibit a mortgage broker, mortgage banker, or mortgage servicer from asking the appraiser to do one or more of the following:

a. Consider additional appropriate property information.

b. Provide further detail, substantiation, or explanation for the appraiser's value conclusion.

c. Correct errors in the appraisal report.

(12) To fail to comply with the mortgage loan servicing transfer, escrow account administration, or borrower inquiry response requirements imposed by sections 6 and 10 of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2605 and § 2609, and regulations adopted thereunder by the Secretary of the Department of Housing and Urban Development.

(13) To broker a rate spread adjustable rate mortgage loan without disclosing to the borrower the terms and costs associated with a fixed rate loan from the same lender at the lowest annual percentage rate for which the borrower qualifies.

(14) To fail to comply with applicable federal laws and regulations related to mortgage lending, or mortgage servicing.

(15) To engage in unfair, misleading, or deceptive advertising related to a solicitation for a mortgage loan.

(16) For a mortgage servicer to fail to comply with the mortgage servicer's obligations under Article 10 of Chapter 45 of the North Carolina General Statutes.

(16A) In connection with the brokering or making of a rate-spread home loan as defined under G.S. 24-1.1F, no lender shall provide nor shall any broker receive any compensation that changes based on the terms of the loan. This subdivision shall not prohibit compensation based on the principal balance of the loan.

(17) For a person acting as a mortgage servicer to fail to provide written notice to a borrower upon taking action to place hazard, homeowner's, or flood insurance on the mortgaged property or to place such insurance when the person acting as a mortgage servicer knows or has reason to know that such insurance is in effect.

(18) For a person acting as a mortgage servicer to place hazard, homeowner's, or flood insurance on a mortgaged property for an amount that exceeds either the value of the insurable improvements or the last known coverage amount of insurance.

(19) For a person acting as a mortgage servicer to fail to provide to the borrower a refund of unearned premiums paid by a borrower or charged to the borrower for hazard, homeowner's, or flood insurance

placed by a lender if the borrower provides reasonable proof that the borrower has obtained coverage such that the forced placement is no longer necessary and the property is insured. If the borrower provides reasonable proof within 12 months of the placement that no lapse in coverage occurred such that the forced placement was not necessary, the servicer shall refund the entire premium.

(20) For a person acting as a mortgage servicer to refuse to reinstate a delinquent loan upon a tender of payment made timely under the contract which is sufficient in amount, based upon the last written statement received by borrower, to pay all past due amounts, outstanding or overdue charges, and restore the loan to a nondelinquent status, but this reinstatement shall be available to a borrower no more than twice in any 24-month period.

(21) For a person acting as a mortgage servicer to fail to mail, at least 45 days before foreclosure is initiated, a notice addressed to the borrower at the borrower's last known address with the following information:

a. An itemization of all past due amounts causing the loan to be in default.
b. An itemization of any other charges that must be paid in order to bring the loan current.
c. A statement that the borrower may have options available other than foreclosure, and that the borrower may discuss such options with the mortgage lender, the servicer, or a counselor approved by the U.S. Department of Housing and Urban Development.
d. The address, telephone number, and other contact information for the mortgage lender, the servicer, or the agent for either of them who is authorized to attempt to work with the borrower to avoid foreclosure.
e. The name, address, telephone number, and other contact information for one or more HUD-approved counseling agencies operating to assist borrowers in North Carolina to avoid foreclosure.
f. The address, telephone number, and other contact information for the consumer complaint section of the Office of the Commissioner of Banks.

(22) To fail to make all payments from any escrow account held for the borrower for insurance, taxes, and other charges with respect to the property in a timely manner so as to ensure that no late penalties are assessed or other negative consequences result regardless of whether the loan is delinquent unless there are not sufficient funds in the account to cover the payments, and the servicer has a reasonable basis to believe that recovery of the funds will not be possible. (2001-393, s. 2; 2001-399, s. 3; 2004-171, s. 10; 2007-352, s. 8; 2008-187, s. 49.6; 2008-227, s. 3; 2008-228, s. 8.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the preceding section, also numbered G.S. 53-243.11.

Editor's Note. — Session Laws 2008-187, s. 49.6, recodified G.S. 53-243.11(16) as enacted by Session Laws 2008-227, s. 3, as G.S. 53-243.11(16A).

Effect of Amendments. — Session Laws 2008-227, s. 3, effective October 1, 2008, added subdivision (16).

Session Laws 2008-228, s. 8, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, inserted "servicer" in subdivision (3); in subdivision (5), inserted "or service" and inserted "Chapter 45, or Chapter 54"; substituted "broker, mortgage banker, or mortgage servicer" for "broker or mortgage banker" in subdivision (11); added "or mortgage servicing" in subdivision (14); and added subdivisions (16) and (17) through (22).

§ 53-243.12. (Effective January 1, 2009) Disciplinary authority.

(a) The Commissioner may, by order, deny, suspend, revoke, or refuse to issue or renew a license of a licensee or applicant under this Article or may restrict or limit the activities relating to mortgage loans of any licensee or any person who owns an interest in or participates in the business of a licensee, if the Commissioner finds both of the following:

(1) That the order is in the public interest.

(2) That any of the following circumstances apply to the applicant, licensee, or any partner, member, manager, officer, director, loan officer, limited loan officer, qualifying individual, or any person occupying a similar status or performing similar functions or any person directly or indirectly controlling the applicant or licensee. The person:

a. Has filed an application for license that, as of its effective date or as of any date after filing, contained any statement that, in light of the circumstances under which it was made, is false or misleading with respect to any material fact.

b. Has violated or failed to comply with any provision of this Article, rule adopted by the Commissioner, or order of the Commissioner.

c. Has been convicted of any felony, or, within the past 10 years, has been convicted of any misdemeanor involving moral turpitude or financial services or a financial services-related business or any fraud, false statements or omissions, theft or any wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses.

d. Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the mortgage lending business.

e. Is the subject of an order of the Commissioner denying, suspending, or revoking that person's license as a mortgage broker, mortgage banker, or mortgage servicer.

f. Is the subject of an order entered within the past five years by the authority of any state with jurisdiction over that state's mortgage brokerage, mortgage banking, or mortgage-servicing industry denying or revoking that person's license as a mortgage broker, mortgage servicer, or mortgage banker.

g. Does not meet the qualifications or the financial responsibility, character, or general fitness requirements under G.S. 53-243.05 or any bond or capital requirements under this Article.

h. Has been the executive officer or controlling shareholder or owned a controlling interest in any mortgage broker or mortgage banker or mortgage servicer who has been subject to an order or injunction described in sub-subdivision d., e., or f. of this subdivision.

i. Has failed to pay the proper filing or renewal fee under this Article. However, the Commissioner may enter only a denial order under this sub-subdivision, and the Commissioner shall vacate the order when the deficiency has been corrected.

j. Has falsely certified attendance or completion of hours at an approved mortgage lending continuing education course.

G.S. 53-243.12 is set out twice. See notes.

(b) The Commissioner may, by order, summarily postpone or suspend the license of a licensee pending final determination of any proceeding under this section. Upon entering the order, the Commissioner shall promptly notify the applicant or licensee that the order has been entered and the reasons for the order. The Commissioner shall calendar a hearing within 15 days after the Commissioner receives a written request for a hearing. If a licensee does not request a hearing and the Commissioner does not request a hearing, the order will remain in effect until it is modified or vacated by the Commissioner. If a hearing is requested or ordered by the Commissioner, after notice of and opportunity for hearing, the Commissioner may modify or vacate the order or extend it until final determination.

(c) The Commissioner may, by order, impose a civil penalty upon a licensee or any partner, officer, director, or other person occupying a similar status or performing similar functions on behalf of a licensee for any violation of this Article. The civil penalty shall not exceed ten thousand dollars ($10,000) for each violation of this Article by a mortgage broker, mortgage banker, or mortgage servicer. The Commissioner may impose a civil penalty of up to ten thousand dollars ($10,000) for each violation of this Article by a person other than a licensee or exempt person.

(d) In addition to other powers under this Article, upon finding that any action of a person is in violation of this Article, the Commissioner may order the person to cease from the prohibited action. If the person subject to the order fails to appeal the order of the Commissioner in accordance with G.S. 53-243.03, or if the person appeals and the appeal is denied or dismissed, and the person continues to engage in the prohibited action in violation of the Commissioner's order, the person shall be subject to a civil penalty of up to twenty-five thousand dollars ($25,000) for each violation of the Commissioner's order. The penalty provision of this section shall be in addition to and not in lieu of any other provision of law applicable to a licensee for the licensee's failure to comply with an order of the Commissioner.

(e) Unless otherwise provided, all actions and hearings under this Article shall be governed by Chapter 150B of the General Statutes.

(f) When a licensee is accused of any act, omission, or misconduct that would subject the licensee to disciplinary action, the licensee, with the consent and approval of the Commissioner, may surrender the license and all the rights and privileges pertaining to it for a period of time established by the Commissioner. A person who surrenders a license shall not be eligible for or submit any application for licensure under this Article.

(g) If the Commissioner has reasonable grounds to believe that a licensee or other person has violated the provisions of this Article or that facts exist that would be the basis for an order against a licensee or other person, the Commissioner may at any time, either personally or by a person duly designated by the Commissioner, investigate or examine the loans and business of the licensee and examine the books, accounts, records, and files of any licensee or other person relating to the complaint or matter under investigation. The Commissioner may require any licensee or other person to submit a consent to a criminal history record check and a set of that person's fingerprints in a form acceptable to the Commissioner in connection with any examination or investigation. Refusal to submit the requested criminal history record check or a set of fingerprints shall be grounds for disciplinary action. The reasonable cost of this investigation or examination shall be charged against the licensee.

(h) The Commissioner may issue subpoenas to require the attendance of and to examine under oath all persons whose testimony the Commissioner deems relative to the person's business.

G.S. 53-243.12 is set out twice. See notes.

(i) The Commissioner may from time to time, at the expense of the licensee, conduct routine examinations of the books and records of any licensee in order to determine the compliance with this Article and any rules adopted pursuant to the authority of G.S. 53-243.04.

(j) In addition to the rights described under this section, the Commissioner may require a licensee to pay to a borrower or other individual any amounts received by the licensee or its employees in violation of Chapter 24 of the General Statutes, or, if a servicer, in excess of those allowed by law to servicers.

(k) If the Commissioner finds that the qualifying individual, branch manager, or loan officer of a licensee had knowledge of or reasonably should have had knowledge of, or participated in, any activity that results in the entry of an order under this section suspending or withdrawing the license of a licensee, the Commissioner may prohibit the branch manager, qualifying individual, or loan officer from serving as a branch manager, qualifying individual, or loan officer for any period of time the Commissioner deems necessary.

(*l*) In addition to the authority to require criminal history background checks as set forth in G.S. 53-243.05 and G.S. 53-243.06, the Commissioner shall have the authority to require a criminal history background check at any other time as a condition of continued licensure. Upon the request of the Commissioner, a licensee shall furnish to the Commissioner the licensee's consent to a criminal history record check and a set of the licensee's fingerprints in a form acceptable to the Commissioner. Refusal to consent to a criminal history record check under this subsection may constitute grounds for the Commissioner to suspend or revoke the license of the licensee.

(m) Subject to the provisions of G.S. 53-243.03, the Commissioner may, by order, prohibit licensees under this Article from engaging in acts and practices in connection with mortgage loans that the Commissioner finds to be unfair, deceptive, designed to evade the laws of this State, or that are not in the best interest of the borrowing public.

(n) In the event the Commissioner shall have evidence that a material violation of law has occurred in the origination or servicing of a loan then being foreclosed or then delinquent and in threat of foreclosure, and that the putative violation would be sufficient in law or equity to base a claim or affirmative defense which would affect the validity or enforceability of the underlying contract or the right to foreclose, then the Commissioner may notify the Clerk of Superior Court, and the Clerk shall suspend foreclosure proceedings on the mortgage for 60 days from the date of the notice. In the event that the Commissioner notifies the Clerk, the Commissioner shall also notify the servicer, if known, and provide an opportunity to cure the violation or provide information to the Commissioner to rebut the evidence of the suspected violation. If the violation is cured or the information satisfies the Commissioner that no material violation has occurred, the Commissioner shall notify the Clerk so that the foreclosure proceeding may be resumed.

(o) The Commissioner shall be deemed to have complied with the requirements of law concerning service of process upon mailing by certified mail any notice required or permitted to a licensee under this Article, postage prepaid and addressed to the last known address of the licensee on file with the Commissioner pursuant to G.S. 53-243.13(d).

(p) The Commissioner is authorized to take action, including suspension of the license, if the licensee fails to respond within 20 days, or within a lesser time if specifically requested for good cause, to inquiries from the Commissioner or the Commissioner's designee regarding any complaints filed against the licensee which allege or appear to involve violation of this Article or any law or rule affecting the mortgage lending business.

G.S. 53-243.12 is set out twice. See notes.

(q) The Commissioner is authorized to take action, including suspension of the license, if the licensee fails to respond within 20 days, or within a lesser time if specifically requested for good cause, to and cooperate fully with notices from the Commissioner or the Commissioner's designee relating to the scheduling and conducting of an examination or investigation under this Article. (2001-393, s. 2; 2002-169, s. 10; 2004-171, ss. 11-13; 2005-316, s. 7; 2007-352, s. 9; 2008-228, s. 9.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Editor's Note. — Session Laws 2008-228, s. 21, provides that subsection (n) of G.S. 53-243.12, as amended by s. 9 of this act, becomes effective January 1, 2009, and applies to foreclosure proceedings filed on or after that date.

Effect of Amendments. — Session Laws 2008-228, s. 9, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, rewrote the existing provisions and added subsections (n) through (q). For the effective date and applicability of subsection (n), see the Editor's note.

§ 53-243.13. Records; escrow funds or trust accounts.

(a) The Commissioner shall keep a list of all applicants for licensure under this Article that includes the date of application, name, and place of residence and whether the license was granted or refused.

(b) The Commissioner shall keep a current roster showing the names and places of business of all licensees that shows their respective loan officers and a roster of exempt persons required to file a notice under G.S. 53-243.02. The rosters shall: (i) be kept on file in the office of the Commissioner; (ii) contain information regarding all orders or other action taken against the licensees, loan officers, and other persons; and (iii) be open to public inspection.

(c) Every licensee shall make and keep the accounts, correspondence, memoranda, papers, books, and other records as prescribed in rules adopted by the Commissioner. All records shall be preserved for three years unless the Commissioner, by rule, prescribes otherwise for particular types of records. The recordkeeping requirements imposed by the Commissioner or this subsection shall not be greater than those imposed by applicable federal law.

(d) If the information contained in any document filed with the Commissioner is or becomes inaccurate or incomplete in any material respect, the licensee shall promptly file a correcting amendment to the information contained in the document.

(e) **(Effective until January 1, 2009)** A licensee shall maintain in a segregated escrow fund or trust account any funds which come into the licensee's possession, but which are not the licensee's property and which the licensee is not entitled to retain under the circumstances. The escrow fund or trust account shall be held on deposit in a federally insured financial institution.

(e) **(Effective January 1, 2009)** A licensee shall maintain in a segregated escrow fund or trust account any funds which come into the licensee's possession, but which are not the licensee's property and which the licensee is not entitled to retain under the circumstances. The escrow fund or trust account shall be held on deposit in a federally insured financial institution. Individual loan applicants' or borrowers' accounts may be aggregated into a common trust fund so long as (i) interests in the common fund can be individually tracked and accounted for, and (ii) the common fund is kept separate from and is not commingled with the licensee's own funds. (2001-393, s. 2; 2008-228, s. 10.)

Subsection (e) Set Out Twice. — The first version of subsection (e) set out above is effective until January 1, 2009. The second version of subsection (e) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-228, s. 10, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, added the last sentence in subsection (e).

§ 53-243.14. (Effective January 1, 2009) Criminal penalty.

A violation of G.S. 53-243.02 is a Class 3 misdemeanor. Each transaction involving the unlawful making or brokering or servicing of a mortgage loan is a separate offense. (2001-393, s. 2; 2008-228, s. 11.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-228, s. 11, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, substituted "Class 3 misdemeanor" for "Class I felony" in the first sentence and inserted "or servicing" in the second sentence.

§ 53-243.15. Filing required for exempt persons; civil penalty.

(a) All exempt persons described in G.S. 53-243.01(12) who are engaged in the mortgage brokerage or mortgage banking business on October 1, 2002, or who are engaged in the mortgage-servicing business on October 1, 2008, shall be required to file a form with the Commissioner on or before that date. All exempt persons, who commence mortgage brokerage or mortgage banking business in this State after October 1, 2002, or who commence mortgage servicing in this State after October 1, 2008, shall file the form with the Commissioner upon commencement of the business. This form, prescribed by the Commissioner, shall contain all of the following information:

(1) The name of the respective exempt person.
(2) The basis of the exempt status of the exempt person.
(3) The principal business address of the exempt person.
(4) The State or federal regulatory authority responsible for the exempt person's supervision, examination, or regulation, if any.

(b) In addition to any other measures the exempt person may be subject to under this Article, failure by an exempt person to file the required form shall not affect the exempt status of the person. However, the exempt person shall be subject to a civil penalty set by the Commissioner that shall not exceed the sum of two hundred fifty dollars ($250.00) for each year the form is not filed. No person required to file under this section may transact business in this State as a mortgage banker or mortgage broker or mortgage servicer unless the person has filed the prescribed form with the Commissioner in accordance with this section.

(c) The filing requirements of this section shall not apply to the individual employees of an exempt person. (2001-393, s. 2; 2008-228, s. 12.)

Effect of Amendments. — Session Laws 2008-228, s. 12, effective August 17, 2008, in subsection (a), substituted "53-243.01(12)" for "53-243.01(8)", inserted "or who are engaged in the mortgage-servicing business on October 1, 2008", inserted "or who commence mortgage servicing in this State after October 1, 2008," and made minor punctuation changes; in subsection (b), inserted "or mortgage servicer" in the last sentence; and added subsection (c).

§ 53-243.16. Criminal history record checks.

(a) The Department of Justice may provide a criminal record check to the Commissioner for any person who has applied for or holds a mortgage banker, mortgage broker, exclusive mortgage broker, or loan officer license through the Commissioner under this Article.

(b) **(Effective until January 1, 2009)** In addition, if a person described in subsection (a) of this section is a corporation, partnership, limited liability company, association, or trust, the Department of Justice may provide a criminal history record check to the Commissioner for any person who has control of that person, or who is the managing principal or a branch manager of that person.

(b) **(Effective January 1, 2009)** In addition, if a person described in subsection (a) of this section is a corporation, partnership, limited liability company, association, or trust, the Department of Justice may provide a criminal history record check to the Commissioner for any person who has control of that person, or who is the qualifying individual or a branch manager of that person.

(c) The Commissioner shall provide to the Department of Justice, along with the request, the fingerprints of the person, any additional information required by the Department of Justice, and a form signed by the person consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The person's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Commissioner shall keep all information pursuant to this section privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge a fee for each person for conducting the checks of criminal history records authorized by this section. (2002-169, s. 11; 2004-171, s. 14; 2008-228, s. 13.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until January 1, 2009. The second version of subsection (b) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-228, s. 13, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, substituted "qualifying individual" for "managing principal" near the end of subsection (b).

§ 53-243.17. Participation in national mortgage licensing system; licensing proprietary software.

(a) The Commissioner of Banks is authorized to participate in the formation and operation of a centralized and automated licensing system and data depository funded by State mortgage regulators and law enforcement agencies. Pursuant to this authority, the Commissioner may:

(1) Cause funds of the Office of Commissioner of Banks to be applied to the initial capitalization, organizational expenses, and operating expenses of a limited liability company, nonprofit corporation or foundation, or other entity created to operate the licensing system and data depository and to serve as a manager or director of the entity;

(2) Enter into operating agreements, information sharing agreements, interstate cooperative agreements, and technology licensing agree-

ments necessary to the organization and operation of the entity and the licensing system and data depository; and

(3) Take such further actions as are reasonably necessary to give effect to the provisions of this section.

(b) The Commissioner is authorized to enter into agreements to license the use of the proprietary software owned by the Office of the Commissioner of Banks to banking, mortgage, or financial services supervisory agencies of other states.

(c) **(Effective until January 1, 2009)** Notwithstanding any other provision of this section, the Commissioner retains full authority and discretion under this Article to license mortgage brokers, mortgage bankers, loan officers, and limited loan officers and to enforce this Article to its fullest extent. Nothing in this section shall be deemed to be a reduction or derogation of that authority and discretion.

(c) **(Effective January 1, 2009)** Notwithstanding any other provision of this section, the Commissioner retains full authority and discretion under this Article to license mortgage brokers, mortgage bankers, mortgage servicers, loan officers, and limited loan officers and to enforce this Article to its fullest extent. Nothing in this section shall be deemed to be a reduction or derogation of that authority and discretion. (2006-239, s. 3; 2008-228, s. 14.)

Subsection (c) Set Out Twice. — The first version of subsection (c) set out above is effective until January 1, 2009. The second version of subsection (c) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-228, s. 14, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, in subsection (c), inserted "mortgage servicers" and made a minor punctuation change.

ARTICLE 22.

Check-Cashing Businesses.

§ 53-276. License required.

CASE NOTES

Cited in Kucan v. Advance Am., — N.C. App. —, 660 S.E.2d 98, 2008 N.C. App. LEXIS 902 (2008).

§ 53-283. Prohibited practices.

CASE NOTES

Cited in Kucan v. Advance Am., — N.C. App. —, 660 S.E.2d 98, 2008 N.C. App. LEXIS 902 (2008).

Chapter 55.

North Carolina Business Corporation Act.

Article 1.

General Provisions.

Part 2. Filing Documents.

§ 55-1-22. Filing, service, and copying fees.

Editor's Note. —

Session Laws 2008-194, s. 2(a)-(f), provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, 'notice' shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section."

Article 7.

Shareholders.

Part 4. Derivative Proceedings.

§ 55-7-43. Stay of proceedings.

CASE NOTES

Cited in Bluebird Corp. v. Aubin, — N.C. App. —, 657 S.E.2d 55, 2008 N.C. App. LEXIS 279 (2008).

§ 55-7-45. Discontinuance or settlement.

CASE NOTES

Cited in Bluebird Corp. v. Aubin, — N.C. App. —, 657 S.E.2d 55, 2008 N.C. App. LEXIS 279 (2008).

§ 55-7-46. Payment of expenses.

CASE NOTES

Cited in Bluebird Corp. v. Aubin, — N.C. App. —, 657 S.E.2d 55, 2008 N.C. App. LEXIS 279 (2008).

§ 55-7-47. Applicability to foreign corporations.

CASE NOTES

Internal Affairs Doctrine. — In a suit between a lender and a broker, a prior New York decision was not overturned when the North Carolina court found that the lender breached fiduciary duties because: (1) collateral estoppel, res judicata, and full faith and credit did not apply since the New York court did not dispose of or address the broker's counterclaims; and (2) the internal affairs doctrine was a conflict of laws principle, not a jurisdictional principal. Bluebird Corp. v. Aubin, — N.C. App. —, 657 S.E.2d 55, 2008 N.C. App. LEXIS 279 (2008).

ARTICLE 14.

Dissolution.

Part 1. Voluntary Dissolution.

§ 55-14-05. Effect of dissolution.

CASE NOTES

Effect of Dissolution on Pending Action. —

Magistrate's order denying defendant employer's motions to extend time on three discovery matters based on the employer's dissolution was contrary to law as the employer's existence did not end at the employer's dissolution, which was but the first part of the winding up and termination process; defending a lawsuit was one of the limited activities allowed a company in dissolution to continue the winding up process. Miceli v. KBRG of Statesville, LLC, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 61169 (W.D.N.C. July 23, 2008).

Cited in In re Brokers, Inc., — Bankr. —, 2008 Bankr. LEXIS 744 (Bankr. M.D.N.C. Mar. 4, 2008).

ARTICLE 16.

Records and Reports.

Part 1. Records.

§ 55-16-04. Court-ordered inspection.

CASE NOTES

Cited in In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

Chapter 55A.

North Carolina Nonprofit Corporation Act.

Article 1.

General Provisions.

Part 4. Definitions.

Sec.
55A-1-40. Chapter definitions.
55A-1-41. Notice.

Part 7. Miscellaneous.

55A-1-70. Electronic transactions.

Article 7.

Members' Meetings and Voting; Derivative Proceedings.

Part 1. Meetings and Action Without Meetings.

55A-7-04. Action by written consent.
55A-7-08. Action by written ballot.

Part 2. Voting.

Sec.
55A-7-24. Proxies.

Article 8.

Directors and Officers.

Part 2. Meetings and Action of the Board.

55A-8-21. Action without meeting.

ARTICLE 1.

General Provisions.

Part 2. Filing Documents.

§ 55A-1-22. Filing, service, and copying fees.

Editor's Note. —

Session Laws 2008-194, s. 2(a)-(f), provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, 'notice' shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section."

Part 4. Definitions.

§ 55A-1-40. Chapter definitions.

In this Chapter unless otherwise specifically provided:

(1) "Articles of incorporation" include amended and restated articles of incorporation and articles of merger.

(2) "Board" or "board of directors" means the group of natural persons vested by the corporation with the management of its affairs whether or not the group is designated as directors in the articles of incorporation or bylaws.

(2a) "Business corporation" or "domestic business corporation" means a corporation as defined in G.S. 55-1-40.

(3) "Bylaws" means the rules (other than the articles) adopted pursuant to this Chapter for the regulation or management of the affairs of the corporation irrespective of the name or names by which the rules are designated.

(4) "Charitable or religious corporation" means any corporation that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section, or that is organized exclusively for one or more of the purposes specified in section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section and that upon dissolution shall distribute its assets to a charitable or religious corporation, the United States, a state or an entity that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section.

(4a) "Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

(5) "Corporation" or "domestic corporation" means a nonprofit corporation subject to the provisions of this Chapter, except a foreign corporation.

(6) "Delegates" means those persons elected or appointed to vote in a representative assembly for the election of a director or directors or on other matters.

(7) "Deliver" includes mail.

(8) "Distribution" means a direct or indirect transfer of money or other property or incurrence of indebtedness by a corporation to or for the benefit of its members, directors, or officers, or to or for the benefit of transferees in liquidation under Article 14 of this Chapter (other than creditors).

(8a) "Domestic limited liability company" has the same meaning as in G.S. 57C-1-03.

(8b) "Domestic limited partnership" has the same meaning as in G.S. 59-102.

(9) "Effective date of notice" is defined in G.S. 55A-1-41.

(9a) "Electronic" has the same meaning as in G.S. 66-312.

(9b) "Electronic record" has the same meaning as in G.S. 66-312.

(9c) "Electronic signature" has the same meaning as in G.S. 66-312.

(10) "Entity" includes:

a. Any domestic or foreign:
  1. Corporation; business corporation; professional corporation;
  2. Limited liability company;
  3. Profit and nonprofit unincorporated association, chapter or other organizational unit; and
  4. Business trust, estate, partnership, trust;

b. Two or more persons having a joint or common economic interest; and

c. The United States, and any state and foreign government.

(10a) "Foreign business corporation" means a foreign corporation as defined in G.S. 55-1-40.

(11) "Foreign corporation" means a corporation (with or without capital stock) organized under a law other than the law of this State for purposes for which a corporation might be organized under this Chapter.

(11a) "Foreign limited liability company" has the same meaning as in G.S. 57C-1-03.

(11b) "Foreign limited partnership" has the same meaning as in G.S. 59-102.

(12) "Governmental subdivision" includes authority, county, district, and municipality.

(13) "Includes" denotes a partial definition.

(14) "Individual" denotes a natural person legally competent to act and also includes the estate of an incompetent or deceased individual.

(15) "Means" denotes an exhaustive definition.

(16) "Member" means a person who is, by the articles of incorporation or bylaws of the corporation, either (i) specifically designated as a member or (ii) included in a category of persons specifically designated as members. A person is not a member solely by reason of having voting rights or other rights associated with membership.

(17) "Nonprofit corporation" means a corporation intended to have no income or intended to have income none of which is distributable to its members, directors, or officers, except as permitted by Article 13 of this Chapter, and includes all associations without capital stock formed under Subchapter V of Chapter 54 of the General Statutes or under any act or acts replaced thereby.

(18) "Notice" includes demand and is defined in G.S. 55A-1-41.

(19) "Person" includes individual and entity.

(20) "Principal office" means the office (in or out of this State) where the principal offices of a domestic or foreign corporation are located, as most recently designated by the domestic or foreign corporation in its articles of incorporation, a Designation of Principal Office Address form, a Corporation's Statement of Change of Principal Office Address form, or in the case of a foreign corporation, its application for a certificate of authority.

(21) "Proceeding" includes civil suit and criminal, administrative, and investigatory action.

(22) "Record date" means the date established under Article 7 of this Chapter on which a corporation determines the identity of its members for the purposes of this Chapter.

(23) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under G.S. 55A-8-40(c) for custody of the minutes of the meetings of the board of directors and of the members and for authenticating records of the corporation.

(24) "State," when referring to a part of the United States, includes a state and commonwealth (and their agencies and governmental subdivisions) and a territory, and insular possession (and their agencies and governmental subdivisions) of the United States.

(24a) "Unincorporated entity" means a domestic or foreign limited liability company, a domestic or foreign limited partnership, a registered limited liability partnership or foreign limited liability partnership as defined in G.S. 59-32, or any other partnership as defined in G.S. 59-36, whether or not formed under the laws of this State.

(25) "United States" includes district, authority, bureau, commission, department, and any other agency of the United States.

(26) "Vote" includes authorization by written ballot and written consent, including electronic ballot and electronic consent. (1955, c. 1230; 1959, c. 1161, s. 4; 1985 (Reg. Sess., 1986), c. 801, s. 1; 1993, c. 398, s. 1; 1995, c. 539, s. 15; 1999-369, s. 2.2; 2001-358, s. 5(b); 2001-387, ss. 33, 34, 35, 173, 175(a); 2001-413, s. 6; 2001-487, s. 62(e); 2008-37, s. 1.)

Effect of Amendments. — Session Laws 2008-37, s. 1, effective October 1, 2008, added subdivisions (9a) through (9c); and at the end of subdivision (26), added "including electronic ballot and electronic consent" and made a minor punctuation change.

CASE NOTES

Cited in Lynnwood Found. v. N.C. Dep't of Revenue, — N.C. App. —, 660 S.E.2d 611, 2008 N.C. App. LEXIS 991 (2008).

§ 55A-1-41. Notice.

(a) Notice under this Chapter shall be in writing unless oral notice is authorized in the corporation's articles of incorporation or bylaws and written notice is not specifically required by this Chapter.

(b) Notice may be communicated in person; by electronic means; or by mail or private carrier. If these forms of personal notice are impracticable as to one or more persons, notice may be communicated to such persons by publishing notice in a newspaper, or by radio, television, or other form of public broadcast communication, in the county where the corporation has its principal place of business in the State, or if it has no principal place of business in the State, the county where it has its registered office.

(c) Written notice by a domestic or foreign corporation to its member is effective when deposited in the United States mail with postage thereon prepaid and correctly addressed to the member's address shown in the corporation's current record of members. To the extent the corporation pursuant to G.S. 55A-1-70 and the member have agreed, notice by a domestic corporation to its member in the form of an electronic record sent by electronic means is effective when it is sent as provided in G.S. 66-325. A member may terminate any such agreement at any time on a prospective basis effective upon written notice of termination to the corporation or upon such later date as may be specified in the notice.

(d) Written notice to a domestic or foreign corporation (authorized to conduct affairs in this State) may be addressed to its registered agent at its registered office or to the corporation or its secretary at its principal office shown in its articles of incorporation, the Designation of Principal Office Address form, or any Corporation's Statement of Change of Principal Office Address form filed with the Secretary of State.

(e) Except as provided in subsection (c) of this section, written notice is effective at the earliest of the following:

(1) When received;

(2) Five days after its deposit in the United States mail, as evidenced by the postmark or otherwise, if mailed with at least first-class postage thereon prepaid and correctly addressed;

(3) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee;

(4) If mailed with less than first-class postage, 30 days after its deposit in the United States mail, as evidenced by the postmark or otherwise, if mailed with postage thereon prepaid and correctly addressed;

(5) When delivered to the member's address shown in the corporation's current list of members.

In the case of notice in the form of an electronic record sent by electronic means, the time of receipt shall be determined as provided in G.S. 66-325.

(f) Written notice is correctly addressed to a member of a domestic or foreign corporation if addressed to the member's address shown in the corporation's current list of members. In the case of members who are residents of the same household and who have the same address, the corporation's bylaws may provide that a single notice may be given to such members jointly.

(g) Oral notice is effective when actually communicated to the person entitled to oral notice.

(h) If this Chapter prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of this Chapter, those requirements govern.

(i) Written notice need not be provided in a separate document and may be included as part of a newsletter, magazine, or other publication regularly sent to members if conspicuously identified as a notice. (1993, c. 398, s. 1; 1995, c. 539, s. 16; 2008-37, s. 2.)

Effect of Amendments. — Session Laws 2008-37, s. 2, effective October 1, 2008, substituted "electronic means" for "telephone, telegraph, teletype, or other form of wire or wireless communication, or by facsimile transmission" in the first sentence of subsection (b); added the second and third sentences in subsection (c); and added the last paragraph in subsection (e).

Part 7. Miscellaneous.

§ 55A-1-70. Electronic transactions.

For purposes of applying Article 40 of Chapter 66 of the General Statutes to transactions under this Chapter, a corporation may agree to conduct a transaction by electronic means through provision in its articles of incorporation or bylaws or by action of its board of directors. (2008-37, s. 3.)

Editor's Note. — Session Laws 2008-37, s. 8, made this Part effective October 1, 2008.

ARTICLE 3.

Purposes and Powers.

§ 55A-3-02. General powers.

CASE NOTES

Assessment to Pay Legal Fees. — Homeowners association's "welfare" covenant was not vague with respect to the levy of a special assessment for legal fees incurred in a discrimination dispute with two homeowners as under the North Carolina Nonprofit Corporation Act, specifically G.S. 55A-3-02(a)(1), the association had the power to sue and be sued, and it was foreseeable that the association would have to pay fees to defend itself; the covenant contained an ascertainable standard by which it could be objectively determined if the amount of the assessment and the purpose for which it was levied fell within the covenant. Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008).

§ 55A-3-04. Ultra vires.

CASE NOTES

Cited in Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008).

Article 7.

Members' Meetings and Voting; Derivative Proceedings.

Part 1. Meetings and Action Without Meetings.

§ 55A-7-04. Action by written consent.

(a) Action required or permitted by this Chapter to be taken at a meeting of members may be taken without a meeting if the action is taken by all members entitled to vote on the action. The action shall be evidenced by one or more written consents describing the action taken, signed before or after such action by all members entitled to vote thereon, and delivered to the corporation for inclusion in the minutes or filing with the corporate records. To the extent the corporation has agreed pursuant to G.S. 55A-1-70, a member's consent to action taken without a meeting may be in electronic form and delivered by electronic means.

(b) If not otherwise determined under G.S. 55A-7-03 or G.S. 55A-7-07, the record date for determining members entitled to take action without a meeting is the date the first member signs the consent under subsection (a) of this section.

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document. (1977, c. 193, s. 2; 1993, c. 398, s. 1; 2008-37, s. 4.)

Effect of Amendments. — Session Laws 2008-37, s. 4, effective October 1, 2008, added the last sentence in subsection (a).

§ 55A-7-08. Action by written ballot.

(a) Unless prohibited or limited by the articles of incorporation or bylaws and without regard to the requirements of G.S. 55A-7-04, any action that may be taken at any annual, regular, or special meeting of members may be taken without a meeting if the corporation delivers a written ballot to every member entitled to vote on the matter. Any requirement that any vote of the members be made by written ballot may be satisfied by a ballot submitted by electronic transmission, including electronic mail, provided that such electronic transmission shall either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the member or the member's proxy.

(b) A written ballot shall:

(1) Set forth each proposed action; and

(2) Provide an opportunity to vote for or against each proposed action.

(c) Approval by written ballot pursuant to this section shall be valid only when the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the same total number of votes were cast.

(d) All solicitations for votes by written ballot shall indicate the time by which a ballot shall be received by the corporation in order to be counted.

(e) Except as otherwise provided in the articles of incorporation or bylaws, a written ballot shall not be revoked. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 35; 1993, c. 398, s. 1; 2008-37, s. 5.)

Effect of Amendments. — Session Laws 2008-37, s. 5, effective October 1, 2008, added the last sentence in subsection (a).

Part 2. Voting.

§ 55A-7-24. Proxies.

(a) Unless the articles of incorporation or bylaws prohibit or limit proxy voting, a member may vote in person or by proxy. A member may appoint one or more proxies to vote or otherwise act for the member by signing an appointment form, either personally or by the member's attorney-in-fact. Without limiting G.S. 55A-1-70, an appointment in the form of an electronic record that bears the member's electronic signature and that may be directly reproduced in paper form by an automated process shall be deemed a valid appointment form within the meaning of this section. In addition, if and to the extent permitted by the nonprofit corporation, a member may appoint one or more proxies by any kind of telephonic transmission, even if not accompanied by written communication, under circumstances or together with information from which the nonprofit corporation can reasonably assume that the appointment was made or authorized by the member.

(b) An appointment of a proxy is effective when received by the secretary or other officer or agent authorized to tabulate votes. An appointment is valid for 11 months unless a different period is expressly provided in the appointment form.

(c) An appointment of a proxy is revocable by the member unless the appointment form conspicuously states that it is irrevocable and the appointment is coupled with an interest. An appointment made irrevocable under this subsection shall be revocable when the interest with which it is coupled is extinguished. A transferee for value of an interest subject to an irrevocable appointment may revoke the appointment if he did not have actual knowledge of its irrevocability.

(d) The death or incapacity of the member appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises authority under the appointment.

(e) A revocable appointment of a proxy is revoked by the person appointing the proxy:

(1) Attending any meeting and voting in person; or

(2) Signing and delivering to the secretary or other officer or agent authorized to tabulate proxy votes either a writing stating that the appointment of the proxy is revoked or a subsequent appointment form.

(f) Subject to G.S. 55A-7-27 and to any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the member making the appointment. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 35; 1993, c. 398, s. 1; 1999-139, s. 1; 2008-37, s. 6.)

Effect of Amendments. — Session Laws 2008-37, s. 6, effective October 1, 2008, in subsection (a), in the first sentence, substituted "the member" for "him" and substituted "the member's" for "his", substituted "Without limiting G.S. 55A-1-70, an appointment in the form of an electronic record that bears the member's electronic signature and that may be directly reproduced in paper form by an automated process" for "A photocopy, telegram, cablegram, facsimile transmission, or equivalent reproduction of a writing appointing one or more proxies" in the second sentence, and deleted "(i) by an electronic mail message or other form of electronic, wire, or wireless communication that provides a written statement appearing to have been sent by the member, or (ii)" following "more proxies" and deleted "electronic or" following "by any kind of" in the third sentence.

ARTICLE 8.

Directors and Officers.

Part 2. Meetings and Action of the Board.

§ 55A-8-21. Action without meeting.

(a) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this Chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action shall be evidenced by one or more written consents signed by each director before or after such action, describing the action taken, and included in the minutes or filed with the corporate records reflecting the action taken. To the extent the corporation has agreed pursuant to G.S. 55A-1-70, a director's consent to action taken without meeting may be in electronic form and delivered by electronic means.

(b) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document. (1973, c. 314, s. 3; 1993, c. 398, s. 1; 2008-37, s. 7.)

Effect of Amendments. — Session Laws 2008-37, s. 7, effective October 1, 2008, added the last sentence in subsection (a).

Chapter 55D.

Filings, Names, and Registered Agents for Corporations, Nonprofit Corporations, and Partnerships.

ARTICLE 2.

Submission of Documents to the Secretary of State for Filing.

§ 55D-10. Filing requirements.

Editor's Note. — Session Laws 2008-194, s. 2, provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, "notice" shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section."

§ 55D-13. Effective time and date of document.

Editor's Note. — Session Laws 2008-194, s. 2, provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, "notice" shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section."

ARTICLE 4.

Registered Office and Registered Agent.

§ 55D-31. Change of registered office or registered agent.

Editor's Note. —

Session Laws 2008-194, s. 2, provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, "notice" shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section."

Chapter 57C.

North Carolina Limited Liability Company Act.

ARTICLE 1.

General Provisions.

Part 1. Short Title; Reservation of Power; Definitions.

§ 57C-1-03. Definitions.

CASE NOTES

Member-managers of a limited liability company could be natural persons or business entities. Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008).

Cited in Hamby v. Profile Prods., L.L.C., 361 N.C. 630, 652 S.E.2d 231, 2007 N.C. LEXIS 1105 (2007).

Part 2. Filing Documents.

§ 57C-1-22. Filing, service, and copying fees.

Editor's Note. —

Session Laws 2008-194, s. 2, provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, "notice" shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section."

ARTICLE 3.

Membership and Management.

Part 1. Membership.

§ 57C-3-02. Cessation of membership.

CASE NOTES

Debtor had standing under G.S. 57C-6-02 to pursue the dissolution of a limited liability corporation because converting his membership interest to that of an assignee by operation of G.S. 57C-3-02 when he filed bankruptcy was a modification or termination of his interest that was rendered ineffective by 11 U.S.C.S. § 541(c). Klingerman v. ExecuCorp, LLC (In re Klingerman), 388 B.R. 677, 2008 Bankr. LEXIS 1117 (Bankr. E.D.N.C. 2008).

Petition for Dissolution Did Not Disassociate Manager-Member. — Manager/member of a limited liability company (LLC) was not disassociated from the LLC under G.S. 57C-3-02(3)(d) by the manager/member filing a petition for dissolution of the LLC. Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008).

§ 57C-3-05. Members bound by operating agreements.

CASE NOTES

Operating Agreements. — Court granted a creditor's motion to dismiss a Chapter 7 petition nunc pro tunc because the petition was filed by an entity that lacked authority to file it in the first place. G.S. 57C-3-24(a) authorized the parties' operating agreement under which the manager was replaced by an independent manager as the sole person who could make decisions in a certain area, and when a financial entity and an individual acquired a membership interest in the debtor, they were bound to the terms of the operating agreement pursuant to G.S. 57C-3-05 as to how the debtor could be placed into bankruptcy. In re Green Power Kenansville, LLC, — Bankr. —, 2004 Bankr. LEXIS 2541 (Bankr. E.D.N.C. Nov. 18, 2004).

Part 2. Managers.

§ 57C-3-20. Determination of managers; management.

CASE NOTES

Cited in Hamby v. Profile Prods., L.L.C., 361 N.C. 630, 652 S.E.2d 231, 2007 N.C. LEXIS 1105 (2007).

§ 57C-3-23. Agency power of managers.

CASE NOTES

Authority of Manager to Institute Lawsuit. — Manager of a limited liability company (LLC) lacked authority under G.S. 57C-3-23 to cause the LLC to institute an action for misappropriation of funds on its own behalf against the co-manager of the LLC because the co-manager did not authorize or ratify the filing of the lawsuit. Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008).

§ 57C-3-24. Delegation of authority of managers.

CASE NOTES

Authority to Transfer. — Court granted a creditor's motion to dismiss a Chapter 7 petition nunc pro tunc because the petition was filed by an entity that lacked authority to file it in the first place. G.S. 57C-3-24(a) authorized the parties' operating agreement under which the manager was replaced by an independent manager as the sole person who could make decisions in a certain area, and when a financial entity and an individual acquired a membership interest in the debtor, they were bound to the terms of the operating agreement pursuant to G.S. 57C-3-05 as to how the debtor could be placed into bankruptcy. In re Green Power Kenansville, LLC, — Bankr. —, 2004 Bankr. LEXIS 2541 (Bankr. E.D.N.C. Nov. 18, 2004).

Part 3. Liability.

§ 57C-3-30. Liability to third parties of members, managers, directors, and executives; parties to actions; governing law.

CASE NOTES

G.S. 57C-3-30(b) was inapplicable to the individual claim of a manager-member of a limited liability company (LLC) for quantum meruit against a comanager-member because, while the manager-member was not a proper party to a proceeding by the LLC, the quantum meruit claim was brought to recover for injuries caused to the manager-member individually. Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008).

Debtor had standing under G.S. 57C-6-02 to pursue the dissolution of a limited liability corporation because converting his membership interest to that of an assignee by operation of G.S. 57C-3-02 when he filed bankruptcy was a modification or termination of his interest that was rendered ineffective by 11 U.S.C.S. § 541(c). Klingerman v. ExecuCorp, LLC (In re Klingerman), 388 B.R. 677, 2008 Bankr. LEXIS 1117 (Bankr. E.D.N.C. 2008).

Cited in Hamby v. Profile Prods., L.L.C., 361 N.C. 630, 652 S.E.2d 231, 2007 N.C. LEXIS 1105 (2007).

Article 6.

Dissolution.

§ 57C-6-04. Winding up.

CASE NOTES

Denial of Manager's Motion to Appoint Manager to Wind Up Affairs. — Pursuant to the unique circumstances existing at the time the trial court denied the manager's motion to appoint the manager to wind up the affairs of a limited liability company (LLC), and with the manager's and the LLC's complaint against a comanager having been dismissed in its entirety, the trial court did not abuse its discretion by denying the motion to appoint the manager to wind up the affairs of the LLC. Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008).

Effect of Dissolution on Pending Action. — Magistrate's order denying defendant employer's motions to extend time on three discovery matters based on the employer's dissolution was contrary to law as the employer's existence did not end at the employer's dissolution, which was but the first part of the winding up and termination process; defending a lawsuit was one of the limited activities allowed a company in dissolution to continue the winding up process. Miceli v. KBRG of Statesville, LLC, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 61169 (W.D.N.C. July 23, 2008).

ARTICLE 7.

Foreign Limited Liability Companies.

§ 57C-7-01. Law governing.

CASE NOTES

Cited in Hamby v. Profile Prods., L.L.C., 361 N.C. 630, 652 S.E.2d 231, 2007 N.C. LEXIS 1105 (2007).

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Derivative Actions.

§ 57C-8-01. Members' derivative actions.

CASE NOTES

Standing to File Derivative Action. — Attorney who was a manager and a member of a law firm that was a limited liability company (LLC) had standing under G.S. 57C-8-01 to file a derivative action on behalf of the LLC, by sufficiently alleging that the attorney demanded that the attorney's partner who was a comanager and member of the LLC share the proceeds from the cases retained through the LLC. Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008).

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ARTICLE 1.

Title and Definitions.

§ 58-1-15. Warranties by manufacturers, distributors, or sellers of goods or services.

CASE NOTES

Warranty and Not Insurance. — Car dealer's automatic inclusion of a window etching system in cars, which purported to deter vehicle theft, where the system seller promised to pay $5,000 to any purchase whose car was stolen and not recovered within 30 days, was a warranty within subsection (b) of G.S. 58-1-15, and not insurance, since the payment was based on an alleged defect in the system. Pope v. TT of Lake Norman, LLC, 505 F. Supp. 2d 309, 2007 U.S. Dist. LEXIS 63648 (W.D.N.C. 2007).

ARTICLE 3.

General Regulations for Insurance.

§ 58-3-191. Managed care reporting and disclosure requirements.

(a) Each health benefit plan shall annually, on or before the first day of May of each year, file in the office of the Commissioner the following information for the previous calendar year:

(1) The number of and reasons for grievances received from plan participants regarding medical treatment. The report shall include the number of covered lives, total number of grievances categorized by reason for the grievance, the number of grievances referred to the second level grievance review, the number of grievances resolved at each level and their resolution, and a description of the actions that are being taken to correct the problems that have been identified through grievances received. Every health benefit plan shall file with

the Commissioner, as part of its annual grievance report, a certificate of compliance stating that the carrier has established and follows, for each of its lines of business, grievance procedures that comply with G.S. 58-50-62.

(2) The number of participants and groups who terminated coverage under the plan for any reason. The report shall include the number of participants who terminated coverage because the group contract under which they were covered was terminated, the number of participants who terminated coverage for reasons other than the termination of the group under which they were enrolled, and the number of group contracts terminated.

(3) The number of provider contracts that were terminated and the reasons for termination. This information shall include the number of providers leaving the plan and the number of new providers. The report shall show voluntary and involuntary terminations separately.

(4) Data relating to the utilization, quality, availability, and accessibility of services. The report shall include the following:

a. Information on the health benefit plan's program to determine the level of network availability, as measured by the numbers and types of network providers, required to provide covered services to covered persons. This information shall include the plan's methodology for:

1. Establishing performance targets for the numbers and types of providers by specialty, area of practice, or facility type, for each of the following categories: primary care physicians, specialty care physicians, nonphysician health care providers, hospitals, and nonhospital health care facilities.

2. Determining when changes in plan membership will necessitate changes in the provider network.

The report shall also include: the availability performance targets for the previous and current years; the numbers and types of providers currently participating in the health benefit plan's provider network; and an evaluation of actual plan performance against performance targets.

b. The health benefit plan's method for arranging or providing health care services from nonnetwork providers, both within and outside of its service area, when network providers are not available to provide covered services.

c. Information on the health benefit plan's program to determine the level of provider network accessibility necessary to serve its membership. This information shall include the health benefit plan's methodology for establishing performance targets for member access to covered services from primary care physicians, specialty care physicians, nonphysician health care providers, hospitals, and nonhospital health care facilities. The methodology shall establish targets for:

1. The proximity of network providers to members, as measured by member driving distance, to access primary care, specialty care, hospital-based services, and services of nonhospital facilities.

2. Expected waiting time for appointments for urgent care, acute care, specialty care, and routine services for prevention and wellness.

The report shall also include: the accessibility performance targets for the previous and current years; data on actual overall accessibility as measured by driving distance and average appointment waiting time; and an evaluation of actual plan performance against performance targets. Measures of actual accessibility may be developed using scientifically valid random sample techniques.

d. A statement of the health benefit plan's methods and standards for determining whether in-network services are reasonably available and accessible to a covered person, for the purpose of determining whether a covered person should receive the in-network level of coverage for services received from a nonnetwork provider.

e. A description of the health benefit plan's program to monitor the adequacy of its network availability and accessibility methodologies and performance targets, plan performance, and network provider performance.

f. A summary of the health benefit plan's utilization review program activities for the previous calendar year. The report shall include the number of: each type of utilization review performed, noncertifications for each type of review, each type of review appealed, and appeals settled in favor of covered persons. The report shall be accompanied by a certification from the carrier that it has established and follows procedures that comply with G.S. 58-50-61.

(5) Aggregate financial compensation data, including the percentage of providers paid under a capitation arrangement, discounted fee-for-service or salary, the services included in the capitation payment, and the range of compensation paid by withhold or incentive payments. This information shall be submitted on a form prescribed by the Commissioner.

The name, or group or institutional name, of an individual provider may not be disclosed pursuant to this subsection. No civil liability shall arise from compliance with the provisions of this subsection, provided that the acts or omissions are made in good faith and do not constitute gross negligence, willful or wanton misconduct, or intentional wrongdoing.

(b) Disclosure requirements. — Each health benefit plan shall provide the following applicable information to plan participants and bona fide prospective participants upon request:

(1) The evidence of coverage (G.S. 58-67-50), subscriber contract (G.S. 58-65-60, 58-65-140), health insurance policy (G.S. 58-51-80, 58-50-125, 58-50-126, 58-50-55), or the contract and benefit summary of any other type of health benefit plan;

(2) An explanation of the utilization review criteria and treatment protocol under which treatments are provided for conditions specified by the prospective participant. This explanation shall be in writing if so requested;

(3) If denied a recommended treatment, written reasons for the denial and an explanation of the utilization review criteria or treatment protocol upon which the denial was based;

(4) The plan's formularies, restricted access drugs or devices as defined in G.S. 58-3-221, or prior approval requirements for obtaining prescription drugs, whether a particular drug or therapeutic class of drugs is excluded from its formulary, and the circumstances under which a nonformulary drug may be covered; and

(5) The plan's procedures and medically based criteria for determining whether a specified procedure, test, or treatment is experimental.

(b1) Effective March 1, 1998, insurers shall make the reports that are required under subsection (a) of this section and that have been filed with the

Commissioner available on their business premises and shall provide any insured access to them upon request.

(c) For purposes of this section, "health benefit plan" or "plan" means (i) health maintenance organization (HMO) subscriber contracts and (ii) insurance company or hospital and medical service corporation preferred provider benefit plans as defined in G.S. 58-50-56. (1997-480, s. 1; 1997-519, s. 1.1; 2001-334, s. 2.2; 2001-446, s. 2.1; 2006-154, s. 13; 2008-124, s. 10.1.)

Editor's Note. —
Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. —
Session Laws 2008-124, s. 10.1, effective July 28, 2008, substituted "May" for "March" in subsection (a).

Article 5.

Deposits and Bonds by Insurance Companies.

§ 58-5-25. (See Editor's note) Replacements upon depreciation of securities.

Editor's Note. — Session Laws 2008-134, s. 67(a), provides: "G.S. 58-5-25(a)(2) is repealed." G.S, 58-5-25 does not carry any subsections or subdivisions.

§ 58-5-50. Deposits of foreign life insurance companies.

In addition to other requirements of this Chapter, all foreign life insurance companies shall deposit securities, as specified in G.S. 58-5-20, that have a market value of four hundred thousand dollars ($400,000) as a prerequisite of doing business in this State. All foreign life insurance companies shall deposit an additional two hundred thousand dollars ($200,000) where such companies cannot show three years of net income before being licensed in this State. (1989, c. 485, s. 35; 2003-212, s. 3; 2005-215, s. 3; 2008-124, s. 2.1.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 2.1, effective July 28, 2008, deleted "of Articles 1 through 64" following "other requirements," substituted "that have" for "having" following "G.S. 58-5-20," and substituted "income before being licensed in this State" for "operational gains prior to admission" at the end.

§ 58-5-55. Deposits of capital and surplus by domestic insurance companies.

(a) In addition to other requirements of Articles 1 through 64 of this Chapter, all domestic stock insurance companies shall deposit their required statutory capital with the Commissioner. Such deposits shall be under the exclusive control of the Commissioner for the protection of policyholders.

(b) In addition to other requirements of Articles 1 through 64 of this Chapter, all domestic mutual insurance companies shall deposit at least fifty percent (50%) of their minimum required surplus with the Commissioner, with the amount of the deposit to be determined by the Commissioner. Such deposits shall be under the exclusive control of the Commissioner for the protection of policyholders.

(c) Deposits fulfilling the requirements of this section shall comprise:

(1) Interest-bearing bonds of the United States of America;

(2) Interest-bearing bonds of the State of North Carolina or of its cities or counties; or

(3) Certificates of deposit issued by any solvent bank domesticated in the State of North Carolina. (1989, c. 485, s. 35; 1991, c. 681, s. 20; 1993, c. 504, s. 3; 2008-124, s. 2.5.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 2.5, effective July 28, 2008, substituted "Commissioner" for "Department" throughout the section.

§ 58-5-71. Liens of policyholders; subordination.

Liens against the deposit of a foreign insurer under G.S. 58-5-70 shall be subordinated to the reasonable and necessary expenses of the Commissioner in liquidating the deposit and paying the special deposit claims. "Special deposit claims" has the same meaning set forth in G.S. 58-30-10(19). (1993 (Reg. Sess., 1994), c. 678, s. 7; 2008-124, s. 2.4.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 2.4, effective July 28, 2008, added the last sentence.

Article 6.

License Fees and Taxes.

§ 58-6-25. Insurance regulatory charge.

Editor's Note. —

Session Laws 2008-107, s. 28.13(a), provides: "The percentage rate to be used in calculating the insurance regulatory charge under G.S. 58-6-25 is five and one-half percent (5.5%) for the 2008 calendar year."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Article 7.

General Domestic Companies.

§ 58-7-15. Amount of capital and/or surplus required; impairment of capital or surplus.

The kinds of insurance that may be authorized in this State, subject to the other provisions of Articles 1 through 64 of this Chapter, are set forth in this section. Except to the extent an insurer participates in a risk sharing plan under Article 42 of this Chapter, nothing in this section requires any insurer to insure every kind of risk that it is authorized to insure. Except to the extent an insurer participates in a risk sharing plan under Article 42 of this Chapter, no insurer may transact any other business than that specified in its charter and articles of association or incorporation. The power to do any kind of insurance against loss of or damage to property includes the power to insure all lawful interests in the property and to insure against loss of use and occupancy and rents and profits resulting therefrom; but no kind of insurance includes life insurance or insurance against legal liability for personal injury or death unless specified in this section. In addition to any power to engage in any other kind of business than an insurance business that is specifically conferred by the provisions of Articles 1 through 64 of this Chapter, any insurer authorized to do business in this State may engage in such other kinds of business to the extent necessarily or properly incidental to the kinds of insurance business that it is authorized to do in this State. Each of the following indicates the scope of the kind of insurance business specified:

(1) "Life insurance", meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance includes the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured, including industrial sick benefit; and optional modes of settlement of proceeds.

(2) "Annuities", meaning all agreements to make periodical payments, whether in fixed or variable dollar amounts, or both, at specified intervals.

(3) "Accident and health insurance", meaning:

  a. Insurance against death or personal injury by accident or by any specified kinds of accident and insurance against sickness, ailment or bodily injury except as specified in paragraph b following; and

  b. "Noncancelable disability insurance," meaning insurance against disability resulting from sickness, ailment or bodily injury (but not including insurance solely against accidental injury), under any contract that does not give the insurer the option to cancel or otherwise terminate the contract at or after one year from its effective date or renewal date.

(4) "Fire insurance", meaning insurance against loss of or damage to any property resulting from fire, including loss or damage incident to the extinguishment of a fire or to the salvaging of property in connection therewith.

(5) "Miscellaneous property insurance", meaning loss of or damage to property resulting from:

  a. Lightning, smoke or smudge, windstorm, tornado, cyclone, earthquake, volcanic eruption, rain, hail, frost and freeze, weather or climatic conditions, excess or deficiency of moisture, flood, the rising of the waters of the ocean or its tributaries, or

  b. Insects, or blights, or from disease of such property other than animals, or

  c. Electrical disturbance causing or concomitant with a fire or an explosion in public service or public utility property, or

  d. Bombardment, invasion, insurrection, riot, civil war or commotion, military or usurped power, any order of a civil authority made to prevent the spread of a conflagration, epidemic or catastrophe, vandalism or malicious mischief, strike or lockout, or explosion; but not including any kind of insurance specified in subdivision (9), except insurance against loss or damage to property resulting from:

    1. Explosion of pressure vessels (except steam boilers of more than 15 pounds pressure) in buildings designed and used solely for residential purposes by not more than four families,

    2. Explosion of any kind originating outside of the insured building or outside of the building containing the property insured,

3. Explosion of pressure vessels that do not contain steam or that are not operated with steam coils or steam jackets,
4. Electrical disturbance causing or concomitant with an explosion in public service or public utility property.

(6) "Water damage insurance," meaning insurance against loss or damage by water or other fluid or substance to any property resulting from the breakage or leakage of sprinklers, pumps, or other apparatus erected for extinguishing fires or of water pipes or other conduits or containers; or resulting from casual water entering through leaks or openings in buildings or by seepage through building walls; but not including loss or damage resulting from flood or the rising of the waters of the ocean or its tributaries; and including insurance against accidental injury of such sprinklers, pumps, fire apparatus, conduits, or containers.

(7) "Burglary and theft insurance," meaning:

a. Insurance against loss of or damage to any property resulting from burglary, theft, larceny, robbery, forgery, fraud, vandalism, malicious mischief, confiscation, or wrongful conversion, disposal or concealment by any person or persons, or from any attempt at any of the foregoing, and

b. Insurance against loss of or damage to moneys, coins, bullion, securities, notes, drafts, acceptances, or any other valuable papers or documents, resulting from any cause, except while in the custody or possession of and being transported by any carrier for hire or in the mail.

(8) "Glass insurance," meaning insurance against loss of or damage to glass and its appurtenances resulting from any cause.

(9) "Boiler and machinery insurance," meaning insurance against loss of or damage to any property of the insured, resulting from the explosion of or injury to:

a. Any boiler, heater or other fired pressure vessel;
b. Any unfired pressure vessel;
c. Pipes or containers connected with any of said boilers or vessels;
d. Any engine, turbine, compressor, pump or wheel;
e. Any apparatus generating, transmitting or using electricity;
f. Any other machinery or apparatus connected with or operated by any of the previously named boilers, vessels or machines;

and including the incidental power to make inspections of and to issue certificates of inspection upon, any such boilers, apparatus, and machinery, whether insured or otherwise.

(10) "Elevator insurance," meaning insurance against loss of or damage to any property of the insured, resulting from the ownership, maintenance or use of elevators, except loss or damage by fire.

(11) "Animal insurance," meaning insurance against loss of or damage to any domesticated or wild animal resulting from any cause.

(12) "Collision insurance," meaning insurance against loss of or damage to any property of the insured resulting from collision of any other object with the property, but not including collision to or by elevators or to or by vessels, craft, piers or other instrumentalities of ocean or inland navigation.

(13) "Personal injury liability insurance," meaning insurance against legal liability of the insured, and against loss, damage, or expense incident to a claim of such liability; including personal excess liability or personal "umbrella" insurance; and including an obligation of the insurer to pay medical, hospital, surgical, or funeral benefits; and in the case of motor vehicle liability insurance including also disability

and death benefits to injured persons, irrespective of legal liability of the insured, arising out of the death or injury of any person, or arising out of injury to the economic interests of any person as a result of negligence in rendering expert, fiduciary, or professional service; but not including any kind of insurance specified in subdivision (15) of this section.

(14) "Property damage liability insurance," meaning insurance against legal liability of the insured, and against loss, damage or expense incident to a claim of such liability, arising out of the loss or destruction of, or damage to, the property of any other person, but not including any kind of insurance specified in subdivision (13) or (15).

(15) "Workers' compensation and employer's liability insurance," meaning insurance against the legal liability, whether imposed by common law or by statute or assumed by contract, of any employer for the death or disablement of, or injury to, the employer's employee.

(16) "Fidelity and surety insurance," meaning:

a. Guaranteeing the fidelity of persons holding positions of public or private trust;

b. Becoming surety on, or guaranteeing the performance of, any lawful contract except the following:

   1. A contract of indebtedness secured by title to, or mortgage upon, or interest in, real or personal property;

   2. Any insurance contract except reinsurance;

c. Becoming surety on, or guaranteeing the performance of, bonds and undertakings required or permitted in all judicial proceedings or otherwise by law allowed, including surety bonds accepted by states and municipal authorities in lieu of deposits as security for the performance of insurance contracts;

d. Guaranteeing contracts of indebtedness secured by any title to, or interest in, real property, only to the extent required for the purpose of refunding, extending, refinancing, liquidating or salvaging obligations heretofore lawfully made and guaranteed;

e. Indemnifying banks, bankers, brokers, financial or moneyed corporations or associations against loss resulting from any cause of bills of exchange, notes, bonds, securities, evidences of debts, deeds, mortgages, warehouse receipts, or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semiprecious stones, including any loss while the same are being transported in armored motor vehicles, or by messenger; but not including any other risks of transportation or navigation; also against loss or damage to such an insured's premises, or to the insured's furnishings, fixtures, equipment, safes and vaults therein, caused by burglary, robbery, theft, vandalism or malicious mischief, or any attempt thereat.

(17) "Credit insurance," meaning indemnifying merchants or other persons extending credit against loss or damage resulting from the nonpayment of debts owed to them; and including the incidental power to acquire and dispose of debts so insured, and to collect any debts owed to the insurer or to any person so insured by the insurer; and also including insurance where the debt is secured by either (a) a junior lien on real estate or (b) a first lien on real estate as long as (i) the purpose of the debt being insured is not for the purchase of the real estate and the insurance is limited to twenty-five percent (25%) of the insurer's aggregate insured risk outstanding, before reinsurance ceded or assumed or (ii) the insurance is not included within the definition of mortgage guaranty insurance.

(18) "Title insurance," meaning insuring the owners of real property and chattels real and other persons lawfully interested therein against loss by reason of defective titles and encumbrances thereon and insuring the correctness of searches for all instruments, liens or charges affecting the title to that property, including the power to procure and furnish information relative thereto, and other incidental powers that are specifically granted in Articles 1 through 64 of this Chapter.

(19) "Motor vehicle or aircraft insurance," meaning insurance against loss of or damage resulting from any cause to motor vehicles or aircraft and their equipment, and against legal liability of the insured for loss or damage to another's property resulting from the ownership, maintenance or use of motor vehicles or aircraft and against loss, damage or expense incident to a claim of such liability. This subdivision does not apply to commercial aircraft as defined in G.S. 58-1-5.

(20) "Marine insurance," meaning insurance against any and all kinds of loss or damage to:

a. Vessels, craft, aircraft, cars, automobiles and vehicles of every kind, as well as all goods, freights, cargoes, merchandise, effects, disbursements, profits, moneys, bullion, precious stones, securities, choses in action, evidences of debt, valuable papers, bottomry and respondentia interests and all other kinds of property and interests therein, in respect to, appertaining to or in connection with any and all risks or perils of navigation, transit, or transportation, including war risks, on or under any seas or other waters, on land or in the air, or while being assembled, packed, crated, baled, compressed or similarly prepared for shipment or while awaiting the same or during any delays, storage, transshipment, or reshipment incident thereto, including marine builder's risks and all personal property floater risks, and

b. Person or to property in connection with or appertaining to a marine, inland marine, transit or transportation insurance, including liability for loss of or damage to either, arising out of or in connection with the construction, repair, operation, maintenance or use of the subject matter of the insurance (but not including life insurance or surety bonds nor insurance against loss because of bodily injury to the person arising out of the ownership, maintenance or use of automobiles), and

c. Precious stones, jewels, jewelry, gold, silver and other precious metals, whether used in business or trade or otherwise and whether the same be in course of transportation or otherwise, and

d. Bridges, tunnels and other instrumentalities of transportation and communication (excluding buildings, their furniture and furnishings, fixed contents and supplies held in storage) unless fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion are the only hazards to be covered; piers, wharves, docks and slips, excluding the risks of fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion; other aids to navigation and transportation, including dry docks and marine railways against all risks.

(21) "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage or expense arising out of, or incident to, the ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

(22) "Miscellaneous insurance," meaning insurance against any other casualty authorized by the charter of the company, not included in this section, which is a proper subject of insurance.

(23) "Mortgage guaranty insurance," meaning insurance against financial loss by reason of nonpayment of principal, interest, or other sums agreed to be paid under the terms of any note or bond or other evidence of indebtedness which constitutes, or is equivalent to, a first lien or charge on the real estate, provided the improvement on the real estate is a residential building or a condominium unit or buildings designed for occupancy by not more than four families. (1899, c. 54, ss. 24, 26; 1903, c. 438, s. 1; Rev., s. 4726; 1911, c. 111, s. 1; C.S., s. 6327; 1945, c. 386; 1947, c. 721; 1953, c. 992; 1967, c. 624, s. 1; 1969, c. 616, s. 1; 1979, c. 714, s. 2; 1986, Ex. Sess., c. 7, ss. 2, 3; 1987, c. 731, s. 1, c. 864, ss. 39, 40; 1991, c. 644, s. 7; 1999-219, s. 5.1; 2001-236, s. 3; 2001-423, s. 3; 2007-127, ss. 1-3; 2008-124, s. 2.3.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. —

Session Laws 2008-124, s. 2.3, effective July 28, 2008, in subdivision (17), near the middle of the paragraph, inserted "either (a)," substituted "(b)" for "where the debt is secured by," and inserted "for" preceding "the purchase of the real estate."

§ 58-7-75. Amount of capital and/or surplus required; impairment of capital or surplus.

The amount of capital and/or surplus requisite to the formation and organization of companies under the provisions of Articles 1 through 64 of this Chapter shall be as follows:

(1) Stock Life Insurance Companies. — A stock corporation may be organized in the manner prescribed in this Chapter and licensed to do the business of life insurance, only when it has paid-in capital of at least six hundred thousand dollars ($600,000) and a paid-in initial surplus of at least nine hundred thousand dollars ($900,000), and it may in addition do the kind of business specified in G.S. 58-7-15(2), without having additional capital or surplus. Every such company shall at all times thereafter maintain a minimum capital of not less than six hundred thousand dollars ($600,000) and a minimum surplus of at least one hundred fifty thousand dollars ($150,000). Provided that, any such corporation may do either or both of the kinds of insurance authorized for stock accident and health insurance companies, as set out in G.S. 58-7-15(3)a. and b., where its charter so permits, and only as long as it maintains a minimum capital and surplus equal to the sum of the minimum capital and surplus requirements of this subdivision and the minimum capital and surplus requirements of subdivision (2) of this section.

(1a) Non-Stock Life Insurance Companies. — A nonstock corporation, not inclusive of a corporation organized pursuant to subdivision (6) of this section, may be organized in the manner prescribed in this Chapter and licensed to do the business of life insurance, only when it has a paid in initial surplus of at least one million five hundred thousand dollars ($1,500,000) and it may in addition do the kind of business specified in G.S. 58-7-15(2), without having additional surplus. Every such corporation shall at all times thereafter maintain a minimum surplus of at least seven hundred fifty thousand dollars ($750,000). Provided that, any such corporation may conduct the kind of insurance authorized for stock accident and health insurance companies, as set out in G.S. 58-7-15(3)a. and b., where its charter so permits, and only as long as it maintains a minimum surplus equal to the sum of the minimum surplus requirements of this subdivision and the minimum surplus requirements of subdivision (2a) of this section.

(2) Stock Accident and Health Insurance Companies.

a. A stock corporation may be organized in the manner prescribed in this Chapter and licensed to do only the kind of insurance specified in G.S. 58-7-15(3)a, when it has paid-in capital of not less than four hundred thousand dollars ($400,000), and a paid-in initial surplus of at least six hundred thousand dollars ($600,000). Every such company shall at all times thereafter maintain a minimum capital of not less than four hundred thousand dollars ($400,000) and a minimum surplus of at least one hundred thousand dollars ($100,000).

b. Any company organized under the provisions of paragraph a of this subdivision may, by the provisions of its original charter or any amendment thereto, acquire the power to do the kind of business specified in G.S. 58-7-15(3)b, if it has a paid-in capital of at least six hundred thousand dollars ($600,000) and a paid-in initial surplus of at least nine hundred thousand dollars ($900,000). Every such company shall at all times maintain a minimum capital of not less than six hundred thousand dollars ($600,000) and a minimum surplus of at least one hundred fifty thousand dollars ($150,000).

(2a) Non-Stock Accident and Health Insurance Companies.

a. A non-stock corporation, not inclusive of a corporation organized pursuant to subdivision (6) of this section, may be organized in the manner prescribed in this Chapter and licensed to do only the kind of insurance specified in G.S. 58-7-15(3)a. when it has a paid in initial surplus of at least one million dollars ($1,000,000). Every such corporation shall at all times thereafter maintain a minimum surplus of at least five hundred thousand dollars ($500,000).

b. Any non-stock corporation organized under the provisions of sub-subdivision a. of this subdivision may, by the provisions of its original charter or any amendment thereto, acquire the power to do the kind of business specified in G.S. 58-7-15(3)b., if it has a paid-in initial surplus of at least one million five hundred thousand dollars ($1,500,000). Every such corporation shall at all times maintain a minimum surplus of at least seven hundred fifty thousand dollars ($750,000).

(3) Stock Fire and Marine Companies. — A stock corporation may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in G.S. 58-7-15 (4), (5), (6), (7), (8), (11), (12), (19), (20), (21) and (22) only when it has a paid-in capital of not less than eight hundred thousand dollars ($800,000) and a paid-in initial surplus of not less than one million two hundred thousand dollars ($1,200,000). Every such company shall at all times thereafter maintain a minimum capital of not less than eight hundred thousand dollars ($800,000) and a minimum surplus of at least two hundred thousand dollars ($200,000). Provided that, any such corporation may do all the kinds of insurance authorized for casualty, fidelity and surety companies, as set out in subdivision (4) of this section where its charter so permits, and when and so long as it meets and thereafter maintains a minimum capital and surplus equal to the sum of the minimum capital and surplus requirements of this

subdivision and the minimum capital and surplus requirements of subdivision (4) of this section.

(4) Stock Casualty and Fidelity and Surety Companies. — A stock corporation may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in G.S. 58-7-15 (3), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (21), (22), and (23) only when it has a paid-in capital of not less than one million dollars ($1,000,000) and a paid-in initial surplus of not less than one million five hundred thousand dollars ($1,500,000). Every such company shall at all times thereafter maintain a minimum capital of not less than one million dollars ($1,000,000) and a minimum surplus of at least two hundred fifty thousand dollars ($250,000).

(5) Mutual Fire and Marine Companies.

a. Limited assessment companies. — A limited assessment mutual company may be organized in the manner prescribed in this Chapter and licensed to do one or more kinds of insurance specified in G.S. 58-7-15 (4), (5), (6), (7), (8), (11), (12), (19), (20), (21) and (22) only when it has no less than five hundred thousand dollars ($500,000) of insurance in not fewer than 500 separate risks subscribed with a paid-in initial surplus of at least three hundred thousand dollars ($300,000), which surplus shall at all times be maintained. The assessment liability of a policyholder of a company organized in accordance with the provisions of this sub-subdivision shall not be limited to less than five annual premiums; provided, the limited assessment company may reduce the assessment liability of its policyholders from such five annual premiums to one additional annual premium when the free surplus of the company amounts to not less than three hundred thousand dollars ($300,000), which surplus shall at all times be maintained.

b. Assessable mutual companies. — An assessable mutual company may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in G.S. 58-7-15 (4), (5) and (6), with an unlimited assessment liability of its policyholders only when it has not less than five hundred thousand dollars ($500,000) of insurance in not fewer than 500 separate risks subscribed with a paid-in initial surplus equal to twice the amount of the maximum net retained liability under the largest policy of insurance issued by the company; but not less than sixty thousand dollars ($60,000); which surplus shall at all times be maintained. Provided the company, when its charter so permits, in addition may be licensed to do one or more of the kinds of insurance specified in G.S. 58-7-15 (7), (8), (11), (12), (19), (20), (21) and (22), with an unlimited assessment liability of its policyholders, when its free surplus amounts to not less than sixty thousand dollars ($60,000), which surplus shall at all times be maintained.

c. Nonassessable mutual companies. — A nonassessable mutual company may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in G.S. 58-7-15 (4), (5), (6), (7), (8), (11), (12), (19), (20), (21) and (22) and may be authorized to issue policies under the terms of which a policyholder is not liable for any assessments in addition to the premium set out in the policy only when it has not less than five hundred thousand dollars ($500,000) of insurance in not fewer than 500 separate risks subscribed with a paid-in initial surplus of not less than eight hundred thousand dollars ($800,000), which surplus shall at all times be maintained.

d. Town or county mutual insurance companies. — A town or county mutual insurance company with unlimited assessment liability may be organized in the manner prescribed in this Chapter and licensed to do the kinds of insurance specified in G.S. 58-7-15(4) only when it has not less than fifty thousand dollars ($50,000) of insurance in force in not fewer than 50 separate risks subscribed with a paid-in initial surplus of not less than fifteen thousand dollars ($15,000), which surplus shall at all times be maintained. A town or county mutual insurance company may, in addition to writing the business specified in G.S. 58-7-15(4) cover in the same policy the hazards usually insured against under an extended coverage endorsement when the company has not less than five hundred thousand dollars ($500,000) of insurance in force in not fewer than 500 separate risks and maintains a surplus at all times of not less than one hundred twenty thousand dollars ($120,000): Provided, that the company may not operate in more than six adjacent counties in this State. Any company authorized under this section before July 1, 1991, shall be permitted to continue to do the same kinds of business that it was authorized to do prior to July 1, 1991, without being required to increase its surplus; however, the insurer shall increase its surplus to the required amounts on or before July 1, 1992. The requirements of this sub-subdivision as to surplus shall apply to such companies as a prerequisite to writing additional lines of business, and to such companies as a prerequisite to commencing business if unlicensed prior to July 1, 1991.

(6) Mutual Life, Accident and Health Insurance Companies. — A non-assessable mutual insurance company may be organized in the manner prescribed in this Chapter, and licensed to do only one or more of the kinds of insurance specified in G.S. 58-7-15 (1), (2) and (3) when it has complied with the requirements of this Chapter and with those set forth in sub-subdivisions a through d of this subdivision, inclusive, whichever shall be applicable.

a. If organized to do only the kinds of insurance specified in G.S. 58-7-15 (1) and (2) the company shall have not less than 500 bona fide applications for life insurance in an aggregate amount not less than five hundred thousand dollars ($500,000), and shall have received from each such applicant in cash the full amount of one annual premium on the policy for which the applicant applied, in an aggregate amount at least equal to ten thousand dollars ($10,000), and shall in addition have a paid-in initial surplus of two hundred thousand dollars ($200,000), and shall have and maintain at all times a minimum surplus of one hundred thousand dollars ($100,000).

b. If organized to do only the kind of insurance specified in paragraph a of G.S. 58-7-15(3) the company shall have not less than 250 bona fide applications for that insurance, and shall have received from each applicant in cash the full amount of one annual premium on the policy for which the applicant applied, in an aggregate amount of at least ten thousand dollars ($10,000), and shall have a paid-in initial surplus of two hundred thousand dollars ($200,000) and shall have and maintain at all times a minimum surplus of one hundred thousand dollars ($100,000).

c. If organized to do the kinds of insurance specified in G.S. 58-7-15 (1) and (3)a, the company shall have complied with the provisions of sub-subdivisions a and b of this subdivision.

d. If organized to do the kind of insurance specified in G.S. 58-7-15(3)b, in addition to the kind or kinds of insurance designated in any one of the preceding sub-subdivisions of this subdivision, the company shall have a paid-in initial surplus of at least five hundred thousand dollars ($500,000) and shall maintain a minimum surplus of at least three hundred thousand dollars ($300,000).

(7) Organization of Mutual Casualty, Fidelity and Surety Companies.

a. Nonassessable, mutual companies. — A mutual insurance company with no assessment liability provided for its policyholders may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in G.S. 58-7-15 (3), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (21) and (22) when it has a minimum paid-in initial surplus of one million dollars ($1,000,000) and not less than five hundred thousand dollars ($500,000) in insurance subscribed in not less than 500 separate risks. The surplus of the company shall at all times be maintained at or above that amount.

b. Assessable mutual companies. — A mutual insurance company with assessment liability provided for its policyholders may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in G.S. 58-7-15 (3), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (21) and (22) when it has a minimum paid-in initial surplus of four hundred thousand dollars ($400,000) and not less than five hundred thousand dollars ($500,000) of insurance subscribed in not less than 500 separate risks. The company shall at all times maintain a surplus in an amount not less than four hundred thousand dollars ($400,000). The assessment liability of a policyholder of the company shall not be limited to less than one annual premium.

(8) Organization of Mutual Multiple Line Companies.

a. Assessable mutual companies. — A company may do all the kinds of insurance authorized to be done by a company organized under the provisions of sub-subdivision (5)a, and sub-subdivision (7)b of this subdivision, where its charter so permits when and if it meets the combined minimum requirements of those sub-subdivisions. The assessment liability of policyholders of such a company shall not be limited to less than one annual premium within any one policy year.

b. Nonassessable mutual companies. — A company may do all the kinds of insurance authorized to be done by a company organized under the provisions of sub-subdivision (5)c, and sub-subdivision (7)a of this subdivision, where its charter so permits when and if it meets the combined minimum requirements of those paragraphs. The policyholders of such a company shall not be subject to any assessment liability.

(9) Repealed by Session Laws 1991, c. 644, s. 32.

(10) Impairment of Capital and/or Surplus. — Whenever the Commissioner finds from a financial statement made by any company, or from a report of examination of any company, that its admitted assets are less than the aggregate amount of its liabilities and its outstanding

capital stock, required minimum surplus, or both, the Commissioner shall determine, in accordance with G.S. 58-2-165 and other applicable provisions of this Chapter, the amount of the impairment of capital, surplus, or both and issue an order in writing requiring the company to eliminate the impairment within such period of not more than 90 days as the Commissioner shall designate. The Commissioner may, by order served upon the company, prohibit the company from issuing any new policies while the impairment exists. If at the expiration of the designated period the company has not satisfied the Commissioner that the impairment has been eliminated, an order for the rehabilitation or liquidation of the company may be entered as provided in Article 30 of this Chapter.

(11) The Commissioner may require an insurer to have and maintain a larger amount of capital or surplus than prescribed in this section, based upon the volume and kinds of insurance transacted by the insurer and on the principles of risk-based capital as determined by the NAIC or the Commissioner. (1899, c. 54, s. 26; 1903, c. 438, s. 4; Rev., s. 4729; 1907, c. 1000, s. 5; 1913, c. 140, s. 2; C.S., s. 6332; 1929, c. 284, s. 1; 1945, c. 386; 1947, c. 721; 1963, c. 943; 1965, c. 947; 1967, c. 300; 1971, c. 536; 1973, c. 686; 1979, c. 421, s. 1; 1983, c. 472; 1985, c. 666, s. 75; 1985 (Reg. Sess., 1986), c. 1013, s. 10; 1989, c. 485, s. 53; 1991, c. 644, s. 32; c. 681, s. 27; 1995, c. 193, s. 17; 2001-223, s. 5.1; 2007-127, s. 4; 2008-124, s. 2.6.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 2.6, effective July 28, 2008, added subdivisions (1a) and (2a).

Article 10.

Miscellaneous Insurer Financial Provisions.

Part 5. Mortgage Guaranty Insurance.

§ 58-10-145. Monoline requirement for mortgage guaranty insurers.

A mortgage guaranty insurance company that transacts any kind of insurance other than mortgage guaranty insurance is not eligible to transact business in this State. Provided, however, that a mortgage guaranty insurance company may, until December 31, 2012, assume reinsurance for "credit insurance," as defined in G.S. 58-7-15(17). (2007-127, s. 7; 2008-124, s. 2.2.)

Editor's Note. —

Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 2.2, effective July 28, 2008, substituted "Monoline" for "Mono-line" in the section heading.

Article 21.

Surplus Lines Act.

§ 58-21-65. Licensing of surplus lines licensee.

(a) No agent or broker licensed by the Commissioner shall procure any contract of surplus lines insurance with any nonadmitted insurer, unless he possesses a current surplus lines insurance license issued by the Commissioner.

(b) The Commissioner shall issue a surplus lines license to any qualified holder of a current property broker's or agent's license, but only when the broker or agent has:

(1) Remitted the fifty dollars ($50.00) annual fee to the Commissioner;
(2) Submitted a completed license application on a form supplied by the Commissioner, and the application has been approved by the Commissioner;
(3) Passed a qualifying examination approved by the Commissioner; except that all holders of a license prior to July 11, 1985 shall be deemed to have passed such an examination; and
(4) Repealed by Session Laws 2004-199, s. 20(c), effective August 17, 2004.

(c) Corporations shall be eligible to be resident surplus lines licensees, upon the following conditions:

(1) The corporate licensee shall list individuals within the corporation who have satisfied all requirements of this Article to become surplus lines licensees; and
(2) Only those individuals listed on the corporate license and who are surplus lines licensees shall transact surplus lines business.

(d) Each surplus lines license shall be issued on September 1 of each year and expire August 31 of the following year unless renewed. Application for renewal shall be made 30 days before the expiration date. The license shall be renewed upon payment of the annual license fee and compliance with the other applicable provisions of this section. Any person who places surplus lines insurance without a valid surplus lines license in effect shall pay a penalty of one thousand dollars ($1,000) and be subject to such other penalties as provided by law.

The clear proceeds of civil penalties provided for in this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(e) Any person who does not renew a surplus lines license and applies for another surplus lines license more than two years after the expiration date of the previous license shall be required to satisfy every condition in this section, including the written exam, before the Commissioner issues another surplus lines license to that person.

(f) A person licensed as a surplus lines licensee under the laws of a state bordering this State may be licensed as a surplus lines licensee under this Article, if: (i) the laws of the bordering state are substantially similar to the provisions of this Article and (ii) the bordering state has a law or regulation substantially similar to this subsection that permits surplus lines licensees licensed under this Article to be licensed by the bordering state and (iii) the person complies with all requirements of this Article and submits himself or herself to the Commissioner's jurisdiction. (1985, c. 688, s. 1; 1985 (Reg. Sess., 1986), c. 928, s. 6; c. 1013, ss. 4, 16; 1987, c. 629, s. 18; c. 752, s. 6; 1987 (Reg. Sess., 1988), c. 975, s. 14; 1991, c. 212, s. 1; c. 644, s. 41; 1998-215, s. 85; 2004-199, s. 20(c); 2008-124, s. 10.2.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 10.2, effective July 28, 2008, substituted "property" for "fire and casualty" in subsection (b).

ARTICLE 24.

Fraternal Benefit Societies.

§ 58-24-185. Exemption of certain societies, orders, and associations.

(a) Nothing contained in this Article shall be so construed as to affect or apply to:

(1) Grand or subordinate lodges of societies, orders or associations now doing business in this State which provide benefits exclusively through local or subordinate lodges;

(2) Orders, societies or associations which admit to membership only persons engaged in one or more crafts or hazardous occupations, in the same or similar lines of business, insuring only their own members and their families, and the ladies' societies or ladies' auxiliaries to such orders, societies or associations;

(3) Domestic societies which limit their membership to employees of a particular city or town, designated firm, business house or corporation which provide for a death benefit of not more than five hundred dollars ($500.00) or disability benefits of not more than three hundred fifty dollars ($350.00) to any person in any one year, or both;

(4) Domestic societies or associations of a purely religious, charitable or benevolent description, which provide for a death benefit of not more than five hundred dollars ($500.00) or for disability benefits of not more than three hundred fifty dollars ($350.00) to any one person in any one year, or both;

(5) An association of local lodges of a society now doing business in this State which provides death benefits not exceeding five hundred dollars ($500.00) to any one person, provided, that the Commissioner may authorize the payment of death benefits not exceeding three thousand dollars ($3,000) to any one person, or may authorize disability benefits not exceeding three hundred dollars ($300.00), or may authorize both payments, in any one year to any one person; or

(6) Any association, whether a fraternal benefit society or not, which was organized before 1880 and whose members are officers or enlisted, regular or reserve, active, retired, or honorably discharged members of the Armed Forces or Sea Services of the United States, and a principal purpose of which is to provide insurance and other benefits to its members and their dependents or beneficiaries.

(b) Any such society or association described in subsections (a)(3) or (a)(4) supra which provides for death or disability benefits for which benefit certificates are issued, and any such society or association included in subsection (a)(4) which has more than 1000 members, shall not be exempted from the provisions of this Article but shall comply with all requirements thereof.

(c) No society which, by the provisions of this section, is exempt from the requirements of this Article, except any society described in subsection (a)(2) supra, shall give or allow, or promise to give or allow to any person any compensation for procuring new members.

(d) Every society which provides for benefits in case of death or disability resulting solely from accident, and which does not obligate itself to pay natural death or sick benefits shall have all of the privileges and be subject to all the applicable provisions and regulations of this Article except that the provisions thereof relating to medical examination, valuations of benefit certificates, and incontestability, shall not apply to the society.

(e) The Commissioner may require from any society or association, by examination or otherwise, such information as will enable the Commissioner to determine whether the society or association is exempt from the provisions of this Article.

(f) Societies, orders, or associations exempted under the provisions of this section shall also be exempt from all other provisions of the general insurance laws of this State. (1987, c. 483, s. 2; 1989, c. 364, s. 2; c. 485, s. 2; 1991, c. 476, s. 1; c. 720, ss. 4, 45, 55; 2007-27, s. 1; 2008-187, s. 12.)

Effect of Amendments. — Session Laws 2008-187, s. 12, effective August 7, 2008, made minor stylistic changes to subdivisions (a)(4) and (a)(5).

ARTICLE 28.

Unauthorized Insurers.

§ 58-28-5. Transacting business without a license prohibited; exceptions.

(a) Except as otherwise provided in this section, it is unlawful for any company to enter into a contract of insurance as an insurer or to transact insurance business in this State as set forth in G.S. 58-28-13 without a license issued by the Commissioner. This section does not apply to the following acts or transactions:

(1) The procuring of a policy of insurance upon a risk within this State where the applicant is unable to procure coverage in the open market with admitted companies and is otherwise in compliance with Article 21 of this Chapter.

(2) Contracts of reinsurance; but not including assumption reinsurance transactions, whereby the reinsuring company succeeds to all of the liabilities of and supplants the ceding company on the insurance contracts that are the subject of the transaction, unless prior approval has been obtained from the Commissioner.

(3) Transactions in this State involving a policy lawfully solicited, written and delivered outside of this State covering only subjects of insurance not resident, located or expressly to be performed in this State at the time of issuance, and which transactions are subsequent to the issuance of such policy.

(4) Transactions in this State involving group life insurance, group annuities, or group, blanket, or franchise accident and health insurance where the master policy for the insurance was lawfully issued and delivered in a state in which the company was authorized to transact business.

(5) Transactions in this State involving all policies of insurance issued before July 1, 1967.

(6) The procuring of contracts of insurance issued to a nuclear insured. As used in this subdivision, "nuclear insured" means a public utility procuring insurance against radioactive contamination and other risks of direct physical loss at a nuclear electric generating plant.

(7) Insurance independently procured, as specified in subsection (b) of this section.

(8) Insurance on vessels or craft, their cargoes, marine builders' risks, marine protection and indemnity, or other risks commonly insured under marine insurance policies, as distinguished from inland marine insurance policies.

(9) Transactions in this State involving commercial aircraft insurance, meaning insurance against (i) loss of or damage resulting from any cause to commercial aircraft and its equipment, (ii) legal liability of the insured for loss or damage to another person's property resulting from the ownership, maintenance, or use of commercial aircraft, and (iii) loss, damage, or expense incident to a liability claim.

(10) An activity in this State by or on the sole behalf of a captive insurer that insures solely the risks of the company's parent and affiliated companies.

(b) Any person in this State may directly procure or directly renew insurance with an eligible surplus lines insurer, as defined in G.S. 58-21-10(3), without the involvement of an agent, broker, or surplus lines licensee, on a risk located or to be performed, in whole or in part, in this State. The person shall, within 30 days after the date the insurance is procured or renewed, file a written report with the Commissioner on forms prescribed by the Commissioner. The report must contain the name and address of the insured; name and address of the insurer; the subject of insurance; a general description of the coverage; the amount of premium currently charged; and any additional information requested by the Commissioner. The report must also contain an affidavit of the insured that states that the full amount or kind of insurance cannot be obtained from insurers that are licensed to do business in this State; and that the insured has made a diligent search among the insurers that are licensed to transact and are actually writing the particular kind and class of insurance in this State. Gross premiums charged for the insurance, less any return premiums, are subject to a tax at the rate of five percent (5%). At the time of filing the report required by this subsection, the insured shall pay the tax to the Commissioner. The Commissioner has the powers specified in G.S. 58-21-90 with respect to the tax levied by this subsection.

(c) This section does not apply to any surviving nonprofit corporation that results from a merger between the nonprofit corporation established by the North Carolina State Bar Council pursuant to Chapter 707 of the 1975 Session Laws of North Carolina and another domestic nonprofit corporation; provided, however, that any such surviving corporation shall register with the North Carolina State Bar Council under G.S. 84-23.1. (1967, c. 909, s. 1; 1971, c. 510, s. 3; 1985, c. 688, s. 2; 1987, c. 727, ss. 4, 5; c. 864, ss. 47, 70; 1991, c. 644, s. 6; 1993, c. 409, s. 26; c. 504, s. 20; 1995, c. 193, s. 30; 1999-219, s. 5.4; 2004-166, s. 4; 2007-305, s. 4; 2008-124, ss. 3.1, 3.2.)

Editor's Note. —
Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. —
Session Laws 2008-124, ss. 3.1 and 3.2, effective July 28, 2008, and applicable to violations that occur on or after that date, substituted "a license" for "certificate of authority" in the section heading; and substituted "G.S. 58-28-13" for "G.S. 58-28-10" in the introductory paragraph of subsection (a).

§ 58-28-10: Repealed by Session Laws 2008-124, s. 3.5, effective July 28, 2008, and applicable to violations that occur on or after that date.

Cross References. — For current provisions as to "transacting insurance business," see G.S. 58-28-12.

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

§ 58-28-12. Transacting insurance business in this State.

Definitions. — As used in this section, G.S. 58-28-13, and G.S. 58-28-14:

(1) "Admitted insurer" means an insurer that is licensed to write insurance in this State.

(2) "Kind of insurance" means one of the types of insurance specified in G.S. 58-7-15.

(3) "Nonadmitted insurer" means an insurer that is not licensed to write insurance in this State.

(4) "Transacting insurance business" or "transact insurance business" means:

  a. The making of or proposing to make, as an insurer, an insurance contract.
  b. The making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety.
  c. The solicitation, taking, or receiving of an application for insurance.
  d. The receiving or collection of any premium, commission, membership fees, assessments, dues, or other consideration for a contract of insurance or any part of the contract of insurance.
  e. The issuance or delivery in this State of a contract of insurance to a resident of this State or to a person authorized to do business in this State.
  f. The solicitation, negotiation, procurement, effectuation, or renewal of a contract of insurance.
  g. The dissemination of information as to coverage or rates; forwarding of an application; delivery of a contract of insurance; inspection of a risk; the fixing of rates; the investigation or adjustment of a claim or loss; the transaction of matters after effectuation of a contract of insurance and arising out of the contract; or any other manner of representing or assisting a person or insurer in transacting insurance business with respect to properties, risks, or exposures located or to be performed in this State.
  h. The transaction of any kind of insurance business specifically recognized as transacting an insurance business within the meaning of this Chapter.
  i. The offering of insurance or the transacting of insurance business.
  j. The offering of an agreement or contract which purports to alter, amend, or void coverage of an insurance contract.
  k. The transaction of any matters before or after the execution of contracts of insurance in contemplation of or arising out of the execution.
  l. The maintaining of any agency or office in this State where any acts in furtherance of an insurance business are transacted, including the execution of contracts of insurance with citizens of this State or any other state.
  m. The maintaining of files or records of contracts of insurance in this State. (2008-124, s. 3.4.)

Editor's Note. — Session Laws 2008-124, s. 12.1, made this section effective July 28, 2008 and applicable to violations that occur on or after that date.

Session Laws 2008-124, s. 11.1 is a severability clause.

§ 58-28-13. Placement of insurance business.

(a) An insurer shall not transact insurance business in this State unless it is an admitted insurer, is exempted by this Article, or is otherwise exempted by this Chapter.

(b) A person shall not transact insurance business or in this State directly or indirectly act as agent for, or otherwise represent or aid on behalf of another, a nonadmitted insurer in the solicitation, negotiation, procurement, or effectuation of insurance, or renewals of insurance; forwarding of applications; delivery of policies or contracts; inspection of risks; fixing of rates; investigation or adjustment of claims or losses; collection or forwarding of premiums; or in any other manner represent or assist the insurer in transacting insurance business.

(c) A person who represents or aids a nonadmitted insurer in violation of this section is subject to penalties or restitution, or both, as set forth in this section.

(d) This section does not prohibit employees, officers, directors, or partners of a commercial insured from acting in the capacity of an insurance manager or buyer in placing insurance on behalf of the employer, provided that the person's compensation is not based on buying insurance.

(e) The venue of an act committed by mail or any other medium is at the point where the matter transmitted by mail or other medium is delivered or issued for delivery or takes effect.

(f) The remedies prescribed in this section are not exclusive. Penalties may also be assessed under Article 63 of this Chapter or G.S. 58-2-161, or both.

(g) If the Commissioner finds a violation of this section, the Commissioner may order the payment of a monetary penalty after considering the factors in G.S. 58-28-14; or petition the Superior Court of Wake County for an order directing payment of restitution as provided in subsection (i) of this section; or both. The monetary penalty shall not exceed five thousand dollars ($5,000) for the first offense and shall not exceed ten thousand dollars ($10,000) for each succeeding offense. Each day during which a violation occurs constitutes a separate violation. The clear proceeds of the penalty shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Payment of the civil penalty under this section shall be in addition to payment of any other penalty for a violation of the criminal laws of this State.

(h) Upon petition of the Commissioner, the Superior Court of Wake County may order the person who committed a violation specified in this section to make restitution in an amount that would make whole any person harmed by the violation. The petition may be made at any time and also in any appeal of any order issued by the Commissioner.

(i) Restitution to the Department for extraordinary administrative expenses incurred in the investigation and hearing of the violation may also be ordered by the court in such amount that would reimburse the Department for the expenses.

(j) Nothing in this section prevents the Commissioner from negotiating a mutually acceptable agreement with any person as to any civil penalty or restitution.

(k) The Attorney General of the State of North Carolina at the request of and upon information from the Commissioner shall initiate a civil action in behalf of the Commissioner in any county of the State in which a violation under this section occurs to recover the penalty provided. Service of process upon the nonadmitted insurer shall be made under G.S. 58-28-40. (2008-124, s. 3.4.)

Editor's Note. — Session Laws 2008-124, s. 12.1, made this section effective July 28, 2008, and applicable to violations that occur on or after that date.

Session Laws 2008-124, s. 11.1 is a severability clause.

§ 58-28-14. Monetary penalty; factors to be considered.

In determining the amount of the penalty under G.S. 58-28-13, the Commissioner shall consider:

(1) The amount of money that inured to the benefit of the violator as a result of the violation,

(2) Whether the violation was committed willfully.

(3) The prior record of the violator in complying or failing to comply with laws, rules, or orders applicable to the violator.

(4) The failure of the violator to provide timely and complete responses to the Department's inquiries about the violator's insurance activities in North Carolina.

(5) The extent and degree to which the violator marketed its insurance product in this State.

(6) The extent to which the violator's marketing materials, including fax solicitations, Internet Web sites, circulars, or other forms of advertisement or solicitations through any medium, were deceptive or misleading to residents of this State.

(7) The number of residents of this State who enrolled in the violator's insurance plan.

(8) The number of policies and amount of insurance coverage issued by the violator to residents of this State.

(9) The failure of the violator to promptly refund premiums and other consideration paid by residents of this State for insurance coverage issued by the violator upon requests by the residents of this State or the Department.

(10) The extent and degree of harm to residents of this State. In assessing the extent and degree of harm, the Commissioner shall consider, among other things, the amount of premiums and other consideration paid by residents of this State for coverage issued by the violator, the failure of the violator to pay claims made by residents of this State, and number and dollar amount of claims made by residents of this State that the violator has failed to pay.

(11) Whether the violator has a prior record of violating this Article or the unauthorized insurance laws of any other state. "Prior record" includes final administrative orders issued by the Commissioner or insurance regulator of any other state; federal or state criminal convictions, including pleas of guilty or nolo contendere; civil judgments; and written settlement agreements of state administrative proceedings, state or federal criminal proceedings, or civil lawsuits against the violator or any entity of which the violator was either a principal or owner. (2008-124, s. 3.4.)

Editor's Note. — Session Laws 2008-124, s. 12.1, made this section effective July 28, 2008, and applicable to violations that occur on or after that date.

Session Laws 2008-124, s. 11.1 is a severability clause.

§ 58-28-40. Service of process on Secretary of State as agent for unauthorized company.

(a) Any act of entering into a contract of insurance as an insurer or transacting insurance business in this State, as set forth in G.S. 58-28-12 by an unauthorized, foreign or alien company, shall be equivalent to and shall constitute an appointment by such company of the Secretary of State to be its true and lawful attorney upon whom may be served all lawful process in any action or proceeding against it arising out of a violation of G.S. 58-28-5, and any of said acts shall be a signification of its agreement that any such process against it, which is so served, shall be of the same legal force and validity as if in fact served upon the company.

(b) Service of process on the Secretary of State shall be made by the sheriff delivering to and leaving with the Secretary of State duplicate copies of such process, notice or demand. Service shall be deemed complete when the Secretary of State is so served. The Secretary of State shall endorse upon both copies the time of receipt and shall forthwith send one of such copies by registered mail, with return receipt requested, to such insurer at its last known principal place of business as shown on the process, notice or demand served on the Secretary of State. The Commissioner and the Attorney General shall see that such address is included on the process, notice or demand which is served upon the Secretary of State. A copy of the complaint or order of the clerk extending the time for filing the complaint must be mailed to the insurer with the copy of the summons. When a copy of the complaint is not mailed with the summons, the Secretary of State shall mail a copy of the complaint when it is served on him in the same manner as the copy of summons is required to be mailed.

(c) Upon the return to the Secretary of State of the requested return receipt showing delivery and acceptance of such registered mail, or upon the return of such registered mail showing refusal thereof by such unauthorized insurer, the Secretary of State shall note thereon the date of such return to him and shall attach either the return receipt or such refused mail including the envelope, as the case may be, to the copy of the process, notice or demand theretofore retained by him and shall mail the same to the clerk of the court in which such action or proceeding is pending and in respect of which such process, notice or demand was issued. Such mailing, in addition to the return by the sheriff, shall constitute the due return required by law. The clerk of the court shall thereupon file the same as a paper in such action or proceeding.

(d) Service made under this section shall have the same legal force and validity as if the service had been made personally in this State. The refusal of any such unauthorized insurer to accept delivery of the registered mail provided for in subsection (b) of this section or the refusal to sign the return receipt shall not affect the validity of such service; and any foreign or alien insurer refusing to accept delivery of such registered mail shall be charged with knowledge of the contents of any process, notice or demand contained therein.

(e) Whenever service of process is made upon the Secretary of State as herein provided the defendant unauthorized insurer shall have 30 days from the date when the defendant receives or refuses to accept the registered mail containing the copy of the complaint sent as in this section provided in which to appear and answer the complaint in the action or proceeding so instituted. Entries on the defendant's return receipt or the refused registered mail shall be sufficient evidence of such date. If the date of acceptance or refusal to accept the registered mail cannot be determined from the entries on the return receipt or from notations of the postal authorities on the envelope, then the date when the defendant accepted or refused to accept the registered mail shall be deemed to be the date that the return receipt or the registered mail was received back by the Secretary of State.

(f) The court in any action or proceeding in which service is made in the manner provided in the above paragraph may, in its discretion, order such postponement as may be necessary to afford such company reasonable opportunity to defend such action or proceeding.

(g) The Secretary of State shall keep a summarized record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(h) Nothing herein contained shall limit or affect the right to serve any process, notice or demand to be served upon an insurer in any other manner now or hereafter permitted by law.

(i) No judgment by default shall be entered in any such action or proceeding until the expiration of 30 days from the date of the filing of the affidavit of compliance. (1967, c. 909, s. 1; 1987, c. 864, ss. 62-64; 1991, c. 720, s. 4; 2008-124, s. 3.3.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 3.3, effective July 28, 2008, and applicable to violations that occur on or after that date, substituted "G.S. 58-28-12" for "G.S. 58-28-10" in subsection (a).

ARTICLE 33.

Licensing of Agents, Brokers, Limited Representatives, and Adjusters.

§ 58-33-125. (Effective January 1, 2009) Fees.

(a) The following table indicates the annual fees that are required for the respective licenses issued, renewed, or cancelled under this Article and Article 21 of this Chapter:

Adjuster	$75.00
Adjuster, crop hail only	20.00
Agent appointment cancellation (paid by insurer)	10.00
Agent appointment, individual	10.00
Agent appointment, Medicare supplement and long-term care, individual	10.00
Agent, overseas military	20.00
Broker, nonresident	50.00
Broker, resident	50.00
Business entity	100.00
Limited representative	20.00
Limited representative cancellation (paid by insurer)	10.00
Motor vehicle damage appraiser	75.00
Surplus lines licensee, corporate	100.00
Surplus lines licensee, individual	50.00

(b) Whenever a temporary license is issued under this Article, the fee shall be at the same rate as provided in subsection (a) of this section; and any amounts so paid for a temporary license may be credited against the fee required for an appointment by the sponsoring company.

(c) Any person who is not licensed and who is required by law or administrative rule to secure a license shall, upon application for licensing, pay to the Commissioner a fee of fifty dollars ($50.00). If additional licensing for other kinds of insurance is requested, a fee of fifty dollars ($50.00) shall be paid to the Commissioner upon application for licensing for each additional kind of insurance.

G.S. 58-33-125 is set out twice. See note.

In addition to the fees prescribed by this subsection, any person applying for a supplemental license to sell Medicare supplement and long-term care insurance policies shall pay an additional fee of fifty dollars ($50.00) upon application for licensing for those kinds of insurance.

(d) The requirement for an examination, prelicensing education, continuing education, or a registration fee does not apply to agents for domestic farmers' mutual assessment fire insurance companies or associations who solicit and sell only those kinds of insurance specified in G.S. 58-7-75(5)d for those companies or associations.

(e) A resident licensee may obtain a duplicate photo-bearing license at times and places within this State that the Commissioner considers necessary and reasonable to serve the convenience of both the Commissioner and the licensee. The Commissioner may contract directly with persons for processing of duplicate photo-bearing licenses, and the contract shall not be subject to Article 3 of Chapter 143 of the General Statutes. The Commissioner may charge a reasonable fee for duplicating a photo-bearing license in an amount that offsets the costs to the Department of duplicating the license, including costs associated with any contract entered into pursuant to this subsection.

(f) Repealed by Session Laws 2007-507, s. 7, effective January 1, 2008, and applicable to fees or charges due, and actions occurring, on or after that date.

(g) All fees prescribed by this section are nonrefundable. The fees in subsection (a) of this section are in lieu of any other license fees. The fee for an individual agent appointment under subsection (a) of this section applies to each license.

(h) Fees paid by an insurer on behalf of a person who is licensed or appointed to represent the insurer are payable to the Commissioner when billed. Billing of insurers for renewal fees must be on an annual basis. The frequency for billing insurers for other licensing and appointment fees is determined by the Commissioner and may be daily, monthly, or quarterly. An electronic payment made through the NAIC or an affiliate of NAIC is considered a payment to the Commissioner. (1987, c. 629, s. 1; c. 864, ss. 84, 85; 1989 (Reg. Sess., 1990), c. 941, ss. 4-5; c. 1021, s. 9; c. 1069, s. 14; 1991, c. 476, s. 3; c. 721, s. 7; 1991 (Reg. Sess., 1992), c. 837, s. 3; 2000-122, s. 1; 2007-507, s. 7; 2008-107, s. 29.10(a).)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Editor's Note. — Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 29.10(a), effective January 1, 2009, and applicable to fees billed on or after that date, in subsection (a), substituted "10.00" for "20.00" on the fourth line of the fee table, deleted the former sixth line of the fee table, which related to fees for agent appointment, Medicare supplement, and long-term care for nonindividuals, deleted the second paragraph, which read: "These fees are in lieu of any other license fees. Fees paid by an insurer on behalf of a person who is licensed or appointed to represent the insurer shall be paid to the Commissioner on a quarterly or monthly basis, in the discretion of the Commissioner"; in subsection (c), substituted "licensing" for "registration" three times, and substituted "who is not licensed and" for "not registered" near the beginning; in subsection (d), subsituted "those companies" for "such companies" near the end; in subsection (g), added the last two sentences; and added subsection (h).

Article 35.

Insurance Premium Financing.

§ 58-35-85. Procedure for cancellation of insurance contract upon default; return of unearned premiums; collection of cash surrender value.

CASE NOTES

Cited in Egen v. Excalibur Resort Prof'l, — N.C. App. —, 663 S.E.2d 914, 2008 N.C. App. LEXIS 1469 (Aug. 5, 2008).

Article 36.

North Carolina Rate Bureau.

§ 58-36-1. North Carolina Rate Bureau created.

CASE NOTES

Fleet Policy is Exception to North Carolina Rate Bureau's Jurisdiction. — Because an insured's policy was a fleet policy, it was not subject to the North Carolina Rate Bureau's jurisdiction. Therefore, the insurer could permissibly use the insurer's own form for selection or rejection of underinsured motorist coverage. Great American Ins. Co. v. Freeman, — N.C. App. —, 665 S.E.2d 536, 2008 N.C. App. LEXIS 1612 (2008).

§ 58-36-85. Termination of a nonfleet private passenger motor vehicle insurance policy.

(a) Definitions. — The following definitions apply in this section:

(1) Policy. — A nonfleet private passenger motor vehicle liability insurance policy, including a policy that provides medical payments, uninsured motorist, or underinsured motorist coverage, whose named insured is one individual or two or more individuals who reside in the same household.

(2) Terminate. — To cancel or refuse to renew a policy.

(b) Termination Restrictions. — An insurer shall not terminate a policy for a reason that is not specified in G.S. 58-2-164(g), 58-36-65(g), or 58-37-50. A termination of a policy is not effective unless the insurer either has notified a named insured of the termination by sending a written termination notice by first class mail to the insured's last known address or is not required by this subsection to send a written termination notice. Proof of mailing of a written termination notice is proof that the notice was sent.

An insurer is not required to send a written termination notice if any of the following applies:

(1) The insurer has manifested its willingness to renew the policy by issuing or offering to issue a renewal policy, a certificate, or other evidence of renewal.

(2) The insurer has manifested its willingness to renew the policy by any means not described in subdivision (1) of this subsection, including mailing a premium notice or expiration notice by first class mail to the named insured and the failure of the insured to pay the required premium on or before the premium due date.

(3) A named insured has given written notification to the insurer or its agent that the named insured wants the policy to be terminated.

(c) Contents of Notice. — The form of a written termination notice used by an insurer must be approved by the Commissioner before it is used. A written termination notice must state the reason for the termination and the date the termination is effective. If the policy is terminated for nonpayment of the premium, the effective date may be 15 days from the date the notice is mailed. If the policy is terminated for any other reason, the effective date must be at least 60 days after the notice is mailed. A written termination notice must include or be accompanied by a statement that advises the insured of the penalty for driving a vehicle without complying with Article 13 of Chapter 20 of the General Statutes and that the insured has the right to request the Department to review the termination.

(d) Request for Review. — An insured who receives from an insurer a written termination notice may obtain review of the termination by filing with the Department a written request for review within 10 days after receiving a termination notice that complies with subsection (c) of this section. An insured who does not file a request within the required time waives the right to a review.

(e) Administrative Review. — When the Department receives a written request to review a termination, it must investigate and determine the reason for the termination. The Department shall issue a letter requiring one of the following upon completing its review:

(1) Approval of the termination, if it finds the termination complies with the law.

(2) Renewal or reinstatement of the policy, if it finds the termination does not comply with the law.

(3) Renewal or reinstatement of the policy and payment by the insurer of the costs of the Department's review, not to exceed one thousand dollars ($1,000), if it finds the termination does not comply with the law and the insurer willfully violated this section.

The Department shall mail the letter to the insured and the insurer. An insured or an insurer who disagrees with the determination of the Department in the letter may file a petition for a contested case under Article 3A of Chapter 150B of the General Statutes and the rules adopted by the Commissioner to implement that Article. The petition must be filed within 30 days after receiving the copy of the letter.

(f) Delegation. — The Commissioner shall designate an employee or a deputy to conduct the departmental review of a termination. The Commissioner may designate a deputy to conduct a contested case hearing concerning a termination. The Commissioner may not designate a deputy who conducted the departmental review of a termination to conduct a contested case hearing concerning the same termination.

(g) Effect of Review on Policy. — A policy shall remain in effect during administrative and judicial review of an insurer's action to terminate the policy.

(h) Liability Limit. — There is no liability on the part of and no cause of action for defamation or invasion of privacy arises against an insurer, an insurer's authorized representatives, agents, or employees, or a licensed insurance agent or broker for a communication or statement made concerning a written notice of termination.

(i) Records. — An insurer shall keep a record of a termination for three years. (1993 (Reg. Sess., 1994), c. 761, s. 30; 1995, c. 517, s. 22; 2008-124, s. 4.2.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 4.2, effective July 28, 2008, substituted "G.S. 58-2-164(g), 58-36-65(g), or 58-37-50" for "G.S. 58-37-50(1) through (5) or G.S. 58-36-65(g)" in the introductory paragraph of subsection (b).

ARTICLE 40.

Regulation of Insurance Rates.

§ 58-40-5. Definitions.

CASE NOTES

Applied in Elshoff v. N.C. Bd. of Nursing, — N.C. App. —, 658 S.E.2d 65, 2008 N.C. App. LEXIS 538 (Mar. 18, 2008).

§ 58-40-10. Other definitions.

CASE NOTES

Fleet Policy. — Pursuant to G.S. 58-40-10(2), a fleet policy is an insurance policy that covers five or more vehicles leased or owned by an employer. Fleet policies do not fall within any of the exceptions to North Carolina's Motor Vehicle Safety and Financial Responsibility Act, G.S. 20-279.1 to 20-279.39; accordingly, the terms of the Act apply to a fleet policy. Great American Ins. Co. v. Freeman, — N.C. App. —, 665 S.E.2d 536, 2008 N.C. App. LEXIS 1612 (2008).

ARTICLE 48.

Postassessment Insurance Guaranty Association.

§ 58-48-5. Purpose of Article.

CASE NOTES

Liability for Attorney Fees. — When the North Carolina Industrial Commission ordered the payment of attorney's fees pursuant to G.S. 97-88 in a case in which the Tennessee Insurance Guaranty Association was involved, it was possible that the Commission intended to hold the Association liable for these fees because, under both TCA §§ 56-12-107(a)(2) and 56-12-102, and G.S. 58-48-5, the Association stepped into the shoes of the employer's insolvent insurer, assuming the insurer's obligations to the extent the obligations were defined by statute. Swift v. Richardson Sports Ltd Partners, — N.C. App. —, 658 S.E.2d 674, 2008 N.C. App. LEXIS 78 (2008).

ARTICLE 50.

General Accident and Health Insurance Regulations.

Part 2. PPOs, Utilization Review and Grievances.

§ 58-50-61. Utilization review.

(a) Definitions. — As used in this section, in G.S. 58-50-62, and in Part 4 of this Article, the term:

(1) "Certificate of coverage" includes a policy of insurance issued to an individual person or a franchise policy issued pursuant to G.S. 58-51-90.

(1a) "Clinical peer" means a health care professional who holds an unrestricted license in a state of the United States, in the same or similar specialty, and routinely provides the health care services subject to utilization review.

(2) "Clinical review criteria" means the written screening procedures, decision abstracts, clinical protocols, and practice guidelines used by an insurer to determine medically necessary services and supplies.

(3) "Covered person" means a policyholder, subscriber, enrollee, or other individual covered by a health benefit plan. "Covered person" includes another person, other than the covered person's provider, who is authorized to act on behalf of a covered person.

(4) "Emergency medical condition" means a medical condition manifesting itself by acute symptoms of sufficient severity including, but not limited to, severe pain, or by acute symptoms developing from a chronic medical condition that would lead a prudent layperson, possessing an average knowledge of health and medicine, to reasonably expect the absence of immediate medical attention to result in any of the following:

  a. Placing the health of an individual, or with respect to a pregnant woman, the health of the woman or her unborn child, in serious jeopardy.

  b. Serious impairment to bodily functions.

  c. Serious dysfunction of any bodily organ or part.

(5) "Emergency services" means health care items and services furnished or required to screen for or treat an emergency medical condition until the condition is stabilized, including prehospital care and ancillary services routinely available to the emergency department.

(6) "Grievance" means a written complaint submitted by a covered person about any of the following:

  a. An insurer's decisions, policies, or actions related to availability, delivery, or quality of health care services. A written complaint submitted by a covered person about a decision rendered solely on the basis that the health benefit plan contains a benefits exclusion for the health care service in question is not a grievance if the exclusion of the specific service requested is clearly stated in the certificate of coverage.

  b. Claims payment or handling; or reimbursement for services.

  c. The contractual relationship between a covered person and an insurer.

  d. The outcome of an appeal of a noncertification under this section.

(7) "Health benefit plan" means any of the following if offered by an insurer: an accident and health insurance policy or certificate; a nonprofit hospital or medical service corporation contract; a health maintenance organization subscriber contract; or a plan provided by a multiple employer welfare arrangement. "Health benefit plan" does not mean any plan implemented or administered through the Department of Health and Human Services or its representatives. "Health benefit plan" also does not mean any of the following kinds of insurance:

  a. Accident.

  b. Credit.

  c. Disability income.

  d. Long-term or nursing home care.

e. Medicare supplement.
f. Specified disease.
g. Dental or vision.
h. Coverage issued as a supplement to liability insurance.
i. Workers' compensation.
j. Medical payments under automobile or homeowners.
k. Hospital income or indemnity.
l. Insurance under which benefits are payable with or without regard to fault and that is statutorily required to be contained in any liability policy or equivalent self-insurance.

(8) "Health care provider" means any person who is licensed, registered, or certified under Chapter 90 of the General Statutes or the laws of another state to provide health care services in the ordinary care of business or practice or a profession or in an approved education or training program; a health care facility as defined in G.S. 131E-176(9b) or the laws of another state to operate as a health care facility; or a pharmacy.

(9) "Health care services" means services provided for the diagnosis, prevention, treatment, cure, or relief of a health condition, illness, injury, or disease.

(10) "Insurer" means an entity that writes a health benefit plan and that is an insurance company subject to this Chapter, a service corporation under Article 65 of this Chapter, a health maintenance organization under Article 67 of this Chapter, or a multiple employer welfare arrangement under Article 49 of this Chapter.

(11) "Managed care plan" means a health benefit plan in which an insurer either (i) requires a covered person to use or (ii) creates incentives, including financial incentives, for a covered person to use providers that are under contract with or managed, owned, or employed by the insurer.

(12) "Medically necessary services or supplies" means those covered services or supplies that are:
a. Provided for the diagnosis, treatment, cure, or relief of a health condition, illness, injury, or disease.
b. Except as allowed under G.S. 58-3-255, not for experimental, investigational, or cosmetic purposes.
c. Necessary for and appropriate to the diagnosis, treatment, cure, or relief of a health condition, illness, injury, disease, or its symptoms.
d. Within generally accepted standards of medical care in the community.
e. Not solely for the convenience of the insured, the insured's family, or the provider.

For medically necessary services, nothing in this subdivision precludes an insurer from comparing the cost-effectiveness of alternative services or supplies when determining which of the services or supplies will be covered.

(13) "Noncertification" means a determination by an insurer or its designated utilization review organization that an admission, availability of care, continued stay, or other health care service has been reviewed and, based upon the information provided, does not meet the insurer's requirements for medical necessity, appropriateness, health care setting, level of care or effectiveness, or does not meet the prudent layperson standard for coverage of emergency services in G.S. 58-3-190, and the requested service is therefore denied, reduced, or terminated. A "noncertification" is not a decision rendered solely on

the basis that the health benefit plan does not provide benefits for the health care service in question, if the exclusion of the specific service requested is clearly stated in the certificate of coverage. A "noncertification" includes any situation in which an insurer or its designated agent makes a decision about a covered person's condition to determine whether a requested treatment is experimental, investigational, or cosmetic, and the extent of coverage under the health benefit plan is affected by that decision.

(14) "Participating provider" means a provider who, under a contract with an insurer or with an insurer's contractor or subcontractor, has agreed to provide health care services to covered persons in return for direct or indirect payment from the insurer, other than coinsurance, copayments, or deductibles.

(15) "Provider" means a health care provider.

(16) "Stabilize" means to provide medical care that is appropriate to prevent a material deterioration of the person's condition, within reasonable medical probability, in accordance with the HCFA (Health Care Financing Administration) interpretative guidelines, policies, and regulations pertaining to responsibilities of hospitals in emergency cases (as provided under the Emergency Medical Treatment and Labor Act, section 1867 of the Social Security Act, 42 U.S.C.S. § 1395dd), including medically necessary services and supplies to maintain stabilization until the person is transferred.

(17) "Utilization review" means a set of formal techniques designed to monitor the use of or evaluate the clinical necessity, appropriateness, efficacy or efficiency of health care services, procedures, providers, or facilities. These techniques may include:

a. Ambulatory review. — Utilization review of services performed or provided in an outpatient setting.

b. Case management. — A coordinated set of activities conducted for individual patient management of serious, complicated, protracted, or other health conditions.

c. Certification. — A determination by an insurer or its designated URO that an admission, availability of care, continued stay, or other service has been reviewed and, based on the information provided, satisfies the insurer's requirements for medically necessary services and supplies, appropriateness, health care setting, level of care, and effectiveness.

d. Concurrent review. — Utilization review conducted during a patient's hospital stay or course of treatment.

e. Discharge planning. — The formal process for determining, before discharge from a provider facility, the coordination and management of the care that a patient receives after discharge from a provider facility.

f. Prospective review. — Utilization review conducted before an admission or a course of treatment including any required preauthorization or precertification.

g. Retrospective review. — Utilization review of medically necessary services and supplies that is conducted after services have been provided to a patient, but not the review of a claim that is limited to an evaluation of reimbursement levels, veracity of documentation, accuracy of coding, or adjudication for payment. Retrospective review includes the review of claims for emergency services to determine whether the prudent layperson standard in G.S. 58-3-190 has been met.

h. Second opinion. — An opportunity or requirement to obtain a clinical evaluation by a provider other than the provider originally making a recommendation for a proposed service to assess the clinical necessity and appropriateness of the proposed service.

(18) "Utilization review organization" or "URO" means an entity that conducts utilization review under a managed care plan, but does not mean an insurer performing utilization review for its own health benefit plan.

(b) Insurer Oversight. — Every insurer shall monitor all utilization review carried out by or on behalf of the insurer and ensure compliance with this section. An insurer shall ensure that appropriate personnel have operational responsibility for the conduct of the insurer's utilization review program. If an insurer contracts to have a URO perform its utilization review, the insurer shall monitor the URO to ensure compliance with this section, which shall include:

(1) A written description of the URO's activities and responsibilities, including reporting requirements.

(2) Evidence of formal approval of the utilization review organization program by the insurer.

(3) A process by which the insurer evaluates the performance of the URO.

(c) Scope and Content of Program. — Every insurer shall prepare and maintain a utilization review program document that describes all delegated and nondelegated review functions for covered services including:

(1) Procedures to evaluate the clinical necessity, appropriateness, efficacy, or efficiency of health services.

(2) Data sources and clinical review criteria used in decision making.

(3) The process for conducting appeals of noncertifications.

(4) Mechanisms to ensure consistent application of review criteria and compatible decisions.

(5) Data collection processes and analytical methods used in assessing utilization of health care services.

(6) Provisions for assuring confidentiality of clinical and patient information in accordance with State and federal law.

(7) The organizational structure (e.g., utilization review committee, quality assurance, or other committee) that periodically assesses utilization review activities and reports to the insurer's governing body.

(8) The staff position functionally responsible for day-to-day program management.

(9) The methods of collection and assessment of data about underutilization and overutilization of health care services and how the assessment is used to evaluate and improve procedures and criteria for utilization review.

(d) Program Operations. — In every utilization review program, an insurer or URO shall use documented clinical review criteria that are based on sound clinical evidence and that are periodically evaluated to assure ongoing efficacy. An insurer may develop its own clinical review criteria or purchase or license clinical review criteria. Criteria for determining when a patient needs to be placed in a substance abuse treatment program shall be either (i) the diagnostic criteria contained in the most recent revision of the American Society of Addiction Medicine Patient Placement Criteria for the Treatment of Substance-Related Disorders or (ii) criteria adopted by the insurer or its URO. The Department, in consultation with the Department of Health and Human Services, may require proof of compliance with this subsection by a plan or URO.

Qualified health care professionals shall administer the utilization review program and oversee review decisions under the direction of a medical doctor. A medical doctor licensed to practice medicine in this State shall evaluate the clinical appropriateness of noncertifications. Compensation to persons involved in utilization review shall not contain any direct or indirect incentives for them to make any particular review decisions. Compensation to utilization reviewers shall not be directly or indirectly based on the number or type of noncertifications they render. In issuing a utilization review decision, an insurer shall: obtain all information required to make the decision, including pertinent clinical information; employ a process to ensure that utilization reviewers apply clinical review criteria consistently; and issue the decision in a timely manner pursuant to this section.

(e) Insurer Responsibilities. — Every insurer shall:

(1) Routinely assess the effectiveness and efficiency of its utilization review program.

(2) Coordinate the utilization review program with its other medical management activity, including quality assurance, credentialing, provider contracting, data reporting, grievance procedures, processes for assessing satisfaction of covered persons, and risk management.

(3) Provide covered persons and their providers with access to its review staff by a toll-free or collect call telephone number whenever any provider is required to be available to provide services which may require prior certification to any plan enrollee. Every insurer shall establish standards for telephone accessibility and monitor telephone service as indicated by average speed of answer and call abandonment rate, on at least a month-by-month basis, to ensure that telephone service is adequate, and take corrective action when necessary.

(4) Limit its requests for information to only that information that is necessary to certify the admission, procedure or treatment, length of stay, and frequency and duration of health care services.

(5) Have written procedures for making utilization review decisions and for notifying covered persons of those decisions.

(6) Have written procedures to address the failure or inability of a provider or covered person to provide all necessary information for review. If a provider or covered person fails to release necessary information in a timely manner, the insurer may deny certification.

(f) Prospective and Concurrent Reviews. — As used in this subsection, "necessary information" includes the results of any patient examination, clinical evaluation, or second opinion that may be required. Prospective and concurrent determinations shall be communicated to the covered person's provider within three business days after the insurer obtains all necessary information about the admission, procedure, or health care service. If an insurer certifies a health care service, the insurer shall notify the covered person's provider. For a noncertification, the insurer shall notify the covered person's provider and send written or electronic confirmation of the noncertification to the covered person. In concurrent reviews, the insurer shall remain liable for health care services until the covered person has been notified of the noncertification.

(g) Retrospective Reviews. — As used in this subsection, "necessary information" includes the results of any patient examination, clinical evaluation, or second opinion that may be required. For retrospective review determinations, an insurer shall make the determination within 30 days after receiving all necessary information. For a certification, the insurer may give written notification to the covered person's provider. For a noncertification, the insurer shall give written notification to the covered person and the covered person's provider within five business days after making the noncertification.

(h) Notice of Noncertification. — A written notification of a noncertification shall include all reasons for the noncertification, including the clinical rationale, the instructions for initiating a voluntary appeal or reconsideration of the noncertification, and the instructions for requesting a written statement of the clinical review criteria used to make the noncertification. An insurer shall provide the clinical review criteria used to make the noncertification to any person who received the notification of the noncertification and who follows the procedures for a request. An insurer shall also inform the covered person in writing about the availability of assistance from the Managed Care Patient Assistance Program, including the telephone number and address of the Program.

(i) Requests for Informal Reconsideration. — An insurer may establish procedures for informal reconsideration of noncertifications and, if established, the procedures shall be in writing. After a written notice of noncertification has been issued in accordance with subsection (h) of this section, the reconsideration shall be conducted between the covered person's provider and a medical doctor licensed to practice medicine in this State designated by the insurer. An insurer shall not require a covered person to participate in an informal reconsideration before the covered person may appeal a noncertification under subsection (j) of this section. If, after informal reconsideration, the insurer upholds the noncertification decision, the insurer shall issue a new notice in accordance with subsection (h) of this section. If the insurer is unable to render an informal reconsideration decision within 10 business days after the date of receipt of the request for an informal reconsideration, it shall treat the request for informal reconsideration as a request for an appeal; provided that the requirements of subsection (k) of this section for acknowledging the request shall apply beginning on the day the insurer determines an informal reconsideration decision cannot be made before the tenth business day after receipt of the request for an informal reconsideration.

(j) Appeals of Noncertifications. — Every insurer shall have written procedures for appeals of noncertifications by covered persons or their providers acting on their behalves, including expedited review to address a situation where the time frames for the standard review procedures set forth in this section would reasonably appear to seriously jeopardize the life or health of a covered person or jeopardize the covered person's ability to regain maximum function. Each appeal shall be evaluated by a medical doctor licensed to practice medicine in this State who was not involved in the noncertification.

(k) Nonexpedited Appeals. — Within three business days after receiving a request for a standard, nonexpedited appeal, the insurer shall provide the covered person with the name, address, and telephone number of the coordinator and information on how to submit written material. For standard, nonexpedited appeals, the insurer shall give written notification of the decision, in clear terms, to the covered person and the covered person's provider within 30 days after the insurer receives the request for an appeal. If the decision is not in favor of the covered person, the written decision shall contain:

(1) The professional qualifications and licensure of the person or persons reviewing the appeal.
(2) A statement of the reviewers' understanding of the reason for the covered person's appeal.
(3) The reviewers' decision in clear terms and the medical rationale in sufficient detail for the covered person to respond further to the insurer's position.
(4) A reference to the evidence or documentation that is the basis for the decision, including the clinical review criteria used to make the determination, and instructions for requesting the clinical review criteria.
(5) A statement advising the covered person of the covered person's right to request a second-level grievance review and a description of the procedure for submitting a second-level grievance under G.S. 58-50-62.

(6) Notice of the availability of assistance from the Managed Care Patient Assistance Program, including the telephone number and address of the Program.

(*l*) Expedited Appeals. — An expedited appeal of a noncertification may be requested by a covered person or his or her provider acting on the covered person's behalf only when a nonexpedited appeal would reasonably appear to seriously jeopardize the life or health of a covered person or jeopardize the covered person's ability to regain maximum function. The insurer may require documentation of the medical justification for the expedited appeal. The insurer shall, in consultation with a medical doctor licensed to practice medicine in this State, provide expedited review, and the insurer shall communicate its decision in writing to the covered person and his or her provider as soon as possible, but not later than four days after receiving the information justifying expedited review. The written decision shall contain the provisions specified in subsection (k) of this section. If the expedited review is a concurrent review determination, the insurer shall remain liable for the coverage of health care services until the covered person has been notified of the determination. An insurer is not required to provide an expedited review for retrospective noncertifications.

(m) Disclosure Requirements. — In the certificate of coverage and member handbook provided to covered persons, an insurer shall include a clear and comprehensive description of its utilization review procedures, including the procedures for appealing noncertifications and a statement of the rights and responsibilities of covered persons, including the voluntary nature of the appeal process, with respect to those procedures. An insurer shall also include in the certificate of coverage and the member handbook information about the availability of assistance from the Managed Care Patient Assistance Program, including the telephone number and address of the Program. An insurer shall include a summary of its utilization review procedures in materials intended for prospective covered persons. An insurer shall print on its membership cards a toll-free telephone number to call for utilization review purposes.

(n) Maintenance of Records. — Every insurer and URO shall maintain records of each review performed and each appeal received or reviewed, as well as documentation sufficient to demonstrate compliance with this section. The maintenance of these records, including electronic reproduction and storage, shall be governed by rules adopted by the Commissioner that apply to insurers. These records shall be retained by the insurer and URO for a period of five years or, for domestic companies, until the Commissioner has adopted a final report of a general examination that contains a review of these records for that calendar year, whichever is later.

(o) Violation. — A violation of this section subjects an insurer to G.S. 58-2-70. (1997-443, s. 11A.122; 1997-519, s. 4.1; 1999-116, s. 1; 1999-391, ss. 1-4; 2001-417, ss. 2-7; 2001-416, ss. 4.4, 5; 2003-105, s. 1; 2005-223, s. 8; 2008-124, s. 5.1.)

Editor's Note. —
Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 5.1, effective July 28, 2008, substituted "five" for "three" and inserted "for domestic companies" near the end of subsection (n).

§ 58-50-62. Insurer grievance procedures.

(a) Purpose and Intent. — The purpose of this section is to provide standards for the establishment and maintenance of procedures by insurers to assure that covered persons have the opportunity for appropriate resolutions of their grievances.

(b) Availability of Grievance Process. — Every insurer shall have a grievance process whereby a covered person may voluntarily request a review of any decision, policy, or action of the insurer that affects that covered person. A decision rendered solely on the basis that the health benefit plan does not provide benefits for the health care service in question is not subject to the insurer's grievance procedures, if the exclusion of the specific service requested is clearly stated in the certificate of coverage. The grievance process may provide for an immediate informal consideration by the insurer of a grievance. If the insurer does not have a procedure for informal consideration or if an informal consideration does not resolve the grievance, the grievance process shall provide for first- and second-level reviews of grievances. Appeal of a noncertification that has been reviewed under G.S. 58-50-61 shall be reviewed as a second-level grievance under this section.

(b1) Informal Consideration of Grievances. — If the insurer provides procedures for informal consideration of grievances, the procedures shall be in writing, and the following requirements apply:

(1) If the grievance concerns a clinical issue and the informal consideration decision is not in favor of the covered person, the insurer shall treat the request as a request for a first-level grievance review, except that the requirements of subdivision (e) (1) of this section apply on the day the decision is made or on the tenth business day after receipt of the request for informal consideration, whichever is sooner;

(2) If the grievance concerns a nonclinical issue and the informal consideration decision is not in favor of the covered person, the insurer shall issue a written decision that includes the information set forth in subsection (c) of this section; or

(3) If the insurer is unable to render an informal consideration decision within 10 business days after receipt of the grievance, the insurer shall treat the request as a request for a first-level grievance review, except that the requirements of subdivision (e) (1) of this section apply beginning on the day the insurer determines an informal consideration decision cannot be made before the tenth business day after receipt of the grievance.

(c) Grievance Procedures. — Every insurer shall have written procedures for receiving and resolving grievances from covered persons. A description of the grievance procedures shall be set forth in or attached to the certificate of coverage and member handbook provided to covered persons. The description shall include a statement informing the covered person that the grievance procedures are voluntary and shall also inform the covered person about the availability of the Commissioner's office for assistance, including the telephone number and address of the office. The description shall also inform the covered person about the availability of assistance from the Managed Care Patient Assistance Program, including the telephone number and address of the Program.

(d) Maintenance of Records. — Every insurer shall maintain records of each grievance received and the insurer's review of each grievance, as well as documentation sufficient to demonstrate compliance with this section. The maintenance of these records, including electronic reproduction and storage, shall be governed by rules adopted by the Commissioner that apply to insurers. The insurer shall retain these records for five years or, for domestic companies, until the Commissioner has adopted a final report of a general examination that contains a review of these records for that calendar year, whichever is later.

(e) First-Level Grievance Review. — A covered person or a covered person's provider acting on the covered person's behalf may submit a grievance.

(1) The insurer does not have to allow a covered person to attend the first-level grievance review. A covered person may submit written

material. Except as provided in subdivision (3) of this subsection, within three business days after receiving a grievance, the insurer shall provide the covered person with the name, address, and telephone number of the coordinator and information on how to submit written material.

(2) An insurer shall issue a written decision, in clear terms, to the covered person and, if applicable, to the covered person's provider, within 30 days after receiving a grievance. The person or persons reviewing the grievance shall not be the same person or persons who initially handled the matter that is the subject of the grievance and, if the issue is a clinical one, at least one of whom shall be a medical doctor with appropriate expertise to evaluate the matter. Except as provided in subdivision (3) of this subsection, if the decision is not in favor of the covered person, the written decision issued in a first-level grievance review shall contain:

a. The professional qualifications and licensure of the person or persons reviewing the grievance.

b. A statement of the reviewers' understanding of the grievance.

c. The reviewers' decision in clear terms and the contractual basis or medical rationale in sufficient detail for the covered person to respond further to the insurer's position.

d. A reference to the evidence or documentation used as the basis for the decision.

e. A statement advising the covered person of his or her right to request a second-level grievance review and a description of the procedure for submitting a second-level grievance under this section.

f. Notice of the availability of assistance from the Managed Care Patient Assistance Program, including the telephone number and address of the Program.

(3) For grievances concerning the quality of clinical care delivered by the covered person's provider, the insurer shall acknowledge the grievance within 10 business days. The acknowledgement shall advise the covered person that (i) the insurer will refer the grievance to its quality assurance committee for review and consideration or any appropriate action against the provider and (ii) State law does not allow for a second-level grievance review for grievances concerning quality of care.

(f) Second-Level Grievance Review. — An insurer shall establish a second-level grievance review process for covered persons who are dissatisfied with the first-level grievance review decision or a utilization review appeal decision. A covered person or the covered person's provider acting on the covered person's behalf may submit a second-level grievance.

(1) An insurer shall, within 10 business days after receiving a request for a second-level grievance review, make known to the covered person:

a. The name, address, and telephone number of a person designated to coordinate the grievance review for the insurer.

b. A statement of a covered person's rights, which include the right to request and receive from an insurer all information relevant to the case; attend the second-level grievance review; present his or her case to the review panel; submit supporting materials before and at the review meeting; ask questions of any member of the review panel; and be assisted or represented by a person of his or her choice, which person may be without limitation to: a provider, family member, employer representative, or attorney. If the covered person chooses to be represented by an attorney, the insurer may also be represented by an attorney.

c. The availability of assistance from the Managed Care Patient Assistance Program, including the telephone number and address of the Program.

(2) An insurer shall convene a second-level grievance review panel for each request. The panel shall comprise persons who were not previously involved in any matter giving rise to the second-level grievance, are not employees of the insurer or URO, and do not have a financial interest in the outcome of the review. A person who was previously involved in the matter may appear before the panel to present information or answer questions. All of the persons reviewing a second-level grievance involving a noncertification or a clinical issue shall be providers who have appropriate expertise, including at least one clinical peer. Provided, however, an insurer that uses a clinical peer on an appeal of a noncertification under G.S. 58-50-61 or on a first-level grievance review panel under this section may use one of the insurer's employees on the second-level grievance review panel in the same matter if the second-level grievance review panel comprises three or more persons.

(g) Second-Level Grievance Review Procedures. — An insurer's procedures for conducting a second-level grievance review shall include:

(1) The review panel shall schedule and hold a review meeting within 45 days after receiving a request for a second-level review.

(2) The covered person shall be notified in writing at least 15 days before the review meeting date.

(3) The covered person's right to a full review shall not be conditioned on the covered person's appearance at the review meeting.

(h) Second-Level Grievance Review Decisions. — An insurer shall issue a written decision to the covered person and, if applicable, to the covered person's provider, within seven business days after completing the review meeting. The decision shall include:

(1) The professional qualifications and licensure of the members of the review panel.

(2) A statement of the review panel's understanding of the nature of the grievance and all pertinent facts.

(3) The review panel's recommendation to the insurer and the rationale behind that recommendation.

(4) A description of or reference to the evidence or documentation considered by the review panel in making the recommendation.

(5) In the review of a noncertification or other clinical matter, a written statement of the clinical rationale, including the clinical review criteria, that was used by the review panel to make the recommendation.

(6) The rationale for the insurer's decision if it differs from the review panel's recommendation.

(7) A statement that the decision is the insurer's final determination in the matter. In cases where the review concerned a noncertification and the insurer's decision on the second-level grievance review is to uphold its initial noncertification, a statement advising the covered person of his or her right to request an external review and a description of the procedure for submitting a request for external review to the Commissioner of Insurance.

(8) Notice of the availability of the Commissioner's office for assistance, including the telephone number and address of the Commissioner's office.

(9) Notice of the availability of assistance from the Managed Care Patient Assistance Program, including the telephone number and address of the Program.

(i) Expedited Second-Level Procedures. — An expedited second-level review shall be made available where medically justified as provided in G.S. 58-50-61(l), whether or not the initial review was expedited. The provisions of subsections (f), (g), and (h) of this section apply to this subsection except for the following timetable: When a covered person is eligible for an expedited second-level review, the insurer shall conduct the review proceeding and communicate its decision within four days after receiving all necessary information. The review meeting may take place by way of a telephone conference call or through the exchange of written information.

(j) No insurer shall discriminate against any provider based on any action taken by the provider under this section or G.S. 58-50-61 on behalf of a covered person.

(k) Violation. — A violation of this section subjects an insurer to G.S. 58-2-70. (1997-519, s. 4.2; 2001-417, ss. 8-11; 2001-446, s. 4.6; 2003-105, s. 2(a)-(d); 2008-124, s. 5.2.)

Editor's Note. —

Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 5.2, effective July 28, 2008, substituted "five" for "three" and inserted "for domestic companies" near the end of subsection (d).

Part 5. Small Employer Group Health Insurance Reform.

§ 58-50-135. Elections by carriers.

(a) Repealed by Session Laws 2006-154, s. 9, effective July 23, 2006.

(b) A small employer carrier that stops participating as a reinsuring carrier shall pay a prorated assessment based upon business issued as a reinsuring carrier for any part of the year that an assessment is made under G.S. 58-50-150.

(c) Any small employer carrier that stops writing, administering, or otherwise providing health benefit plans to employers in this State shall continue to be governed by this Act with respect to business conducted under this Act that was transacted before the effective date of termination and that remains in force. (1991, c. 630, s. 1; 1998-211, s. 11; 2006-154, ss. 9, 11.)

Editor's Note. — The text of this section has been set out in the supplement to correct a publishing error in the main volume.

Part 6. North Carolina Health Insurance Risk Pool.

§ 58-50-175. Definitions.

The following definitions apply to this Part:

(1) "Administrator" — The Pool Administrator selected by the Executive Director in accordance with this Part.
(2) "Benefit plan" — The coverage offered by the Pool to eligible individuals.
(3) "Board" — The Board of Directors of the Pool.
(4) "Commissioner" — The Commissioner of Insurance of North Carolina or the Commissioner's authorized designee.
(5) "Covered person" — Any individual resident of this State, excluding dependents, who is receiving or is eligible to receive medical care benefits from any insurer.

(6) "Creditable coverage" — The same meaning as defined in G.S. 58-68-30(c)(1).

(7) "Dependent" — A resident spouse, an unmarried child under the age of 19 years, a child who is a full-time student under the age of 23 years and who is financially dependent upon the parent or guardian, a child who is over 18 years of age and for whom a person may be obligated to pay child support, or a child of any age who is disabled and dependent upon the parent or guardian.

(8) "Executive Director" — The individual selected by a majority vote of the Board members and hired to serve as the Executive Director of the Pool.

(9) "Federally defined eligible individual" — The same meaning as the defined term "eligible individual" in G.S. 58-68-60(b).

(9a) "Fund." — The North Carolina Health Insurance Risk Pool Fund.

(10) "Health insurance coverage" — The same meaning as defined in G.S. 58-68-25(a)(5) but does not include benefits described in G.S. 58-68-25(b).

(11) "Insurance arrangement" — The plan, program, contract, or other arrangement through which medical care is provided by an employer to its officers or employees but does not include medical care covered through an insurer.

(12) "Insured" — An individual who is eligible to receive benefits from the Pool.

(13) "Insurer" — Any entity, other than the Pool, that provides medical care benefits, including excess or stop-loss insurance, that covers medical care or administers medical care on any individual in this State. For the purposes of this Part, insurer includes:

a. An insurance company;
b. A hospital or medical service corporation;
c. A health maintenance organization;
d. A multiple employer welfare arrangement;
e. A third-party administrator or claims processor; and
f. Any other nongovernmental entity providing a health benefit plan subject to State insurance regulation.

Insurer does not include an entity to the extent the entity provides excepted benefits as defined in G.S. 58-68-25(b).

(14) "Medical care" — All of the following:

a. The diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body;
b. Transportation primarily for and essential to medical care referred to in sub-subdivision a. of this subdivision; and
c. Insurance covering medical care referred to in sub-subdivisions a. and b. of this subdivision.

(15) "Plan of Operation" — The articles, bylaws, and operating rules and procedures adopted by the Board in accordance with this Part.

(16) "Pool" — The North Carolina Health Insurance Risk Pool.

(17) "Provider" — An individual or entity that provides medical care to individuals residing in this State.

(18) "Resident" — An individual who has legal status in the United States and who:

a. Has been legally domiciled in this State for a period of at least 30 days, except that for a federally defined eligible individual, there shall not be a 30-day requirement;
b. Is legally domiciled in this State on the date of application to the Pool and who is eligible for enrollment in the Pool as a result of

the Health Insurance Portability and Accountability Act of 1996; or

c. Is legally domiciled in this State on the date of application to the Pool and is eligible for the credit for health insurance costs under section 35 of the Internal Revenue Code of 1986.

(19) Recodified as G.S. 58-50-175(9a).

(20) "Trade Adjustment Assistance Program" (TAA) — Title II of the Trade Act of 2002, P.L. 107-210. (2007-532, s. 1.1; 2008-118, s. 3.2(a).)

Editor's Note. —

Session Laws 2007-532, s. 2.1, as amended by Session Laws 2008-118, s. 3.2(f), provides: "In addition to the North Carolina Health Insurance Risk Pool Fund established under G.S. 58-50-225, as enacted in this act, there is established in the Department of Insurance two separate funds, as follows:

"(1) The Start-Up Reserve — State Funds. State funds appropriated to this Fund shall be used to support reasonable expenses for personnel to carry out the Board's responsibilities under the Pool, including contracting a third-party administrator. Funds shall be allocated by the Commissioner of Insurance for the reasonable expenses of the Board in conducting its duties under this Article that are incurred on or before July 1, 2009. At the end of the fiscal year, any unspent and unencumbered State funds and any interest or investment income earned on these funds shall not revert to the General Fund but shall be transferred to the North Carolina Health Insurance Risk Pool Fund.

"(2) The Start-Up Reserve — Federal Funds. Federal funds received in lump sum or as a draw-down grant for the purposes of this Article shall be deposited to this Reserve and shall be expended and accounted for in accordance with requirements of the federal grant."

Former subdivision (19), as amended by Session Laws 2008-118, s. 3.2(a), was recodified as subdivision (9a) at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2008-118, s. 3.2(a), effective July 28, 2008, deleted "special" preceding "fund" twice in subdivision (19).

§ 58-50-180. Risk Pool established; board of directors; plan of operation.

(a) There is hereby created a nonprofit entity to be known as the North Carolina Health Insurance Risk Pool. Notwithstanding that the Pool may be supported in whole or in part from State funds, the Pool is not an instrumentality of the State. The Pool shall operate under the supervision and control of the Board.

(b) The Board of the North Carolina Health Insurance Risk Pool shall consist of the Commissioner, who shall serve as an ex officio nonvoting member of the Board, and 11 members appointed as follows:

(1) One member who represents an insurer, as appointed by the Governor.

(2) Two members of the general public who are not employed by or affiliated with an insurance company or plan, group hospital, or other health care provider and can reasonably be expected to qualify for coverage in the Pool. Members of the general public include individuals whose only affiliation with health insurance or health care coverage is as a covered member. The two members of the general public shall be appointed by the General Assembly, as follows:

a. One member upon the recommendation of the President Pro Tempore of the Senate.

b. One member upon the recommendation of the Speaker of the House of Representatives.

(3) Eight members appointed by the Commissioner, as follows:

a. One insurer who sells individual health insurance policies.

b. One who represents the insurance industry, as recommended by the insurer who covers the largest number of persons in the State.

c. One who is licensed to sell health insurance in this State.

d. Two who represent the medical provider community, one as recommended by the North Carolina Medical Society, and one as recommended by the North Carolina Hospital Association.
e. One who represents business, as recommended by the North Carolina Citizens for Business and Industry.
f. One who represents small business, as recommended by the National Federation of Independent Business.
g. One who is either a health policy researcher or a health economist with experience relating to the operation of health insurance risk pools.

(c) The initial appointments by the Governor and the General Assembly upon the recommendation of the Speaker of the House of Representatives and the President Pro Tempore of the Senate shall serve a term of three years. The initial appointments by the Commissioner under sub-subdivisions a., b., and d. of subdivision (b)(3) of this section shall be for a term of two years. The initial appointments by the Commissioner under sub-subdivisions c., e., f., and g. of subdivision (b)(3) of this section shall be for a term of one year. All succeeding appointments shall be for terms of three years. Members shall not serve for more than two successive terms.

A Board member's term shall continue until the member's successor is appointed by the original appointing authority. Vacancies shall be filled by the appointing authority for the unexpired portion of the term in which they occur. A Board member may be removed by the appointing authority for cause.

The Board shall meet at least quarterly upon the call of the chair. A majority of the total membership of the Commission shall constitute a quorum.

The Commissioner shall appoint a chair to serve for the initial two years of the Plan's operation. Subsequent chairs shall be elected by a majority vote of the Board members and shall serve for two-year terms. Board members shall receive travel allowances under G.S. 138-5 when traveling to and from meetings of the Board or for official business of the Pool, but shall not receive any per diem under subdivision (a)(1) of that section.

(d) The Board shall submit to the Commissioner a Plan of Operation for the Pool and any amendments necessary or suitable to assure the fair, reasonable, and equitable administration of the Plan of Operation. The Plan of Operation shall become effective upon approval in writing by the Commissioner consistent with the date on which the coverage under this Part must be made available. If the Board fails to submit a suitable Plan of Operation within 180 days after the appointment of the Board, or at any time thereafter fails to submit suitable amendments to the Plan of Operation, the Commissioner shall adopt temporary rules necessary or advisable to effectuate the provisions of this section. The rules shall continue in force until modified by the Commissioner or superseded by a Plan of Operation submitted by the Board and approved by the Commissioner. The Plan of Operation shall:

(1) Establish procedures for operation of the Pool.
(2) Establish procedures for selecting a Pool Administrator in accordance with G.S. 58-50-185.
(3) Establish procedures to create a fund for administrative expenses, which shall be managed by the Board.
(4) Establish procedures for the collection, handling, disbursing, accounting, and auditing of assets, monies, and claims of the Pool and the Pool Administrator.
(5) Develop and implement a program to publicize the existence of the Pool, the eligibility requirements, procedures for enrollment, and availability of State premium subsidies and to maintain public awareness of the Pool.
(6) Establish procedures under which applicants and participants may have grievances reviewed by a grievance committee appointed by the Executive Director in accordance with G.S. 58-50-230.

(7) Establish procedures for identifying and confirming income levels of applicants for Pool coverage who are eligible to receive a State premium subsidy, if a State premium subsidy is available.

(8) Provide for other matters as may be necessary and proper for the execution of the Executive Director's powers, duties, and obligations under this Part.

(e) The Pool shall have the general powers and authority granted under the laws of this State to health insurers and the specific authority to do all of the following:

(1) Enter into contracts as are necessary or proper to carry out the provisions and purposes of this Part, including the authority, with the approval of the Executive Director acting upon the approval or authorization of the Board, to enter into contracts with similar plans of other states for the joint performance of common administrative functions or with persons or other organizations for the performance of administrative functions.

(2) Sue or be sued.

(3) Take legal action as necessary to:
  a. Avoid the payment of improper claims against the Pool or the coverage provided by or through the Plan.
  b. Recover any amounts erroneously or improperly paid by the Plan.
  c. Recover any amounts paid by the Pool as a result of mistake of fact or law.
  d. Recover other amounts due the Pool.

(4) Establish rates and rate schedules in accordance with this Part.

(5) Issue policies of insurance in accordance with the requirements of this Part.

(6) Appoint appropriate legal, actuarial, and other committees as necessary to provide technical assistance in the operation of the Pool, policy, and other contract design, and any other function within the Pool's authority.

(7) Establish policies, conditions, and procedures for reinsuring risks of participating health insurers, as defined in G.S. 58-68-25(a), desiring to issue Pool coverage in their own name. Provision of reinsurance shall not subject the Pool to any of the capital or surplus requirements, if any, otherwise applicable to reinsurers.

(8) Employ and fix the compensation of employees.

(9) Prepare and distribute certificate of eligibility forms and enrollment instruction forms to insurance producers and to the general public.

(10) Provide for reinsurance for the Pool.

(11) Issue additional types of health insurance policies to provide optional coverage, including Medicare supplemental insurance coverage.

(12) Provide for and employ cost containment measures and requirements including preadmission screening, second surgical opinion, concurrent utilization review, disease management, individual case management, health and wellness programs including a smoking cessation initiative, and other commonly used benefit plan design features for the purpose of making health insurance coverage offered by the Pool more cost-effective.

(13) Design, utilize, contract, or otherwise arrange for the delivery of cost-effective health care services, including establishing or contracting with preferred provider organizations, health maintenance organizations, and other limited network provider arrangements.

(14) Adopt bylaws, policies, and procedures as may be necessary or convenient for the implementation of this Part and the operation of the Pool.

(f) The Executive Director, with the approval of the Board, shall operate the Pool in a manner so that the estimated cost of providing the benefit plans offered during any calendar year is not anticipated to exceed the total income the Pool expects to receive from policy premiums and other revenue available to the Pool. The Board may impose a cap on enrollment or may suspend enrollment for an indefinite period if the Board finds that estimated costs are anticipated to exceed income, except that any enrollment cap or suspension shall not apply to federally defined eligible individuals who are eligible to enroll in the Pool pursuant to G.S. 58-50-195(a)(5).

(g) The Executive Director shall make an annual report to the Speaker of the House of Representatives, the President Pro Tempore of the Senate, the Commissioner, the Joint Legislative Health Care Oversight Committee, and the Committee on Employee Hospital and Medical Benefits. The report shall summarize the activities of the Pool in the preceding calendar year, including the net written and earned premiums, benefit plan enrollment, the expense of administration, and the paid and incurred losses.

(h) Neither the Board nor the employees of the Pool are liable for any obligations of the Pool. There shall be no liability on the part of, and no cause of action of any nature shall arise against, the Pool or its agents or employees, the Board, the Executive Director, or the Commissioner or the Commissioner's representatives for any action taken by them in good faith in the performance of their powers and duties under this Part.

(i) The members of the Board are public servants under G.S. 138A-3(30) and are subject to the provisions of Chapter 138A of the General Statutes. (2007-532, s. 1.1; 2008-124, ss. 6.1, 6.2.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, ss. 6.1 and 6.2, effective October 1, 2008, in the fourth paragraph of subsection (c), substituted "G.S. 138-5" for "G.S. 138-6," inserted "or for official business of the Pool," and substituted "per diem under subdivision (a)(1) of that section" for "subsistence allowance or per diem under G.S. 138-5"; and in subdivision (e)(1), substituted "acting upon the approval or authorization of" for "in collaboration with."

§ 58-50-185. Administrator.

(a) The Executive Director, with the approval or authorization of the Board, shall select through a competitive bidding process one or more insurers to administer the Pool. The Executive Director shall evaluate bids submitted based on criteria established by the Board. The criteria shall allow for the comparison of information about each bidding administrator and selection of a Pool Administrator based on at least the following:

(1) Proven ability to handle health insurance coverage to individuals.
(2) Efficiency and timeliness of the claim processing procedures.
(3) Estimated total charges for administering the Pool.
(4) Ability to apply effective cost containment programs and procedures and to administer the Pool in a cost-efficient manner.
(5) Financial condition and stability.
(6) Evidence of authority to provide third-party administrative services in North Carolina.

(b) The Administrator shall serve for a period specified in the contract between the Pool and the Administrator subject to removal for cause and subject to any terms, conditions, and limitations of the contract between the Pool and the Administrator. At least one year before the expiration of each period of service by an Administrator, the Executive Director shall invite eligible entities, including the current Administrator, unless the current Administrator was removed for cause, to submit bids to serve as the Administrator. Selection of the Administrator for the succeeding period shall be made at least six months before the end of the current period.

(c) The Administrator shall perform such functions relating to the Pool as may be assigned to it, including:

(1) Verification of eligibility.
(2) Payment of claims.
(3) Establishment of a premium billing procedure for collection of premiums from individuals covered under the Pool.
(4) Other necessary functions to assure timely payment of benefits to covered persons under the Pool.

(d) The Administrator shall submit regular reports to the Executive Director and the Board regarding the operation of the Pool. The contract between the Pool and the Administrator shall specify the frequency, content, and form of the report.

(e) Following the close of each calendar year, the Administrator shall determine net written and earned premiums, the expense of administration, and the paid and incurred losses for the year and report this information to the Executive Director and the Board on a form prescribed by the Executive Director.

(f) The Administrator shall be paid as provided in the contract between the Pool and the Administrator. (2007-532, s. 1.1; 2008-124, s. 6.3.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 6.3, effective October 1, 2008, in the introductory paragraph of subsection (a), substituted "with the approval or authorization of the Board" for "in collaboration with the Board."

§ 58-50-195. Eligibility for Pool coverage.

(a) Any individual who is and continues to be a resident of this State is eligible for Pool coverage if the individual provides evidence of any of the following:

(1) A notice of rejection or refusal to issue substantially similar health insurance coverage for health reasons by an insurer. A rejection or refusal by an insurer offering only stop-loss, excess loss, or reinsurance coverage with respect to the applicant is not sufficient evidence of eligibility.
(2) An offer to issue health insurance coverage only with a conditional rider that limits coverage for the individual's high-risk medical condition.
(3) A refusal by an insurer to issue health insurance coverage except at a rate exceeding the Pool rate.
(4) A diagnosis of the individual with one of the medical or health conditions listed by the Board in accordance with this section. An individual diagnosed with one or more of these conditions is eligible for Pool coverage without applying for other health insurance coverage.
(5) Qualification as a federally defined eligible individual, whether or not currently covered by an insurer under that qualification.
(6) An individual who is legally domiciled in this State and is eligible for the credit for health insurance costs under the Trade Adjustment Assistance Reform Act of 2002, section 35 of the Internal Revenue Code of 1986. Each dependent of an individual who is eligible for Pool coverage under this subdivision shall also be eligible for Pool coverage.
(7) The individual has current individual health insurance coverage at a rate exceeding the Pool rate.

(b) The Board, upon recommendation of the Executive Director, shall adopt a list of medical or health conditions for which a person shall be eligible for Pool coverage under subdivision (a)(4) of this section. The Board may amend the list as the Board considers appropriate.

(c) An individual is not eligible for coverage under the Pool if:

(1) The individual has or obtains medical care benefits substantially similar to or more comprehensive than the benefit plan offered by the Pool, or would be eligible to have coverage if the person elected to obtain it, except that:

a. An individual may maintain other coverage for the period of time the individual is satisfying any preexisting condition waiting period under a Pool policy; and

b. An individual may maintain Pool coverage for the period of time the individual is satisfying a preexisting condition waiting period under another health insurance policy intended to replace the Pool policy.

(2) The individual is determined to be eligible for enrollment in the State Medical Assistance Plan or in Medicare, unless the Pool offers Medicare supplemental insurance coverage.

(3) The individual has previously terminated Pool coverage unless 12 months have lapsed since the termination, except that this subdivision shall not apply with respect to an applicant who is a federally defined eligible individual or to an applicant eligible for or receiving benefits under the Trade Adjustment Assistance Program.

(4) The individual is an inmate or resident of a public institution, except that this subdivision shall not apply with respect to an applicant who is a federally defined eligible individual.

(5) The individual's premiums are paid for or reimbursed under any government-sponsored program or by any government agency or health care provider, except as an otherwise qualifying full-time employee, or dependent thereof, of a government agency or health care provider. This subdivision shall not apply for individuals receiving benefits under the Trade Adjustment Assistance Program or to individuals receiving premium subsidies made available by the State based on individual income levels.

(6) The individual has in effect on the date Pool coverage takes effect health insurance coverage from an insurer or insurance arrangement.

(d) Coverage under the Pool shall cease:

(1) On the date an individual is no longer a resident of this State.

(2) On the date an individual requests coverage to end.

(3) Upon the death of the covered individual.

(4) On the date State law requires cancellation of the Pool policy.

(5) At the option of the Pool, 30 days after the Pool makes any inquiry concerning the individual's eligibility or residence to which the individual does not reply.

(6) Because the individual has failed to make the payments required under this Part.

(7) Because the individual has performed an act or practice that constitutes fraud or made an intentional misrepresentation of material fact under the terms of the coverage.

(e) Except as provided in subsection (d) of this section, an individual who ceases to meet the eligibility requirements of this section may be terminated at the end of the Pool policy period for which the necessary premiums have been paid. (2007-532, s. 1.1; 2008-124, s. 6.4.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 6.4, effective October 1, 2008, added subdivision (d)(7).

§ 58-50-210. Preexisting conditions.

(a) Except as otherwise provided by law, Pool coverage shall exclude charges or expenses incurred during the first 12 months following the effective date of coverage as to any condition for which medical advice, care, or treatment was recommended or received as to such conditions during the 12-month period immediately preceding the effective date of coverage, except that no preexisting condition exclusion shall be applied to a federally defined eligible individual or an individual who is eligible for the Pool because of his or her eligibility for the credit for health insurance costs under the Trade Adjustment Assistance Reform Act of 2002, section 35 of the Internal Revenue Code of 1986, pursuant to G.S. 58-50-195(a)(6).

(b) Repealed by Session Laws 2008-124, s. 6.5, effective October 1, 2008.

(c) The period of any preexisting condition exclusion shall be reduced by the aggregate of the periods of creditable coverage, if any, applicable as of the enrollment date. Credit for having satisfied some or all of the preexisting condition waiting period under previous creditable coverage, as defined in G.S. 58-51-17(a)(1), shall be provided in accordance with G.S. 58-51-17. (2007-532, s. 1.1; 2008-124, s. 6.5.)

Editor's Note. —
Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 6.5, effective October 1, 2008, added the language beginning with "or an individual who is eligible..." and ending with "...pursuant to G.S. 58-50-195(a)(6)" at the end of subsection (a); deleted subsection (b) regarding preexisting condition exceptions; and added subsection (c).

§ 58-50-225. North Carolina Health Insurance Risk Pool Fund.

(a) The North Carolina Health Insurance Risk Pool Fund is established and consists of the following revenue:

(1) Premiums, fees, charges, rebates, refunds, and any other receipts occurring or arising in connection with the Pool.
(2) The revenue transferred to the Fund under G.S. 105-228.5B.
(3) Gifts, grants, and other appropriations.
(4) Any interest earned by the Fund.

(b) Disbursements from the Fund shall include the amounts required to pay the claims, benefits, and administrative costs as may be determined by the Executive Director and the Board.

(c) For the purposes of providing the funds necessary to carry out the powers and duties of the Pool, effective July 1, 2008, the Teachers' and State Employees' Comprehensive Major Medical Plan and any successor Plan shall pay an annual surcharge to the North Carolina Health Insurance Risk Pool Fund in the amount of one dollar and fifty cents ($1.50) per member per year based on enrollment of active employee Plan members and their dependents covered under the Plan. (2007-532, ss. 1.1, 6; 2008-118, ss. 3.2(b), (g).)

Editor's Note. — Session Laws 2007-532, s. 6, as amended by S.L. 2008-118, s. 3.2(g), effective July 28, 2008, was codified as subsection (c) of G.S. 58-50-225, at the direction of the Revisor of Statutes.

Session Laws 2007-532, ss. 2.1 and 2.2, as amended by Session Laws 2008-118, s. 3.2(f), provide: "2.1. In addition to the North Carolina Health Insurance Risk Pool Fund established under G.S. 58-50-225, as enacted in this act, there is established in the Department of Insurance two separate funds, as follows:

"(1) The Start-Up Reserve — State Funds. State funds appropriated to this Fund shall be used to support reasonable expenses for personnel to carry out the Board's responsibilities under the Pool, including contracting a third-party administrator. Funds shall be allocated by the Commissioner of Insurance for the reasonable expenses of the Board in conducting its duties under this Article that are incurred on or before July 1, 2009. At the end of the fiscal year, any unspent and unencumbered State funds and any interest or investment income earned on these funds shall not revert to the General Fund but shall be transferred to the North Carolina Health Insurance Risk Pool Fund.

"(2) The Start-Up Reserve — Federal Funds. Federal funds received in lump sum or as a draw-down grant for the purposes of this Article shall be deposited to this Reserve and shall be expended and accounted for in accordance with requirements of the federal grant.

"2.2. It is the intent of the General Assembly that in the event the State is not awarded the federal funds anticipated, the General Fund shall be held harmless."

Effect of Amendments. — Session Laws 2008-118, ss. 3.2(b), and (g), effective July 28, 2008, deleted "Special" preceding "Fund" throughout the section; substituted "and" for "as an interest-bearing, non-reverting account in the General Fund. The Special Fund" in subsection (a); added subdivision (a)(4); and deleted the second sentence in subsection (b), relating to making disbursements from the Fund by warrant drawn on the State Treasurer.

§ 58-50-235. Audit.

An audit of the Pool shall be conducted annually under the oversight of the State Auditor. The cost of the audit shall be reimbursed to the State Auditor from the Fund. (2007-532, s. 1.1; 2008-118, s. 3.2(c).)

Effect of Amendments. — Session Laws 2008-118, s. 3.2(c), effective July 28, 2008, deleted "Special" preceding "Fund."

Article 55.

Long-Term Care Insurance.

§ 58-55-35. Facilities, services, and conditions defined.

(a) Whenever long-term care insurance provides coverage for the facilities, services, or physical or mental conditions listed below, unless otherwise defined in the policy and certificate, and approved by the Commissioner, such facilities, services, or conditions are defined as follows:

(1) "Adult care home" shall be defined in accordance with the terms of G.S. 131D-2(1b).

(1a) "Adult day care program" shall be defined in accordance with the provisions of G.S. 131D-6(b).

(2) "Chore" services include the performance of tasks incidental to activities of daily living that do not require the services of a trained homemaker or other specialist. Such services are provided to enable individuals to remain in their own homes and may include such services as: assistance in meeting basic care needs such as meal preparation; shopping for food and other necessities; running necessary errands; providing transportation to essential service facilities; care and cleaning of the house, grounds, clothing, and linens.

(3) "Combination home" shall be defined in accordance with the terms of G.S. 131E-101(1a).

(4) Repealed by Session Laws 1995, c. 535, s. 3.

(5) "Family care home" shall be defined in accordance with the terms of G.S. 131D-2(a)(5).

(6) Renumbered.

(7) Repealed by Session Laws 1995, c. 535, s. 3.

(8) "Home health services" shall be defined in accordance with the terms of G.S. 131E-136(3).

(9) "Homemaker services" means supportive services provided by qualified para-professionals who are trained, equipped, assigned, and supervised by professionals within the agency to help maintain, strengthen, and safeguard the care of the elderly in their own homes. These standards must, at a minimum, meet standards established by the North Carolina Division of Social Services and may include: Providing assistance in management of household budgets; planning nutritious meals; purchasing and preparing foods; housekeeping duties; consumer education; and basic personal and health care.

(10) "Hospice" shall be defined in accordance with the terms of G.S. 131E-176(13a).

(11) "Intermediate care facility for the mentally retarded" shall be defined in accordance with the terms of G.S. 131E-176(14a).

(12) "Nursing home" shall be defined in accordance with the terms of G.S. 131E-101(6).

(13) "Respite care, institutional" means provision of temporary support to the primary caregiver of the aged, disabled, or handicapped individual by taking over the tasks of that person for a limited period of time. The insured receives care for the respite period in an institutional setting, such as a nursing home, family care home, rest home, or other appropriate setting.

(14) "Respite care, non-institutional" means provision of temporary support to the primary caregiver of the aged, disabled, or handicapped individual by taking over the tasks of that person for a limited period of time in the home of the insured or other appropriate community location.

(15) "Skilled Nursing Facility" shall be defined in accordance with the terms of G.S. 135-40.1(18).

(16) "Supervised living facility for developmentally disabled adults" means a residential facility, as defined in G.S. 122C-3(14), which has two to nine developmentally disabled adult residents.

(b) Whenever long-term care insurance provides coverage for organic brain disorder syndrome, progressive dementing illness, or primary degenerative dementia, such phrases shall be interpreted to include Alzheimer's Disease. Clinical diagnosis of "organic brain disorder syndrome", "progressive dementing illness", and "primary degenerative dementia" must be accepted as evidence that such conditions exist in an insured when a pathological diagnosis cannot be made; provided that such medical evidence substantially documents the diagnosis of the condition and the insured received treatment for such condition.

(c) All long-term care insurance policies must be filed with and approved by the Commissioner before they can be used in this State and are subject to the provisions of Article 38 of this Chapter. (1987, c. 331, s. 1; 1989, c. 207, ss. 5, 6; 1991, c. 721, s. 85; 1995, c. 535, s. 3; 2001-209, s. 4; 2008-187, s. 38(a).)

Effect of Amendments. — Session Laws 2008-187, s. 38(a), effective August 7, 2008, in subdivision (a)(1), substituted "G.S. 131D-2(1b)" for "G.S. 131D-2(a)(3)"; in subdivision (a)(3), substituted "G.S. 131E-101(1a)" for "G.S. 131E-101(1)"; in subdivision (a)(11), inserted "for the mentally retarded" near the beginning, and substituted "G.S. 131E-176(14a)" for "G.S. 131E-176(14b)"; and in subdivision (a)(15), substituted "G.S. 135-40.1(18)" for "G.S. 131E-176(23)."

ARTICLE 63.

Unfair Trade Practices.

§ 58-63-10. Unfair methods of competition or unfair and deceptive acts or practices prohibited.

CASE NOTES

Past Credit and Insurance Histories. — Homeowners made material misrepresentations under G.S. 58-3-10 to obtain an insurance policy as homeowner one signed the application knowing that it contained misrepresentations about the homeowners' past credit and insurance histories, even though an insurance agent completed the application and told the homeowners that truthful answers did not have to be included for various reasons. Luther v. Seawell, — N.C. App. —, 662 S.E.2d 1, 2008 N.C. App. LEXIS 1148 (June 17, 2008).

§ 58-63-15. Unfair methods of competition and unfair or deceptive acts or practices defined.

CASE NOTES

Deceptive Trade Practice Not Found. — Insurer and an insurance agent did not engage in deceptive trade practices by failing to investigate in violation of G.S. 58-63-15(11), and by refusing to pay a mortgage in violation of G.S. 58-63-15(11)(f) as the insurer and the insurance agent pursued liability questions diligently. Luther v. Seawell, — N.C. App. —, 662 S.E.2d 1, 2008 N.C. App. LEXIS 1148 (June 17, 2008).

Insured's Claim Analyzed Under Unfair and Deceptive Trade Practices Act. — In an action in which an insured alleged that an insurer failed to pay the full amount due under a commercial insurance policy for damage to property in violation of G.S. 58-63-15(11) and the Unfair and Deceptive Trade Practices Act (UDTPA), G.S. 75-1 et seq., the court analyzed the claim for unfair and deceptive acts or practices in the business of insurance as one brought pursuant to the UDTPA because only the Commissioner of Insurance could pursue an action pursuant to G.S. 58-63-15(11). Amatulli & Sons, LLC v. Great N. Ins. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 1589 (W.D.N.C. Jan. 8, 2008).

The plaintiffs's claim of unfair and deceptive trade practices failed, etc.

Where a home was flooded and the homeowner argued that defendants, an insurer and an adjusting company, allowed the mold problem to go unremediated and become more severe, directed verdict was properly granted as to the unfair and deceptive trade practices claim because defendants' response was not the proximate cause of the damage. Burrell v. Sparkkles Reconstruction Co., — N.C. App. —, 657 S.E.2d 712, 2008 N.C. App. LEXIS 422 (2008).

Cited in Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007); Carter v. West Am. Ins. Co., — N.C. App. —, 661 S.E.2d 264, 2008 N.C. App. LEXIS 1021 (2008).

ARTICLE 67.

Health Maintenance Organization Act.

§ 58-67-50. Evidence of coverage and premiums for health care services.

(a)(1) Every enrollee residing in this State is entitled to evidence of coverage under a health care plan. If the enrollee obtains coverage under a health care plan through an insurance policy or a contract issued by a hospital or medical service corporation, whether by option or otherwise, the insurer or the hospital or medical service corporation shall issue the evidence of coverage. Otherwise, the health maintenance organization shall issue the evidence of coverage.

(2) No evidence of coverage, or amendment thereto, shall be issued or delivered to any person in this State until a copy of the form of the evidence of coverage, or amendment thereto, has been filed with and approved by the Commissioner.

(3) An evidence of coverage shall contain:

a. No provisions or statements which are unjust, unfair, inequitable, misleading, deceptive, which encourage misrepresentation, or which are untrue, misleading or deceptive as defined in G.S. 58-67-65(a); and

b. A clear and complete statement, if a contract, or a reasonably complete summary, if a certificate of:

1. The health care services and insurance or other benefits, if any, to which the enrollee is entitled under the health care plan;
2. Any limitations on the services, benefits, or kind of benefits, to be provided, including any deductible or copayment feature;
3. Where and in what manner information is available as to how services may be obtained;
4. The total amount of payment for health care services and the indemnity or service benefits, if any, which the enrollee is obligated to pay with respect to individual contracts, or an indication whether the plan is contributory or noncontributory with respect to group certificates;
5. A clear and understandable description of the health maintenance organization's method of resolving enrollee complaints;
6. A description of the reasons, if any, for which an enrollee's enrollment may be terminated for cause, which reasons may include behavior that seriously impairs the health maintenance organization's ability to provide services or an inability to establish and maintain a satisfactory physician-patient relationship after reasonable efforts to do so have been made.

Any subsequent change may be evidenced in a separate document issued to the enrollee.

(4) A copy of the form of the evidence of coverage to be used in this State, and any amendment thereto, shall be subject to the filing and approval requirements of subsection (b) unless it is subject to the jurisdiction of the Commissioner under the laws governing health insurance or hospital or medical service corporations in which event the filing and approval provisions of such laws shall apply. To the extent, however, that such provisions do not apply the requirements in subsection (c) shall be applicable.

(b)(1) Premium approval. — No schedule of premiums for coverage for health care services, or any amendment to the schedule, shall be used in conjunction with any health care plan until a copy of the schedule or amendment has been filed with and approved by the Commissioner.

(2) Individual coverage. — Premiums shall be established in accordance with actuarial principles for various categories of enrollees. Premiums applicable to an enrollee shall not be individually determined based on the status of the enrollee's health. Premiums shall not be excessive, inadequate or unfairly discriminatory; and shall exhibit a reasonable relationship to the benefits provided by the evidence of coverage. The premiums or any premium revisions for nongroup enrollee coverage

shall be guaranteed, as to every enrollee covered under the same category of enrollee coverage, for a period of not less than 12 months. As an alternative to giving this guarantee for nongroup enrollee coverage, the premium or premium revisions may be made applicable to all similar categories of enrollee coverage at one time if the health maintenance organization chooses to apply for the premium revision with respect to the categories of coverages no more frequently than once in any 12-month period. The premium revision shall be applicable to all categories of nongroup enrollee coverage of the same type; provided that no premium revision may become effective for any category of enrollee coverage unless the HMO has given written notice of the premium revision to the enrollee 45 days before the effective date of the revision. The enrollee must then pay the revised premium in order to continue the contract in force. The Commissioner may adopt reasonable rules, after notice and hearing, to require the submittal of supporting data and such information as the Commissioner considers necessary to determine whether the rate revisions meet the standards in this subdivision. In adopting the rules under this subsection, the Commissioner may require identification of the types of rating methodologies used by filers and may also address standards for data in HMO rate filings for initial filings, filings by recently licensed HMOs, and rate revision filings; data requirements for service area expansion requests; policy reserves used in rating; incurred loss ratio standards; and other recognized actuarial principles of the NAIC, the American Academy of Actuaries, and the Society of Actuaries.

(3) Group coverage. — Employer group premiums shall be established in accordance with actuarial principles for various categories of enrollees, provided that premiums applicable to an enrollee shall not be individually determined based on the status of the enrollee's health. Premiums shall not be excessive, inadequate, or unfairly discriminatory, and shall exhibit a reasonable relationship to the benefits provided by the evidence of coverage. The premiums or any revisions to the premiums for employer group coverage shall be guaranteed for a period of not less than 12 months. No premium revision shall become effective for any category of group coverage unless the HMO has given written notice of the premium revision to the master group contract holder upon receipt of the group's finalized benefits or 45 days before the effective date of the revision, whichever is earlier. The master group contract holder thereafter must pay the revised premium in order to continue the contract in force. The Commissioner may adopt reasonable rules, after notice and hearing, to require the submittal of supporting data and such information as the Commissioner considers necessary to determine whether the rate revisions meet the standards in this subdivision.

(c) The Commissioner shall, within a reasonable period, approve any form if the requirements of subsection (a) of this section are met and any schedule of premiums if the requirements of subsection (b) of this section are met. It shall be unlawful to issue the form or to use the schedule of premiums until approved. If the Commissioner disapproves the filing, the Commissioner shall notify the filer. In the notice, the Commissioner shall specify the reasons for disapproval. A hearing will be granted within 30 days after a request in writing by the person filing. If the Commissioner does not approve or disapprove any form or schedule of premiums within 90 days after the filing for forms and within 45 days after the filing for premiums, they shall be deemed to be approved.

(d) The Commissioner may require the submission of whatever relevant information he deems necessary in determining whether to approve or disapprove a filing made pursuant to this section.

(e) Effective January 1, 1989, every health maintenance organization shall provide at least minimum cost and utilization information for group contracts of 100 or more subscribers on an annual basis when requested by the group. Such information shall be compiled in accordance with the Data Collection Form developed by the Standardized HMO Date Form Task Force as endorsed by the Washington Business Group on Health and the Group Health Association of America on November 19, 1986, and any subsequent amendments. In addition, beginning with data for the calendar year 1998, every HMO, for group contracts of 1,000 or more members, shall provide cost, use of service, prevention, outcomes, and other group-specific data as collected in accordance with the latest edition of the Healthcare Effectiveness Data and Information Set guidelines, as published by the National Committee for Quality Assurance. Beginning with data for the calendar year 1998, every HMO shall file with the Commissioner and make available to all employer groups, not later than July 1 of the following calendar year, a report of health benefit plan-wide experience on its costs, use of services, and other aspects of performance, in the Healthcare Effectiveness and Information Set format. (1977, c. 580, s. 1; 1979, c. 876, s. 1; 1987, c. 631, s. 9; 1989, c. 485, s. 59; 1991, c. 195, s. 1; c. 644, s. 13; c. 720, s. 36; 1995, c. 193, s. 59; 1997-474, s. 3; 1997-519, s. 1.3; 2001-334, ss. 8.1, 17.4; 2001-487, ss. 106(a), 106(b); 2008-124, s. 5.3.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 5.3, effective July 28, 2008, in subsection (e), substituted "Healthcare Effectiveness Data and Information Set" for "Health Plan Employer Data and Information Set (HEDIS)" near the middle, and substituted "Healthcare Effectiveness and Information Set" for "(HEDIS)" near the end.

Article 74.

Mortgage in Lieu of Bond.

§ 58-74-5. Mortgage in lieu of security for appearance, costs, or fine.

CASE NOTES

Cited in State v. Labinski, — N.C. App. —, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

Article 76.

Actions on Bonds.

§ 58-76-5. Liability and right of action on official bonds.

CASE NOTES

Bond Determines Limit on Immunity. — In a wrongful death action arising from an incident at a county jail, although the sheriff claimed that sovereign immunity entitled him to summary judgment as a matter of law to the extent plaintiffs — the decedent's mother and the administrator of his estate, sought to recover damages in excess of the sheriff's official bond under G.S. 162-8 and G.S. 58-76-5, plaintiffs' claims were not barred by exclusions in the county's liability insurance under G.S. 153A-435; although the policy excluded coverage for claims arising from criminal behavior and plaintiffs claimed the sheriff was negligent by violating G.S. 153A-224, a Class 1 misdemeanor, other grounds were alleged for the sheriff's negligence. Myers v. Bryant, — N.C. App. —, 655 S.E.2d 882, 2008 N.C. App. LEXIS 215 (Feb. 5, 2008).

ARTICLE 84.

Fund Derived from Insurance Companies.

§ 58-84-1: Repealed by Session Laws 2006-196, s. 6, effective January 1, 2008, and applicable to proceeds credited to the Department of Insurance on or after that date.

Local Supplemental Firemen's Retirement Fund. — Forsyth: 1969, c. 418; 1995, c. 160; Mount Airy: 2000-22, s. 1, 1995, c. 165, s.1; city of Asheboro: 1985, c. 186; city of Asheville: 1979, 2nd Sess., c. 1315, amending 1979, c. 208; city of Belhaven: 1981, c. 294; city of Charlotte: 1947, c. 837; 1965, c. 210; city of Clinton: 1969, c. 177; 1973, c. 46; 1979, c. 264; city of Conover: 1977, c. 334; 1991, c. 260, s. 1; city of Durham: 1951, c. 576; 1973, c. 701; 1983, c. 463; 2002-114, ss. 1 and 2; 2003-325, ss. 1-3; city of Eden: 1977, c. 285; city of Fayetteville: 1979, c. 557, s. 8.3; 1987, c. 85; 1991, c. 149, s. 1, 2003-34, ss. 1, 2; city of Greensboro: 1953, c. 899; 1979, c. 289; 1983, c. 466; 1987, c. 178; 1993, c. 431, s. 1; city of Greenville: 1967, c. 570; city of Henderson: 1959, c. 810; 1969, c. 374; 1977, c. 133; 1981, c. 111; 1987, c. 173; 1991 (Reg. Sess., 1992), c. 897, s. 1; 2001-71; city of Hendersonville: 1981, c. 341; city of Hickory: 1985, c. 139; 1999-128, s. 1; city of Kings Mountain: 1979, c. 209; city of Lenoir: 1973, c. 1261; city of Lexington: 1981, c. 906, s. 6.1; 1983 c. 462; 1989 (Reg. Sess., 1990), c. 931; city of Lumberton: 1955, c. 100; 1973, c. 960; 1989, c. 357, c. 770; 1991 (Reg. Sess., 1992), c. 792; 1995 (Reg. Sess., 1996), c. 699; 2003-324, s. 1; city of Mayodan: 1985, c. 255; city of Monroe: 2000-35, s. 1; city of Mount Airy: 1995, c. 165, s. 1; 2000-22, s. 1; city of New Bern: 1969, c. 704; 1983, c. 551; city of Newton: 1969, c. 363; 1981, c. 298; 1983, c. 503; city of North Wilkesboro: 1969, c. 120; 1979, c. 366; city of Reidsville: 1979, c. 94; 1981 (Reg. Sess., 1982), c. 1235; 1989, c. 278; 1989 (Reg. Sess., 1990), c. 957, s. 1; 1977, c. 312; 1989, c. 247; city of Rocky Mount: 1969, c. 434; 1975, c. 353; 1983, c. 498; 1991, c. 497, s. 1; c. 761, s. 43; city of Sanford: 1991 (Reg. Sess., 1992), c. 798; city of Shelby: 1969, cc. 496, 552; 1985, c. 209; 1987 (Reg. Sess., 1988), c. 985; 1991 (Reg. Sess., 1992), c. 791; city of Washington: 1975, c. 418; city of Williamston: 1985, c. 188; city of Wilmington: 1949, c. 684; 1973, c. 939; 1975, c. 247; 1983, cc. 504, 505, 906; 1987 (Reg. Sess., 1988), c. 904; city of Wilson: 1969, c. 138; 1995 (Reg. Sess., 1996), c. 678; city of Winston-Salem: 1973, c. 388; 1977, c. 15; 1979, c. 284; 1981, c. 647; 1983, c. 464; 1987, c. 508; 1989, c. 793; 1998-92; 2003-35; 2006-121; 2008-98; town of Black Mountain: 1965, c. 672; town of Canton: 1979, 2nd Sess., c. 1105; town of Edenton: 1981, cc. 286, 996; town of Elkin: 1969, c. 169; 1971, c. 391; 1987, c. 740, ss. 1 and 5; 2008-49, s. 1; town of Farmville: 1981, c. 533; town of Lillington: 1981, c. 285; town of Mebane: 1979, c. 183; town of Mount Airy: 1967, c. 302, s. 9; 1973, c. 121; town of North Wilkesboro: 1981, c. 287; 1987, c. 176; town of Selma: 1987, c. 614; town of Smithfield: 1973, c. 941; town of Tarboro: 1973, c. 261; 1985, c. 157; 1987, c. 609; town of Valdese: 1983, c. 501; town of Wadesboro: 1967, c. 596; town of Waynesville: 1981, c. 288; town of Wilkesboro: 1985, c. 131; 1999-56, s. 1; village of Kannapolis: 1971, c. 408; 1973, c. 216; 1975, c. 423; 1983, c. 497.

§ 58-84-35. Disbursement of funds by trustees.

The board of trustees shall have entire control of the funds derived from the provisions of this Article, and shall disburse the funds only for the following purposes:

(1) To safeguard any fireman in active service from financial loss, occasioned by sickness contracted or injury received while in the performance of his duties as a fireman.

(2) To provide a reasonable support for those actually dependent upon the services of any fireman who may lose his life in the fire service of his town, city, or State, either by accident or from disease contracted or injury received by reason of such service. The amount is to be determined according to the earning capacity of the deceased.

(2a) To provide assistance, upon approval by the Secretary of the State Firemen's Association, to a destitute member fireman who has served honorably for at least five years.

(3) Repealed by Session Laws 1985, c. 666, s. 61.

(4) To provide for the payment of any fireman's assessment in the Firemen's Fraternal Insurance Fund of the State of North Carolina if the board of trustees finds as a fact that said fireman is unable to pay the said assessment by reason of disability.

(5) To provide for benefits of supplemental retirement, workers compensation, and other insurance and pension protection for firefighters otherwise qualifying for benefits from the Firefighters' Relief Fund as set forth in Article 85 of this Chapter.

(6) To provide for educational benefits to firemen and their dependents who otherwise qualify for benefits from the Firefighters' Relief Fund as set forth in Article 85 of this Chapter.

Notwithstanding any other provisions of law, no expenditures shall be made pursuant to subsections (5) and (6) of this section unless the State Firemen's Association has certified that such expenditures will not render the Fund actuarially unsound for the purposes of providing the benefits set forth in subsections (1), (2), and (4) of this section. If, for any reason, funds made available for subsections (5) and (6) of this section shall be insufficient to pay in full any benefits, the benefits pursuant to subsections (5) and (6) shall be reduced pro rata for as long as the amount of insufficient funds exists. No claim shall accrue with respect to any amount by which a benefit under subsections (5) and (6) shall have been reduced. (1907, c. 831, s. 6; 1919, c. 180; C.S., s. 6069; Ex. Sess. 1921, c. 55; 1923, c. 22; 1925, c. 41; 1945, c. 74, s. 2; 1985, c. 666, s. 61; 1987, c. 174, ss. 2, 3; 1997-456, s. 27; 2007-246, s. 4; 2008-187, s. 13.)

Effect of Amendments. —
Session Laws 2008-187, s. 13, effective August 7, 2008, substituted "Firefighters' Relief Fund" for "Firemen's Relief Fund" in subdivision (6).

Article 85A.

State Fire Protection Grant Fund.

§ 58-85A-1. Creation of Fund; allocation to local fire districts and political subdivisions of the State.

(a) There is created in the Office of State Budget and Management the State Fire Protection Grant Fund. The purpose of the Fund is to compensate local fire districts and political subdivisions of the State for providing local fire protection to State-owned buildings and their contents.

(b) The Office of State Budget and Management shall develop and implement an equitable and uniform statewide method for distributing any funds to the State's local fire districts and political subdivisions.

Upon the request of the Director of the Budget, the Department of Insurance shall provide the Office of State Budget and Management all information necessary to develop and implement the formula.

(c) It is the intent of the General Assembly to appropriate annually to the State Fire Protection Grant Fund up to four million one hundred eighty thousand dollars ($4,180,000) from the General Fund, one hundred fifty-eight thousand dollars ($158,000) from the Highway Fund, and one million three hundred forty-five thousand dollars ($1,345,000) from University of North Carolina receipts. Funds received from the General Fund shall be allocated only for providing local fire protection for State-owned property supported by the General Fund; funds received from the Highway Fund shall be allocated only for providing local fire protection for State-owned property supported by the Highway Fund; and funds received from University of North Carolina receipts shall be allocated only for providing local fire protection for State-owned property supported by University of North Carolina receipts. (1997-443, s. 23(a); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2007-323, ss. 23.4(a), 23.4(b); 2008-107, s. 22.2.)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 22.2, effective July 1, 2008, substituted "four million one hundred eighty thousand dollars ($4,180,000)" for "three million eight hundred eighty thousand dollars ($3,880,000)" in subsection (c).

Article 86.

North Carolina Firemen's and Rescue Squad Workers' Pension Fund.

§ 58-86-55. Monthly pensions upon retirement.

Any member who has served 20 years as an "eligible fireman" or "eligible rescue squad worker" in the State of North Carolina, as provided in G.S. 58-86-25 and G.S. 58-86-30, and who has attained the age of 55 years is entitled to be paid a monthly pension from this fund. The monthly pension shall be in the amount of one hundred seventy dollars ($170.00) per month. Any retired fireman receiving a pension shall, effective July 1, 2008, receive a pension of one hundred seventy dollars ($170.00) per month.

Members shall pay ten dollars ($10.00) per month as required by G.S. 58-86-35 and G.S. 58-86-40 for a period of no longer than 20 years. No "eligible rescue squad member" shall receive a pension prior to July 1, 1983. No member shall be entitled to a pension hereunder until the member's official duties as a fireman or rescue squad worker for which the member is paid compensation shall have been terminated and the member shall have retired as such according to standards or rules fixed by the board of trustees.

A member who is totally and permanently disabled while in the discharge of the member's official duties as a result of bodily injuries sustained or as a result of extreme exercise or extreme activity experienced in the course and scope of those official duties and who leaves the fire or rescue squad service because of this disability shall be entitled to be paid from the fund a monthly benefit in an amount of one hundred seventy dollars ($170.00) per month beginning the first month after the member's fifty-fifth birthday. All applications for disability are subject to the approval of the board who may appoint physicians to examine and evaluate the disabled member prior to approval of the application, and annually thereafter. Any disabled member shall not be required to make the monthly payment of ten dollars ($10.00) as required by G.S. 58-86-35 and G.S. 58-86-40.

A member who is totally and permanently disabled for any cause, other than line of duty, who leaves the fire or rescue squad service because of this disability and who has at least 10 years of service with the pension fund, may be permitted to continue making a monthly contribution of ten dollars ($10.00) to the fund until the member has made contributions for a total of 240 months. The member shall upon attaining the age of 55 years be entitled to receive a pension as provided by this section. All applications for disability are subject to the approval of the board who may appoint physicians to examine and evaluate the disabled member prior to approval of the application and annually thereafter.

A member who, because his residence is annexed by a city under Part 2 or Part 3 of Article 4A of Chapter 160A of the General Statutes, or whose department is closed because of an annexation by a city under Part 2 or Part 3 of Article 4A of Chapter 160A of the General Statutes, or whose volunteer department is taken over by a city or county, and because of such annexation or takeover is unable to perform as a fireman or rescue squad worker of any status, and if the member has at least 10 years of service with the pension fund, may be permitted to continue making a monthly contribution of ten dollars ($10.00) to the fund until the member has made contributions for a total of 240 months. The member upon attaining the age of 55 years and completion of such contributions shall be entitled to receive a pension as provided by this section. Any application to make monthly contributions under this section shall be subject to a finding of eligibility by the Board of Trustees upon application of the member.

The pensions provided shall be in addition to all other pensions or benefits under any other statutes of the State of North Carolina or the United States, notwithstanding any exclusionary provisions of other pensions or retirement systems provided by law. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1961, c. 980; 1971, c. 336; 1977, c. 926, s. 1; 1981, c. 1029, s. 1; 1983, c. 500, s. 2; c. 636, s. 24; 1985 (Reg. Sess., 1986), c. 1014, s. 49.1(b); 1987 (Reg. Sess., 1988), c. 1099, s. 1; 1991, c. 720, s. 48; 1993 (Reg. Sess., 1994), c. 653, s. 1; 1995, c. 507, s. 7.21A(g); 1997-443, s. 33.25(a); 1998-212, s. 28.21(a); 2000-67, s. 26.18; 2002-113, s. 1; 2002-126, s. 28.7; 2003-284, s. 30.19; 2004-124, s. 31.18; 2005-276, s. 29.26; 2006-66, s. 22.19; 2007-323, s. 28.21; 2008-107, s. 26.25.)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 26.25, effective July 1, 2008, in the first paragraph, substituted "one hundred seventy dollars ($170.00)" for "one hundred sixty-seven dollars ($167.00)" twice, and substituted "July 1, 2008" for "July 1, 2007"; and in the third paragraph, substituted "one hundred seventy dollars ($170.00)" for "one hundred sixty-seven dollars ($167.00)."

Article 88.

Rescue Squad Workers' Relief Fund.

§ 58-88-30. Administration costs.

The Association shall withhold twelve percent (12%) from the money received pursuant to G.S. 20-183.7(c) for the administration of the Fund. The Commissioner of Insurance shall withhold two percent (2%) from the money received pursuant to G.S. 20-183.7(c) for the administration of the Fund. (1987, c. 584, s. 5; 1989 (Reg. Sess., 1990), c. 1066, s. 33(d); 1991 (Reg. Sess., 1992), c. 943, s. 3; 2008-107, s. 29.9(a).)

Editor's Note. — Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 29.9(a), effective October 1, 2008, substituted "twelve percent (12%)" for "ten percent (10%)" in the first sentence.

ARTICLE 89A.

North Carolina Professional Employer Organization Act.

Part 1. In General.

§ 58-89A-10: Repealed by Session Laws 2008-124, s. 7.3, effective October 1, 2008.

Editor's Note. — Session Laws 2008-124, s.11.1 is a severability clause.

Part 2. License Requirements and Limitations.

§ 58-89A-50. Surety bond; letter of credit; other deposits.

(a) An applicant for licensure shall file with the Commissioner a surety bond for the benefit of the Commissioner in an amount equal to five percent (5%) of the applicant's prior year's total North Carolina wages, benefits, workers compensation premiums, and unemployment compensation contributions, but not greater than five hundred thousand dollars ($500,000), or such greater amount as the Commissioner may require.

(b) The surety bond required by this section shall be in a form acceptable to the Commissioner, issued by an insurer authorized by the Commissioner to write surety business in this State, and maintained in force while the license remains in effect or any obligations or liabilities of the applicant, licensee or PEO previously licensed by this State remain outstanding.

(c) The surety bond required by this section may be exchanged or replaced with another surety bond if (i) the surety bond applies to obligations and liabilities that arose during the period of the original surety bond, (ii) the surety bond meets the requirements of this section, and (iii) 90 days' advance written notice is provided to the Commissioner.

(d) A licensee shall not require a client company to contribute in any manner to the payment of the surety bond required by this section.

(e) Notice of cancellation or nonrenewal of the surety bond required by this section shall be provided to the Commissioner in writing at least 45 days before cancellation or nonrenewal.

(e1) A surety bond may be cancelled by the issuer of the bond with respect to future obligations or liabilities upon proper notice pursuant to this section and without regard to approval or acceptance of the Commissioner.

(f) In lieu of the surety bond required by this section, an applicant may submit to the Commissioner an irrevocable letter of credit in a form acceptable to the Commissioner issued by a financial institution, the deposits of which are insured by the Federal Deposit Insurance Corporation, or may maintain on deposit with the Commissioner an amount equal to the amount required under subsection (a) of this section in cash or in value of securities of the kind specified in G.S. 58-5-20.

(g) This section does not apply to persons who are licensed pursuant to the alternative licensing procedures set forth in G.S. 58-89A-76 or to persons who are de minimis registrants pursuant to G.S. 58-89A-75.

(h) The license of any licensee that fails to provide and maintain a surety bond, letter of credit, cash, or securities pursuant to this section shall be automatically and immediately suspended, and the licensee shall tender its license to the Commissioner within three days of failure to satisfy this requirement. (2004-162, s. 1; 2005-124, s. 1; 2008-124, ss. 7.1, 7.2.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, ss. 7.1 and 7.2, effective October 1, 2008, added "other deposits" in the section heading; and rewrote subsection (a), which read: "An applicant for licensure shall file with the Commissioner a surety bond in the amount of one hundred thousand dollars ($100,000) in favor of the State of North Carolina."

Part 3. Licensee Duties and Responsibilities.

§ 58-89A-105. Employee benefit plans; required disclosure; other reports.

(a) A licensee may sponsor and maintain employee benefit plans for the benefit of assigned employees. Any health insurance plan sponsored and maintained by a licensee shall only be fully insured by one of the following:

(1) A licensed insurance company that is authorized to write accident and health insurance, as defined in G.S. 58-7-15(3).

(2) A service corporation organized and licensed under Article 65 of this Chapter.

(3) A health maintenance organization organized and licensed under Article 67 of this Chapter.

(b), (c) Repealed by Session Laws 2008-124, s. 7.4, effective October 1, 2008.

(d) For the purposes of this section, a health insurance plan is fully insured only if all of the benefits provided under the plan are covered by an approved policy issued by one or more of the entities specified in subsection (a) of this section. A health insurance plan is not fully insured if the plan is any form of stop-loss insurance or any other form of reinsurance.

(e) Existing licensees shall comply with subsection (a) of this section by October 1, 2009. Before October 1, 2009, if an existing licensee sponsors and maintains any health insurance plan that is not fully insured by one or more of the entities specified in subsection (a) of this section, the licensee shall do all of the following:

(1) Use a third-party administrator licensed or registered under Article 56 of this Chapter.

(2) Hold all plan assets, including participant contributions, in a trust account.

(3) Provide sound reserves for the plan as determined by generally accepted actuarial standards. (2004-162, s. 1; 2008-124, s. 7.4.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 7.4, effective October 1, 2008, added the second sentence in subsection (a) and added subdivisions (a)(1) through (a)(3); deleted subsections (b) and (c) regarding sponsorship and insurance of employee health benefit plans; rewrote subsection (d); and added subsection (e).

Chapter 59.

Partnership.

Article 2.

Uniform Partnership Act.

Part 1. Preliminary Provisions.

§ 59-35.2. Filing, service, and copying fees.

Editor's Note. —

Session Laws 2008-194, s. 2, provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, 'notice' shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section [August 8, 2008]."

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-43. Partnership bound by partner's wrongful act.

CASE NOTES

Liability of Law Firm for Partner's Activities. —

Trial court did not err in dismissing a client's professional malpractice claims against law firms because there was nothing in the complaint to suggest that the law firms authorized, participated in, or even knew about an attorney's fraudulent conduct; fraud associated with the attorney's representation, including the failure to keep the client informed about the status of his case and the active concealment of the true state of affairs in violation of N.C. R. Prof. Conduct 1.4, was not in the ordinary course of the law firms' business. Goodman v. Holmes & McLaurin, — N.C. App. —, 665 S.E.2d 526, 2008 N.C. App. LEXIS 1622 (2008).

ARTICLE 5.

Revised Uniform Limited Partnership Act.

Part 11. Miscellaneous.

§ 59-1106. Filing, service, and copying fees.

Editor's Note. —

Session Laws 2008-194, s. 2, provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, 'notice' shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section [August 8, 2008]."

Chapter 59B.

Uniform Unincorporated Nonprofit Association Act.

§ 59B-11. Appointment of agent to receive service of process.

Editor's Note. — Session Laws 2008-194, s. 2, provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, 'notice' shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section [August 8, 2008]."

Chapter 62.

Public Utilities.

Article 1.

General Provisions.

§ 62-1. Short title.

CASE NOTES

Cited in Shepard v. Bonita Vista Props., L.P., — N.C. App. —, 664 S.E.2d 388, 2008 N.C. App. LEXIS 1489 (2008).

§ 62-3. Definitions.

CASE NOTES

Campground Not Within Exception. — Because owners of a campground charged occupants more than the actual cost of electricity supplied to the campground by an electric company, the owners were not excluded from the statutory definition of public utility under G.S. 62-3(23)(h). Shepard v. Bonita Vista Props., L.P., — N.C. App. —, 664 S.E.2d 388, 2008 N.C. App. LEXIS 1489 (2008).

Article 7.

Rates of Public Utilities.

§ 62-133.6. Environmental compliance costs recovery.

Editor's Note. —

Session Laws 2005-442, ss. 1 through 12, as amended by Session Laws 2006-73, s. 1, and as amended by Session Laws 2008-81, s. 1, provide as follows: "Commission Established; Membership. — The Legislative Commission on Global Climate Change is hereby established. The Commission shall consist of 34 members as follows:

"(1) Nine members appointed by the President Pro Tempore of the Senate.

"(2) Nine members appointed by the Speaker of the House of Representatives.

"(3) The President of Duke Power or the President's designee.

"(4) The President of Progress Energy or the President's designee.

"(5) The President of the North Carolina Citizens for Business and Industry or the President's designee.

"(6) The President of the Manufacturers and Chemical Industry Council of North Carolina or the President's designee.

"(7) The President of the North Carolina Farm Bureau Federation or the President's designee.

"(8) The President of the North Carolina Forestry Association or the President's designee.

"(9) The Southeast Regional Director of Environmental Defense or the Regional Director's designee.

"(10) The Executive Director of the Southern Alliance for Clean Energy or the Executive Director's designee.

"(11) The Executive Director of the North Carolina Coastal Federation or the Executive Director's designee.

"(12) The Executive Director of the North Carolina Conservation Council or the Executive Director's designee.

"(13) The Dean of the Nicholas School of the Environment and Earth Sciences, Duke University, or the Dean's designee.

"(14) The Dean of the College of Agriculture and Life Sciences at North Carolina State University or the Dean's designee.

"(15) The Dean of the School of Agriculture and Environmental Sciences at North Carolina Agricultural and Technical State University or the Dean's designee.

"(16) The Director of the Carolina Environmental Program at the University of North Carolina at Chapel Hill or the Director's designee.

"(17) The Distinguished Research Professor (with expertise in sea level change), Department of Geology at East Carolina University.

"(18) The North Carolina State Climatologist.

"Cochairs. — The Commission shall have two cochairs, one designated by the President Pro Tempore of the Senate and one designated by the Speaker of the House of Representatives from among their respective appointees. The Commission shall meet upon the call of the cochairs.

"Quorum. — A quorum of the Commission shall consist of 18 members.

"Vacancies. — Any vacancy on the Commission shall be filled by the original appointing authority.

"Purpose and Duties. — The Commission shall have the following purposes and duties:

"(1) The Commission shall conduct an in-depth examination of issues related to global climate change. This examination shall include all of the following:

"a. A review of current scientific literature on the possible natural and anthropogenic causes of global climate change.

"b. A review of actions taken by the federal government and by other states to address global warming.

"c. An examination of the emissions of greenhouse gases from within the State and the extent to which reductions in the emissions of these gases in the State, region, nation, and worldwide could be expected to affect global climate change.

"d. An evaluation of the economic opportunities for the State that may result from international, national, and State action to address global climate change and the emerging carbon market.

"e. The potential impacts of global climate change on the citizens, natural resources, and economy of the State, including agriculture, travel and tourism, recreation, coastal real estate, insurance, and other economic sectors.

"f. The costs of any action taken by the State to address global climate change on individuals, individual households, local governments, businesses, educational institutions, agricultural operations, the State government, and other institutions and economic sectors.

"The benefits of any action taken by or within the State or other states and at the national or international levels to address global climate change on individuals, individual households, local governments, businesses, educational institutions, agricultural operations, the State government, and other institutions and economic sectors.

"(2) If, in the course of its examination, the Commission determines that it would be appropriate and desirable for the State to establish a global warming pollutant reduction goal, the Commission may develop a recommended global warming pollutant reduction goal for the State.

"(3) In conducting its examination of global climate change, the Commission shall consider and integrate the findings and recommendations of the study of issues related to the development and implementation of standards and plans to control emissions of carbon dioxide required by Section 13 of S.L. 2002-4.

"(4) Based on its examination of global climate change, the Commission shall develop findings and recommendations, including any legislative proposals it determines to be appropriate, for consideration by the General Assembly.

"Additional Duties. — The Commission may work cooperatively with other state and national governments to organize a forum on global climate change, including its causes, impacts, challenges, and opportunities in the southeastern United States. The Commission may also work cooperatively with other State agencies with respect to the agencies' areas of responsibilities regarding greenhouse gas emissions and climate change.

"Expenses of Members. — Members of the Commission shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate.

"Staff. — Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional staff to the Commission to aid in its work.

"Consultants. — The Commission may hire consultants to assist with the study as provided in G.S. 120-32.02(b).

"Meetings. — The Commission may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Commission.

"Reports. — The Commission may submit interim reports at its discretion. The Commission shall submit a final report, including any findings and recommendations, to the 2009 General Assembly and the Environmental Review Commission on or before 1 October 2009, at which time the Commission shall terminate."

"Funding. — From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the purpose of conducting the study provided for in this Part."

§ 62-139. Rates varying from schedule prohibited; refunding overcharge; penalty.

CASE NOTES

Overcharge was Wilful. — Trial court properly ordered campground owners to pay tenants $ 10.00 per day for every day between 2 December 2005 and 16 October 2006 as a penalty for overcharges, as provided for in G.S. 62-139(b). The owners were a public utility and their action in overcharging tenants was wilful. Shepard v. Bonita Vista Props., L.P., — N.C. App. —, 664 S.E.2d 388, 2008 N.C. App. LEXIS 1489 (2008).

ARTICLE 14.

Fees and Charges.

§ 62-302. Regulatory fee.

Editor's Note. —

Session Laws 2008-107, s. 28.14(a), (b), provides: "(a) The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is twelve one-hundredths of one percent (0.12%) for each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 2008.

"(b) The electric membership corporation regulatory fee imposed under G.S. 62-302(b1) for the 2008-2009 fiscal year is two hundred thousand dollars ($200,000)."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Chapter 62A.

Public Safety Telephone Service and Wireless Telephone Service.

Article 3.

Emergency Telephone Service.

Sec.
62A-44. 911 Fund.

Sec.
62A-46. Fund distribution to PSAPs.

ARTICLE 3.

Emergency Telephone Service.

§ 62A-43. Service charge for 911 service.

Editor's Note. —
Session Laws 2007-383, s. 7(c), as amended by Session Laws 2008-134, s. 1(d), provides: "Notwithstanding G.S. 62A-43, the charge imposed by that section does not apply to prepaid wireless telephone service for the 2008 calendar year and for the first nine months of the 2009 calendar year."

§ 62A-44. 911 Fund.

(a) Fund. — The 911 Fund is created as an interest-bearing special revenue fund within the State treasury. The 911 Board administers the Fund. The 911 Board must credit to the 911 Fund all revenues remitted to it from the service charge imposed by G.S. 62A-43 on voice communications service connections in the State. Revenue in the Fund may only be used as provided in this Article.

(b) Allocation of Revenues. — The 911 Board may deduct and retain for its administrative expenses up to one percent (1%) of the total service charges remitted to it under G.S. 62A-43 for deposit in the 911 Fund. The remaining revenues remitted to the 911 Board for deposit in the 911 Fund are allocated as follows:

(1) A percentage of the funds remitted by CMRS providers to the 911 Fund are allocated for reimbursements to CMRS providers pursuant to G.S. 62A-45.

(2) A percentage of the funds remitted by CMRS providers and all funds remitted by all other voice communications service providers are allocated for monthly distributions to primary PSAPs pursuant to G.S. 62A-46 and grants to PSAPs pursuant to G.S. 62A-47.

(3) The percentage of the funds remitted by CMRS providers allocated to CMRS providers and PSAPs shall be set by the 911 Board and may be adjusted by the 911 Board as necessary to ensure full cost recovery for CMRS providers and, to the extent there are excess funds, for distributions to primary PSAPs.

(c) Report. — In February of each odd-numbered year, the 911 Board must report to the Joint Legislative Commission on Governmental Operations, the Revenue Laws Study Committee, and the Joint Legislative Utility Review Committee. The report must contain complete information regarding receipts and expenditures of all funds received by the 911 Board during the period covered by the report, the status of the 911 system in North Carolina at the time of the report, and the results of any investigations by the Board of PSAPs that have been completed during the period covered by the report.

(d) Nature of Revenue. — The General Assembly finds that distributions of revenue from the 911 Fund are not State expenditures for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold revenue in the 911 Fund. (2007-383, s. 1(a); 2008-134, s. 1(a).)

Effect of Amendments. — Session Laws 2008-134, s. 1(a), effective July 28, 2008, in subdivision (b)(1), substituted "A percentage of" for "Fifty-three percent (53%) of"; in subdivision (b)(2), substituted "A percentage of" for "Forty-seven percent (47%) of"; and added subdivision (b)(3).

§ 62A-46. Fund distribution to PSAPs.

(a) Monthly Distribution. — The 911 Board must make monthly distributions to primary PSAPs from the amount allocated to the 911 Fund for PSAPs. The amount to be distributed to each primary PSAP is the sum of the following:

(1) The PSAP's base amount. — The PSAP's base amount is the amount the PSAP received in the fiscal year ending June 30, 2007, and deposited in the Emergency Telephone System Fund of its local governing entity, as reported to the State Treasurer's Office, Local Government Division.

(2) The PSAP's per capita amount. — The PSAP's per capita amount is the PSAP's per capita share of the amount designated by the Board under subsection (b) of this section for the per capita distribution. The 911 Board must use the most recent population estimates certified by the State Budget Officer in making the per capita distribution under this subdivision. A PSAP is not eligible for a distribution under this subdivision unless it provides enhanced 911 service.

(b) Percentage Designations. — The 911 Board must determine how revenue that is allocated to the 911 Fund for distribution to primary PSAPs and is not needed to make the base amount distribution required by subdivision (a)(1) of this section is to be used. The 911 Board must designate a percentage of the remaining funds to be distributed to primary PSAPs on a per capita basis and a percentage to be allocated to the PSAP Grant Account established in G.S. 62A-47. If the 911 Board does not designate an amount to be allocated to the PSAP Grant Account, the 911 Board must distribute all of the remaining funds on a per capita basis. The 911 Board may not change the percentage designation more than once each fiscal year.

(c) Use of Funds. — A PSAP that receives a distribution from the 911 Fund may not use the amount received to pay for the lease or purchase of real estate, cosmetic remodeling of emergency dispatch centers, hiring or compensating telecommunicators, or the purchase of mobile communications vehicles, ambulances, fire engines, or other emergency vehicles. Distributions received by a PSAP may be used only to pay for the following:

(1) The lease, purchase, or maintenance of emergency telephone equipment, including necessary computer hardware, software, and database provisioning, addressing, and nonrecurring costs of establishing a 911 system.

(2) Expenditures for in-State training of 911 personnel regarding the maintenance and operation of the 911 system. Allowable training expenses include the cost of transportation, lodging, instructors, certifications, improvement programs, quality assurance training, and training associated with call taking, and emergency medical, fire, or law enforcement procedures. Training outside the State is not an eligible expenditure unless the training is unavailable in the State or the PSAP documents that the training costs are less if received

out-of-state. Training specific to the receipt of 911 calls is allowed only for intake and related call taking quality assurance and improvement. Instructor certification costs and course required prerequisites, including physicals, psychological exams, and drug testing, are not allowable expenditures.

(3) Charges associated with the service supplier's 911 service and other service supplier recurring charges. The PSAP providing 911 service is responsible to the voice communications service provider for all 911 installation, service, equipment, operation, and maintenance charges owed to the voice communications service provider. A PSAP may contract with a voice communications service provider on terms agreed to by the PSAP and the provider.

(d) Local Fund. — The fiscal officer of a PSAP to whom a distribution is made under this section must deposit the funds in a special revenue fund, as defined in G.S. 159-26(b)(2), designated as the Emergency Telephone System Fund. The fiscal officer may invest money in the Fund in the same manner that other money of the local government may be invested. Income earned from the invested money in the Emergency Telephone System Fund must be credited to the Fund. Revenue deposited into the Fund must be used only as permitted in this section.

(e) Compliance. — A PSAP, or the governing entity of a PSAP, must comply with all of the following in order to receive a distribution under this section:

(1) A county or municipality that has one or more PSAPs must submit in writing to the 911 Board information that identifies the PSAPs in the manner required by the FCC Order.

(2) A participating PSAP must annually submit to the 911 Board a copy of its governing agency's proposed or approved budget detailing the revenues and expenditures associated with the operation of the PSAP. The PSAP budget must identify revenues and expenditures for eligible expense reimbursements as provided in this Article and rules adopted by the 911 Board.

(3) A PSAP must be included in its governing entity's annual audit required under the Local Government Budget and Fiscal Control Act. The Local Government Commission must provide a copy of each audit of a local government entity with a participating PSAP to the 911 Board.

(4) A PSAP must comply with all requests by the 911 Board for financial information related to the operation of the PSAP.

(f) Application to Cherokees. — The Eastern Band of Cherokee Indians is an eligible PSAP. The Tribal Council of the Eastern Band is the local governing entity of the Eastern Band for purposes of this section. The Tribal Council must give the 911 Board information adequate to determine the Eastern Band's base amount. The 911 Board must use the most recent federal census estimate of the population living on the Qualla Boundary to determine the per capita distribution amount. (2007-383, s. 1(a); 2008-134, ss. 1(b), (c).)

Editor's Note. — Session Laws 2008-134, s. 1(e), provides, in part, that the addition of subsection (f) to this section by s. 1(c) of the act is applicable to distributions for the 2007-2008 fiscal year and subsequent fiscal years.

Effect of Amendments. — Session Laws 2008-134, ss. 1(b) and 1(c), effective July 28, 2008, substituted "fiscal year" for "calendar year" at the end of subsection (b); and added subsection (f). See Editor's note for applicability.

Chapter 63.

Aeronautics.

Article 6.

Public Airports and Related Facilities.

§ 63-56. Joint operation of airports.

Editor's Note. —

Session Laws 2008-107, s. 13.8, provides for the use of certain funds appropriated to the Rural Economic Development Center, Inc. for the 2007-2008 fiscal year for wastewater-related and public water system-related projects. See note at G.S. 160A-311.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008 2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008 2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Chapter 66.

Commerce and Business.

Article 11.

Government in Business.

Sec.
66-58. Sale of merchandise or services by governmental units.

Article 20.

Loan Brokers.

66-106. Definitions.

Article 37.

Tobacco Reserve Fund and Escrow Compliance.

Part 1. Tobacco Reserve Fund.

Article 42.

State Franchise for Cable Television Service.

Sec.
66-352. Award of franchise and commencement of service.

Article 44.

Free Insurance.

66-380. Definitions.
66-381. Free insurance.
66-382. Unfair trade practice.

ARTICLE 11.

Government in Business.

§ 66-58. Sale of merchandise or services by governmental units.

(a) Except as may be provided in this section, it shall be unlawful for any unit, department or agency of the State government, or any division or subdivision of the unit, department or agency, or any individual employee or employees of the unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or to engage in the operation of restaurants, cafeterias or other eating places in any building owned by or leased in the name of the State, or to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises, or to provide transportation services, or to contract with any person, firm or corporation for the operation or rendering of the businesses or services on behalf of the unit, department or agency, or to purchase for or sell to any person, firm or corporation any article of merchandise in competition with private enterprise. The leasing or subleasing of space in any building owned, leased or operated by any unit, department or agency or division or subdivision thereof of the State for the purpose of operating or rendering of any of the businesses or services herein referred to is hereby prohibited.

(b) The provisions of subsection (a) of this section shall not apply to:

(1) Counties and municipalities.

(2) The Department of Health and Human Services or the Department of Agriculture and Consumer Services for the sale of serums, vaccines, and other like products.

(3) The Department of Administration, except that the agency shall not exceed the authority granted in the act creating the agency.
(4) The State hospitals for the mentally ill.
(5) The Department of Health and Human Services.
(6) The North Carolina School for the Blind at Raleigh.
(6a) The Department of Juvenile Justice and Delinquency Prevention.
(7) The North Carolina Schools for the Deaf.
(8) The University of North Carolina with regard to:
  a. The University's utilities and other services operated by it prior to January 1, 2005.
  b. The sale of articles produced incident to the operation of instructional departments, articles incident to educational research, articles of merchandise incident to classroom work, meals, books, or to articles of merchandise when sold to members of the educational staff or staff auxiliary to education or to duly enrolled students or occasionally to immediate members of the families of members of the educational staff or of duly enrolled students.
  c. The sale of meals or merchandise to persons attending meetings or conventions as invited guests.
  d. The operation by the University of North Carolina of an inn or hotel and dining and other facilities usually connected with a hotel or inn.
  e. The hospital and Medical School of the University of North Carolina.
  f. The Coliseum of North Carolina State University at Raleigh, and the other schools and colleges for higher education maintained or supported by the State.
  g. The Centennial Campus of North Carolina State University at Raleigh.
  h. The Horace Williams Campus of the University of North Carolina at Chapel Hill.
  i. A Millennial Campus of a constituent institution of The University of North Carolina.
  j. The comprehensive student health services or the comprehensive student infirmaries maintained by the constituent institutions of the University of North Carolina.
  k. Agreements by the University of North Carolina School of the Arts to the use of that school's facilities, equipment, and services of students, faculty, and staff for the creation of commercial materials and productions that may be unrelated to educational purposes, so long as the proceeds from those agreements are used for the benefit of the educational mission of the University of North Carolina School of the Arts.
  l. Activities that further the mission of the University as stated in G.S. 116-1.
  m. Activities that serve students or employees of the University or members of the immediate families or guests of students or employees.
  n. Activities that provide University-related services or market University-related merchandise to alumni of the University and members of their immediate families.
  o. Activities that enable the community in which the constituent institution or other University entity is located, or the people of the State to utilize the University's facilities, equipment, or expertise. If the University proposes to engage in a new type of activity under this subdivision, then the University shall provide

electronic notice of the proposal to the persons who have requested to be included in the registry created pursuant to subdivision (j)(2) of this section prior to engaging in the new type of activity.

(8a) The University of North Carolina with regard to the operation of gift shops, snack bars, and food service facilities physically connected to any of The University of North Carolina's public exhibition spaces, including the North Carolina Arboretum, provided that the resulting profits are used to support the operation of the public exhibition space.

(9) The Department of Environment and Natural Resources, except that the Department shall not construct, maintain, operate or lease a hotel or tourist inn in any park over which it has jurisdiction. The North Carolina Wildlife Resources Commission may sell wildlife memorabilia as a service to members of the public interested in wildlife conservation.

(10) Child-caring institutions or orphanages receiving State aid.

(11) Highlands School in Macon County.

(12) The North Carolina State Fair.

(13) Rural electric memberships corporations.

(13a) Repealed by Session Laws 2006-264, s. 8, effective August 27, 2006.

(13b) The Department of Agriculture and Consumer Services with regard to its lessees at farmers' markets operated by the Department.

(13c) The Western North Carolina Agricultural Center.

(13d) Agricultural centers or livestock facilities operated by the Department of Agriculture and Consumer Services.

(14) Nothing herein contained shall be construed to prohibit the engagement in any of the activities described in subsection (a) hereof by a firm, corporation or person who or which is a lessee of space only of the State of North Carolina or any of its departments or agencies; provided the leases shall be awarded by the Department of Administration to the highest bidder, as provided by law in the case of State contracts and which lease shall be for a term of not less than one year and not more than five years.

(15) The State Department of Correction is authorized to purchase and install automobile license tag plant equipment for the purpose of manufacturing license tags for the State and local governments and for such other purposes as the Department may direct.

The Commissioner of Motor Vehicles, or such other authority as may exercise the authority to purchase automobile license tags is hereby directed to purchase from, and to contract with, the State Department of Correction for the State automobile license tag requirements from year to year.

The price to be paid to the State Department of Correction for the tags shall be fixed and agreed upon by the Governor, the State Department of Correction, and the Motor Vehicle Commissioner, or such authority as may be authorized to purchase the supplies.

(16) Laundry services performed by the Department of Correction may be provided only for agencies and instrumentalities of the State which are supported by State funds and for county or municipally controlled and supported hospitals presently being served by the Department of Correction, or for which services have been contracted or applied for in writing, as of May 22, 1973. In addition to the prior sentence, laundry services performed by the Department of Correction may be provided for VA Medical Centers of the United States Department of Veterans Affairs, the Governor Morehead School, and the North Carolina School for the Deaf.

The services shall be limited to wet-washing, drying and ironing of flatwear or flat goods such as towels, sheets and bedding, linens and those uniforms prescribed for wear by the institutions and further limited to only flat goods or apparel owned, distributed or controlled entirely by the institutions and shall not include processing by any dry-cleaning methods; provided, however, those garments and items presently being serviced by wet-washing, drying and ironing may in the future, at the election of the Department of Correction, be processed by a dry-cleaning method.

(17) The North Carolina Global TransPark Authority or a lessee of the Authority.

(18) The activities and products of private enterprise carried on or manufactured within a State prison facility pursuant to G.S. 148-70.

(19) The North Carolina Justice Academy.

(20) The Department of Transportation, or any nonprofit lessee of the Department, for the sale of books, crafts, gifts, and other tourism-related items at visitor centers owned by the Department.

(21) Repealed by Session Laws 2008-134, s. 73(b), effective July 28, 2008.

(22) The North Carolina State Highway Patrol.

(23) The North Carolina State Lottery Commission.

(24) The North Carolina national guard, for the operation of post exchanges.

(25) The gift or sale of any craft items made by inmates in the custody of the Department of Correction as part of a program or initiative established by the Division of Prisons.

(c) The provisions of subsection (a) shall not prohibit:

(1) The sale of products of experiment stations or test farms.

(1a) The sale of products raised or produced incident to the operation of a community college viticulture/enology program as authorized by G.S. 18B-1114.4.

(1b) The sale by North Carolina State University at University-owned facilities of dairy products, including ice cream, cheeses, milk-based beverages, and the by-products of heavy cream, produced by the Dairy and Process Applications Laboratory, so long as any profits are used to support the Department of Food Science and College of Agriculture and Life Sciences at North Carolina State University.

(2) The sale of learned journals, works of art, books or publications of the Department of Cultural Resources or other agencies, or the Supreme Court Reports or Session Laws of the General Assembly.

(3) The business operation of endowment funds established for the purpose of producing income for educational purposes; for purposes of this section, the phrase "operation of endowment funds" shall include the operation by constituent institutions of The University of North Carolina of campus stores, the profits from which are used exclusively for awarding scholarships to defray the expenses of students attending the institution; provided, that the operation of the stores must be approved by the board of trustees of the institution, and the merchandise sold shall be limited to educational materials and supplies, gift items and miscellaneous personal-use articles. Provided further that, notwithstanding this subsection, profits from a campus store operated by the endowment of the North Carolina School of Science and Mathematics are used exclusively for student activities, athletics, and other programs to enhance student life. Provided further that sales at campus stores are limited to employees of the institution and members of their immediate families, to duly enrolled students of the campus at which a campus store is located and their immediate

families, to duly enrolled students of other campuses of the University of North Carolina other than the campus at which the campus store is located, to other campus stores and to other persons who are on campus other than for the purpose of purchasing merchandise from campus stores. It is the intent of this subdivision that campus stores be established and operated for the purpose of assuring the availability of merchandise described in this Article for sale to persons enumerated herein and not for the purpose of competing with stores operated in the communities surrounding the campuses of the University of North Carolina.

(3a) The use of community college personnel or facilities, with the consent of the trustees of that college, in support of or by a private business enterprise located on a community college campus or in the service area of a community college for one or more of the following specific services in support of economic development:

a. Small business incubators. — As used in this sub-subdivision, the term "small business incubators" means sites for new business ventures in the service area of the community college that are in need of the support and assistance provided by the college; and, without which, the likelihood of success of the business would be greatly diminished. The services of the small business incubator shall not extend to any such new business venture for a period of more than 24 months.

b. Product testing services.

c. Videoconferencing services provided to the public for occasional use.

(3b) The operation of a military business center by a community college. For the purposes of this subdivision, the term "military business center" means a facility that serves to coordinate and facilitate interactions between the United States Armed Forces; military personnel, veterans, and their families; and private businesses.

(3c) The use of the personnel and facilities of Western Piedmont Community College, with the consent of the trustees of the college, in support of economic development through the operation of the East Campus and its companion facilities as an event venue.

(3d) The use of community college facilities by a private business enterprise that has loaned or donated instructional equipment to the college to demonstrate that equipment to customers. This use of college facilities shall be in accordance with policies adopted by the board of trustees of the college.

(4) The operation of lunch counters by the Department of Health and Human Services as blind enterprises of the type operated on January 1, 1951, in State buildings in the City of Raleigh.

(5) The operation of a snack bar and cafeteria in the State Legislative Building, and a snack bar in the Legislative Office Building.

(6) The maintenance by the prison system authorities of eating and sleeping facilities at units of the State prison system for prisoners and for members of the prison staff while on duty, or the maintenance by the highway system authorities of eating and sleeping facilities for working crews on highway construction or maintenance when actually engaged in such work on parts of the highway system.

(7) The operation by penal, correctional or facilities operated by the Department of Health and Human Services, the Department of Juvenile Justice and Delinquency Prevention, or by the Department of Agriculture and Consumer Services, of dining rooms for the inmates or clients or members of the staff while on duty and for the

accommodation of persons visiting the inmates or clients, and other bona fide visitors.

(8) The sale by the Department of Agriculture and Consumer Services of livestock, poultry and publications in keeping with its present livestock and farm program.

(9) The operation by the public schools of school cafeterias.

(9a) The use of a public school bus or public school activity bus for a purpose allowed under G.S. 115C-242 or the use of a public school activity bus for a purpose authorized by G.S. 115C-247.

(9b) The use of a public school activity bus by a nonprofit corporation or a unit of local government to provide transportation services for school-aged and preschool-aged children, their caretakers, and their instructors to or from activities being held on the property of a nonprofit corporation or a unit of local government. The local board of education that owns the bus shall ensure that the person driving the bus is licensed to operate the bus and that the lessee has adequate liability insurance to cover the use and operation of the leased bus.

(10) Sale by any State correctional or other institution of farm, dairy, livestock or poultry products raised or produced by it in its normal operations as authorized by the act creating it.

(11) The sale of textbooks, library books, forms, bulletins, and instructional supplies by the State Board of Education, State Department of Public Instruction, and local school authorities.

(12) The sale of North Carolina flags by or through the auspices of the Department of Administration, to the citizens of North Carolina.

(13) The operation by the Department of Correction of forestry management programs on State-owned lands, including the sale on the open market of timber cut as a part of the management program.

(14) The operation by the Department of Correction of facilities to manufacture and produce traffic and street name signs for use on the public streets and highways of the State.

(15) The operation by the Department of Correction of facilities to manufacture and produce paint for use on the public streets and highways of the State.

(16) The performance by the Department of Transportation of dredging services for a unit of local government.

(17) The sale by the State Board of Elections to political committees and candidate committees of computer software designed by or for the State Board of Elections to provide a uniform system of electronic filing of the campaign finance reports required by Article 22A of Chapter 163 of the General Statutes and to facilitate the State Board's monitoring of compliance with that Article. This computer software for electronic filing of campaign finance reports shall not exceed a cost of one hundred dollars ($100.00) to any political committee or candidate committee without the State Board of Elections first notifying in writing the Joint Legislative Commission on Governmental Operations.

(18) The leasing of no more than 50 acres within the North Carolina Zoological Park by the Department of Environment and Natural Resources to the North Carolina Zoological Society for the maintenance or operation, pursuant to a contract or otherwise, of an exhibition center, theater, conference center, and associated restaurants and lodging facilities.

(19) The use of the North Carolina Museum of Art's conservation lab by the Regional Conservation Services Program of the North Carolina Museum of Art Foundation for the provision of conservation treat-

ment services on privately owned works of art. However, when providing this service, the Regional Conservation Services Program shall give priority to publicly owned works of art.

(d) A department, agency or educational unit named in subsection (b) shall not perform any of the prohibited acts for or on behalf of any other department, agency or educational unit.

(e) Any person, whether employee of the State of North Carolina or not, who shall violate, or participate in the violation of this section, shall be guilty of a Class 1 misdemeanor.

(f) Notwithstanding the provisions of G.S. 66-58(a), the operation by the Department of Corrections of facilities for the manufacture of any product or the providing of any service pursuant to Article 14 of Chapter 148 of the General Statutes not regulated by the provisions of subsection (c) of this section shall be subject to the prior approval of the Governor, with biennial review by the General Assembly, at the beginning of each fiscal year commencing after October 1, 1975. The Department of Correction shall file with the Director of the Budget quarterly reports detailing prison enterprise operations in such a format as shall be required by the Director of the Budget.

(g) Repealed by Session Laws 2006-66, s. 9.11(x), effective July 1, 2007.

(h) Notwithstanding the provisions of G.S. 66-58(b)(8), The University of North Carolina, its constituent institutions, the Centennial Campus of North Carolina State University, the Horace Williams Campus of the University of North Carolina at Chapel Hill, a Millennial Campus of a constituent institution of The University of North Carolina, or any corporation or other legal entity created or directly controlled by and using land owned by The University of North Carolina shall consult with and provide the following information to the Joint Legislative Commission on Governmental Operations before issuing debt or executing a contract for a golf course or for any transient accommodations facility, including a hotel or motel:

(1) Architectural concepts.
(2) Financial and debt service projections.
(3) Business plans.
(4) Operating plans.
(5) Feasibililty studies and consultant reports.

(i) The Board of Governors of The University of North Carolina shall establish a panel to determine whether The University of North Carolina is authorized pursuant to sub-subdivisions m., n., and o. of subdivision (8) of subsection (b) of this section to undertake an activity in competition with an existing or proposed nongovernmental entity. Pursuant to G.S. 138-5, panel members shall receive the same per diem and reimbursement for travel expenses as members of State boards and commissions. The University of North Carolina shall be responsible for staffing and paying the expenses of the panel. The panel shall consist of nine members as follows:

(1) Two members who are familiar with the interests of the business community of the State appointed by the Governor.
(2) Two members who are familiar with the interests of the business community of the State appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives under G.S. 120-121.
(3) Two members who are familiar with the interests of the business community of the State appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate under G.S. 120-121.
(4) Three members who are not employees of The University of North Carolina appointed by the Board of Governors.

The panel may make the determination whether a proposed or ongoing activity undertaken under sub-subdivisions m. or n. of subdivision (8) of subsection (b) of this section is unauthorized competition. The panel may also make a determination whether a proposed or ongoing activity undertaken under sub-subdivision o. of subdivision (8) of subsection (b) of this section is either unauthorized or unfair competition. The University will be bound by a decision of the panel that a proposed or ongoing activity is not justified by the exceptions set out in sub-subdivisions m., n., or o. of subdivision (8) of subsection (b) of this section.

The panel established by this subsection shall report to the Joint Legislative Economic Development Oversight Committee. The panel shall report to the Committee by May 1 of each year on the number and types of determinations made during the preceding year.

(j) The Board of Governors shall establish and publish procedures to be used by the panel created under subsection (i) of this section in making determinations. The procedures shall:

(1) Include that a determination may be initiated based on a request from any nongovernmental entity in the State that is in or proposes to be in the same or a similar or competing business or based on a request from the constituent institution or other university system entity engaging in or proposing to engage in the activity.

(2) Require the panel to maintain a registry of all parties that request to receive notification of the panel's proceedings. The notification may be electronic and shall be given to all parties that have requested to be notified at least seven days prior to the panel's meeting. The notice shall include the name of the constituent institution or other university system entity engaging in or proposing to engage in the activity and the nature of the activity. The panel shall provide the documents relating to any agenda item to anyone requesting them in advance of the panel's proceedings.

(3) Provide that the agendas for the panel's meetings, the minutes of the meetings, and the determinations of the panel shall be posted on The University of North Carolina Web site.

(k) The University of North Carolina and its employees may rely on a determination made by the panel created under subsection (i) of this section as to whether an activity violates this section, and a determination that an activity is authorized shall be an absolute defense in any prosecution for any activity undertaken before a contrary determination is made by a court or by an opinion of the Attorney General. The panel shall not have the power to overrule a prior determination of the Attorney General.

(*l*) The proceeds of any activity undertaken under sub-subdivisions m., n., or o. of subdivision (8) of subsection (b) of this section shall be placed in an institutional trust fund pursuant to G.S. 116-36.1 and shall be used to continue to conduct the activity that generated the proceeds or to further the mission of the constituent institution or other University entity engaging in the activity. (1929, c. 221, s. 1; 1933, c. 172, s. 18; 1939, c. 122; 1941, c. 36; 1951, c. 1090, s. 1; 1957, c. 349, ss. 6, 10; 1967, c. 996, s. 13; 1973, c. 476, ss. 48, 128, 143; c. 671, s. 1; c. 965; c. 1262, s. 86; c. 1294; c. 1457, s. 7; 1975, c. 730, ss. 2-5; c. 840; c. 879, s. 46; 1977, cc. 355, 715; c. 771, s. 4; 1979, c. 830, s. 4; 1981, c. 635, s. 3; 1983, c. 8; c. 476; c. 717, s. 13; c. 761, s. 168; 1985, c. 589, s. 28; c. 757, s. 206(d); 1989, c. 727, s. 218(9); 1989 (Reg. Sess., 1990), c. 1004, s. 1; 1991, c. 749, s. 7; 1991 (Reg. Sess., 1992), c. 902, s. 3; 1993, c. 539, s. 513; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 769, s. 17.15; c. 777, s. 4(e); 1995, c. 247, s. 2; c. 507, s. 13.1(a); 1997-258, s. 1; 1997-261, ss. 4-6; 1997-315, s. 1; 1997-443, s. 11A.21; 1997-456, s. 55.2A; 1997-527, s. 1; 1998-202, s. 4(d), (e); 1998-212, ss. 9.9, 13.3; 1999-234, s. 9; 1999-237, ss. 19.7, 27.23A; 2000-137, ss. 4(f), 4(g); 2000-148, s. 6; 2000-177, s. 10; 2001-41, s. 2; 2001-127, s. 1; 2001-368, s. 1; 2002-102, s. 3; 2002-109, s. 1; 2002-126, ss. 9.15(a), 18.5; 2004-124, ss. 8.17(b), 9.13; 2005-20, s. 1; 2005-63, s. 1; 2005-247, s. 1; 2005-344, s. 5; 2005-397, ss. 1, 2, 4; 2006-66, ss. 9.11(w), (x); 2006-264, s. 8; 2007-60, s. 1; 2007-280, ss. 4.1, 5; 2007-398, s. 5; 2008-134, s. 73(b); 2008-192, s. 12.)

Effect of Amendments. —

Session Laws 2008-134, s. 73(b), effective July 28, 2008, repealed subdivision (b)(21).

Session Laws 2008-192, s. 12, effective August 1, 2008, twice substituted "University of North Carolina School of the Arts" for "North Carolina School of the Arts" in subdivision (b)(8)k.

Article 11A.

Electronic Commerce in Government.

§ 66-58.12. Agencies may provide access to services through electronic and digital transactions; fees authorized.

CASE NOTES

Cited in Petroleum Traders Corp. v. State, — N.C. App. —, 660 S.E.2d 662, 2008 N.C. App. LEXIS 1003 (2008).

Article 20.

Loan Brokers.

§ 66-106. Definitions.

(a) For purposes of this Article the following definitions apply:

(1) A "loan broker" is any person, firm, or corporation who, in return for any consideration from any person, promises to (i) procure for such person, or assist such person in procuring, a loan from any third party; or (ii) consider whether or not it will make a loan to such person.

(2) A "loan" is an agreement to advance money or property in return for the promise to make payments therefor, whether such agreement is styled as a loan, credit card, line of credit, a lease or otherwise.

(b) **(Effective until January 1, 2009)** Except for mortgage loans as defined in G.S. 53-243.01(15), this Article shall not apply to any party approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, a National Mortgage Association or any federal agency; nor to any party currently designated and compensated by a North Carolina licensed insurance company as its agent to service loans it makes in this State; nor to any insurance company registered with and licensed by the North Carolina Insurance Commissioner; nor, with respect to residential mortgage loans, to any residential mortgage banker or mortgage broker licensed pursuant to Article 19A of Chapter 53 of the General Statutes or exempt from licensure pursuant to G.S. 53-243.01(8) and G.S. 53-243.02; nor to any attorney-at-law, public accountant, or dealer registered under the North Carolina Securities Act, acting in the professional capacity for which such attorney-at-law, public accountant, or dealer is registered or licensed under the laws of the State of North Carolina. Provided further that subdivision (1)(ii) above shall not apply to any lender

G.S. 66-106(b) is set out twice. See notes.

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whose loans or advances to any person, firm or corporation in North Carolina aggregate more than one million dollars ($1,000,000) in the preceding calendar year.

(b) **(Effective January 1, 2009)** Except for mortgage loans as defined in G.S. 53-243.01, this Article shall not apply to any party approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, a National Mortgage Association or any federal agency; nor to any party currently designated and compensated by a North Carolina licensed insurance company as its agent to service loans it makes in this State; nor to any insurance company registered with and licensed by the North Carolina Insurance Commissioner; nor, with respect to residential mortgage loans, to any residential mortgage banker or mortgage broker licensed pursuant to Article 19A of Chapter 53 of the General Statutes or exempt from licensure pursuant to G.S. 53-243.01(12) and G.S. 53-243.02; nor to any attorney-at-law, public accountant, or dealer registered under the North Carolina Securities Act, acting in the professional capacity for which such attorney-at-law, public accountant, or dealer is registered or licensed under the laws of the State of North Carolina. Provided further that subdivision (1)(ii) above shall not apply to any lender whose loans or advances to any person, firm or corporation in North Carolina aggregate more than one million dollars ($1,000,000) in the preceding calendar year. (1979, c. 705, s. 1; 1981, c. 785, s. 1; 1993, c. 339, s. 2; 2001-393, s. 4; 2008-228, s. 17.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until January 1, 2009. The second version of subsection (b) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-228, s. 17, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, in subsection (b), substituted "53-243.01" for "53-243.01(15)" near the beginning; and substituted "53-243.01(12)" for "53-243.01(8)" near the middle.

ARTICLE 24.

Trade Secrets Protection Act.

§ 66-152. Definitions.

CASE NOTES

Establishing Misappropriation. — Trial court did not err in dismissing a bank's misappropriation of trade secrets counterclaims against employees because the bank did not identify with sufficient specificity either the trade secrets the employees allegedly misappropriated or the acts by which the alleged misappropriations were accomplished; the identification of the trade secrets allegedly misappropriated was broad and vague. Washburn v. Yadkin Valley Bank & Trust Co., — N.C. App. —, 660 S.E.2d 577, 2008 N.C. App. LEXIS 865 (2008).

§ 66-153. Action for misappropriation.

CASE NOTES

Misappropriation of Trade Secrets Claim Dismissed. — Trial court did not err in dismissing a bank's misappropriation of trade secrets counterclaims against employees because the bank did not identify with sufficient specificity either the trade secrets the employees allegedly misappropriated or the acts by which the alleged misappropriations were accomplished; the identification of the trade secrets allegedly misappropriated was broad and vague. Washburn v. Yadkin Valley Bank & Trust Co., — N.C. App. —, 660 S.E.2d 577, 2008 N.C. App. LEXIS 865 (2008).

ARTICLE 37.

Tobacco Reserve Fund and Escrow Compliance.

Part 1. Tobacco Reserve Fund.

§ 66-291. Requirements.

CASE NOTES

Instrumentality Rule. — For the purpose of a G.S. 66-291(c) claim, a shareholder was not a new party in the State's action to enforce the terms of a master settlement agreement in tobacco litigation because the shareholder was not legally a distinct entity from the corporation. Applying the instrumentality rule, the corporation was so operated that it was a mere instrumentality or alter ego of the shareholder and a shield for the shareholder's activities that violated G.S. 66-291(c). State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. —, 666 S.E.2d 107, 2008 N.C. LEXIS 687 (2008).

Civil Conspiracy Cause of Action. — State's civil conspiracy complaint should not have been dismissed for failure to state a cause of action. The complaint specifically alleged that there was an agreement of an incorporator and owners and managers of a seller to unfairly and deceptively underprice the cigarettes made by the corporation and distributed and sold by an exclusive seller so that the corporation would be unable to deposit sufficient escrow to cover sales in violation of G.S. 66-291 and would deprive the State of North Carolina of a fund against which it could execute judgments against the corporation. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. —, 666 S.E.2d 107, 2008 N.C. LEXIS 687 (2008).

Personal Jurisdiction Over Foreign Corporation Not Shown. — In an action filed by the State against a foreign corporation under G.S. 66-291, the trial court properly dismissed the action for lack of personal jurisdiction, because: (1) the State's conclusory allegation was insufficient to establish an alter ego theory of liability for personal jurisdiction purposes; (2) there was no evidence of any act or omission by the foreign corporation within North Carolina in the record; and (3) the trial court specifically found that the foreign corporation was not in the State of North Carolina when it received the alleged fraudulent funds from the North Carolina corporation. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. App. —, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008).

ARTICLE 42.

State Franchise for Cable Television Service.

§ 66-351. State franchising authority.

CASE NOTES

Comity Principles Prevented Federal Court from Granting Declaratory Relief. — In a 42 U.S.C.S. § 1983 action in which direct broadcast satellite providers sought a declaratory judgment that 2006 N.C. Sess. Laws 2006-151, which revoked the authority of local governments to charge franchise taxes to cable providers and vested the state with franchising authority, violated the Dormant Commerce Clause of U.S. Const., Art. I, § 8, cl. 3, comity principles prevented the court from granting the relief sought because (1) the franchise charges levied on cable providers by North Carolina's political subdivisions prior to 2006 N.C. Sess. Laws 2006-151 were taxes; (2) court-ordered redistribution of intrastate taxation authority would have been an inappropriate intrusion by the federal courts into North

Carolina's tax laws, and (3) state courts provided a plain, adequate, and complete remedy for the alleged constitutional violations. DIRECTV, Inc. v. Tolson, 513 F.3d 119, 2008 U.S. App. LEXIS 450 (4th Cir. 2008).

§ 66-352. Award of franchise and commencement of service.

(a) Notice of Franchise. — A person who intends to provide cable service over a cable system in an area must file a notice of franchise with the Secretary before providing the service. A person who files a notice of franchise must pay a fee in the amount set in G.S. 57C-1-22 for filing articles of organization.

A notice of franchise is effective when it is filed with the Secretary. The notice of franchise must include all of the following:

(1) The applicant's name, principal place of business, mailing address, physical address, telephone number, and e-mail address.

(2) A description and map of the area to be served. If the description includes the area within the boundaries of a city, the area to be served is considered to include any area that is subsequently annexed to the city unless the notice limits the area to be served to the boundaries of the city on the effective date of the notice.

(3) A list of each county and city in which the described service area is located, in whole or in part.

(4) A schedule indicating when service is expected to be offered in the service area.

(b) Commencement of Service. — A person who files a notice of franchise under subsection (a) of this section must begin providing cable service in the service area described in the notice within 120 days after the notice is filed. If cable service does not begin within this period, the notice of franchise terminates 130 days after it was filed. If cable service begins within this period, the holder of the State-issued franchise must file a notice of service with the Secretary within 10 days after the cable service begins. Cable service begins when it passes one or more households in the described service area. This subsection does not apply to a cable service provider who terminates an existing agreement whose franchise area includes all of the service area described in a notice of franchise filed by the provider under subsection (a) of this section.

A notice of service for a service area must include all of the following:

(1) The effective date of a notice of franchise for that area.

(2) A description and map of the service area.

(3) A statement that cable service has begun in the service area.

(c) Extension. — A person who intends to provide cable service over a cable system in an area that is contiguous with but outside the service area described in a notice of franchise on file with the Secretary must file a notice of franchise under subsection (a) of this section that includes the proposed area. The initial service requirements in subsection (b) of this section apply to the proposed area. If the map of the area to be served includes any area that is part of the service area of another State-issued franchise, the termination of a notice of franchise for the proposed area for failure to begin service within the required time does not affect the status of the other State-issued franchise.

(d) Withdrawal. — A person may withdraw a notice of franchise by filing a notice of withdrawal with the Secretary. The notice of withdrawal must be filed at least 90 days before the service is withdrawn. (2006-151, s. 1; 2008-148, s. 5.)

Effect of Amendments. — Session Laws 2008-148. s. 5, effective August 2, 2008, and applicable to notices of franchise that are in effect on August 2, 2008, or become effective on or after that date, added the second sentence to subdivision (a)(2).

ARTICLE 44.

Free Insurance.

§ 66-380. Definitions.

As used in this Article:

(1) "Consumer goods" means goods that are used primarily for personal, family, or household purposes. For the purposes of this Article, consumer goods do not include automobiles or residences.

(2) "Free insurance" means any of the following:

a. Insurance for which no identifiable or additional charge is made to the purchaser or lessee of consumer goods or services directly or indirectly connected with the purchase of consumer goods.

b. Insurance for which an identifiable or additional charge is made in an amount less than the cost of such insurance as to the seller, lessor, or other person other than the insurer providing the insurance. (2008-124, s. 9.1.)

Editor's Note. — Session Laws 2008-124, s. 12.1, made this Article effective October 1, 2008, and applicable to violations that occur on or after that date.

Session Laws 2008-124, s. 11.1 is a severability clause.

§ 66-381. Free insurance.

No person shall advertise, offer, or provide free insurance for damage, loss, or theft as an inducement to the purchase, sale, or rental of consumer goods or services directly or indirectly connected with the purchase of consumer goods. (2008-124, s. 9.1.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

§ 66-382. Unfair trade practice.

A violation of G.S. 66-381 constitutes an unfair trade practice under G.S. 75-1.1. (2008-124, s. 9.1.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Chapter 67.

Dogs.

Article 5.

Protection of Livestock and Poultry from Ranging Dogs.

§ 67-30. Appointment of animal control officers authorized; salary, etc.

CASE NOTES

Applied in Kitchin v. Halifax County, — N.C. App. —, 665 S.E.2d 760, 2008 N.C. App. LEXIS 1624 (2008).

Chapter 74.

Mines and Quarries.

Article 3.

Waterways Obtained.

§ 74-30. Obstructing mining drains.

CASE NOTES

Cited in State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. —, 666 S.E.2d 107, 2008 N.C. LEXIS 687 (2008).

Chapter 74E.

Company Police Act.

§ 74E-1. Title.

Local Modification. — Ashe: (As to Chapter 74E) 2008-78, s. 2.

Chapter 75.

Monopolies, Trusts and Consumer Protection.

Article 3.

Motor Fuel Marketing Act.

Sec.
75-90. Availability of gasoline suitable for blending with fuel alcohol; blender of record.

Article 4.

Telephone Solicitations.

Sec.
75-104. Restrictions on use of automatic dialing and recorded message players.

ARTICLE 1.

General Provisions.

§ 75-1. Combinations in restraint of trade illegal.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applicability of Chapter to Unfair Insurance Practices. —

In an action in which an insured alleged that an insurer failed to pay the full amount due under a commercial insurance policy for damage to property in violation of G.S. 58-63-15(11) and the Unfair and Deceptive Trade Practices Act (UDTPA), G.S. 75-1 et seq., the court analyzed the claim for unfair and deceptive acts or practices in the business of insurance as one brought pursuant to the UDTPA because only the Commissioner of Insurance could pursue an action pursuant to G.S. 58-63-15(11). Amatulli & Sons, LLC v. Great N. Ins. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 1589 (W.D.N.C. Jan. 8, 2008).

Insurer's Letter Denying Further Coverage. — Letter in which an insurer, which had paid to an insured an amount that exceeded a jury's determination of the insured's amount of loss, informed the insured that the insured's claim for further payment under a commercial insurance policy for damage to insured property was rejected due to the insured's failure to document its claim properly was insufficient to support the insured's unfair and deceptive trade practices claim under G.S. 75-1 et seq. Amatulli & Sons, LLC v. Great N. Ins. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 1589 (W.D.N.C. Jan. 8, 2008).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

CASE NOTES

I. General Consideration.
III. Unfair and Deceptive Acts.
  A. In General.
  B. Illustrative Cases.
IV. Pleading and Practice.

I. GENERAL CONSIDERATION.

Federal Preemption. —

With respect to plaintiff's North Carolina Unfair and Deceptive Trade Practices Act (UDTPA), G.S. 75-1.1 et seq., claim, the Fair Credit Reporting Act (FCRA), 15 U.S.C.S. § 1681 et seq., preempted the claim to the extent the claim was based on defendant's alleged reporting of false loan information; to the extent plaintiff alleged a UDTPA claim based on the bank's alleged unfair debt collection practices, plaintiff failed to show that the bank proximately caused her damages. Ross v. Wash. Mut. Bank, 566 F. Supp. 2d 468, 2008 U.S. Dist. LEXIS 51060 (E.D.N.C. 2008).

What Must Be Proved to Prevail. —

Unfair or deceptive trade practices claim brought pursuant to G.S. 75-1.1 et seq. failed since there was a complete lack of proof as to which parties had contracted and what the terms of any such agreement were. S.B. Simmons Landscaping & Excavating, Inc. v. Boggs, — N.C. App. —, 665 S.E.2d 147, 2008 N.C. App. LEXIS 1537 (2008).

The Unfair and Deceptive Trade Practices Act covers claims arising out of employer-employee relations; etc.

Hourly production workers made some attempt to establish the viability of their unfair trade practices claim, however, the employer argued convincingly to the contrary; under the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1.1, it was unlawful to engage in unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, G.S. 75-1.1(a). Although the Unfair and Deceptive Trade Practices Act was intended to benefit consumers, its protections extend to businesses in appropriate situations, but the Unfair and Deceptive Trade Practices Act did not normally extend to run-of-the-mill employment disputes and when the Supreme Court of North Carolina has allowed Unfair and Deceptive Trade Practices Act claims in employer-employee disputes, it was in circumstances not present in the instant case: for example, claims brought by employers against employees who engaged in conduct falling squarely within the Unfair and Deceptive Trade Practices Act's intended reach. Anderson v. Sara Lee Corp., 508 F.3d 181, 2007 U.S. App. LEXIS 26723 (4th Cir. 2007).

Sale of Personal Residence. —

Home sellers were entitled to partial summary judgment regarding the home buyer's unfair and deceptive practices claim against the sellers because private homeowners selling their personal residence were exempt from the purview of the North Carolina unfair and deceptive practices statute and neither the complaint nor the affidavits submitted alleged any facts showing that the sellers were engaged in a business or that the sale was a commercial land transaction that affected commerce. Birmingham v. H&H Home Consultants & Designs, Inc., — N.C. App. —, 658 S.E.2d 513, 2008 N.C. App. LEXIS 646 (Apr. 1, 2008).

Violation Not Shown. —

Insured did not show grounds for reformation of the insured's replacement coverage in the insurance policy covering the insured's home after: (1) the insured's husband oversaw that coverage for many years; (2) the insured asked after the husband died that the insurance company and insurance agent continue the coverage that the husband obtained; (3) they followed the insured's instructions; and (4) the insured sought to reform the insurance policy's replacement coverage provision after fire destroyed the insured's home and the insured felt the policy did not provide sufficient replacement coverage. The insured could not show that the insurance company and insurance agent did anything more than provide the coverage requested, and the insured could not demonstrate any G.S. 75-1.1 unfair or deceptive act or practice that they engaged in. Carter v. West Am. Ins. Co., — N.C. App. —, 661 S.E.2d 264, 2008 N.C. App. LEXIS 1021 (2008).

Cited in Tillman v. Commer. Credit Loans, Inc., 362 N.C. 93, 655 S.E.2d 362, 2008 N.C. LEXIS 21 (2008); Catawba Valley Bank v. Porter, — N.C. App. —, 655 S.E.2d 473, 2008 N.C. App. LEXIS 77 (2008); Higgins v. Spence & Spence, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 13096 (E.D.N.C. Feb. 21, 2008); PCS Phosphate Co. v. Norfolk Southern Corp., 520 F. Supp. 2d 705, 2007 U.S. Dist. LEXIS 73374 (E.D.N.C. Sept. 28, 2007); Kucan v. Advance Am., — N.C. App. —, 660 S.E.2d 98, 2008 N.C. App. LEXIS 902 (2008).

III. UNFAIR AND DECEPTIVE ACTS.

A. In General.

Consumer Transaction Required. — Since a consumer transaction was required to establish a violation of the North Carolina unfair or deceptive trade practices law under G.S. 75-1.1(a) and (b), a shareholder failed to establish such a violation because the shareholder only alleged actions involving internal corporate relationships, and not actions involving the buyer-seller commercial market. Anderson v. Dobson, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 84154 (W.D.N.C. Nov. 13, 2007).

Determination of Unfairness of Conduct. —

A G.S. 75-1.1 claim failed because a potential property purchaser's allegations did not show any of the other businesses engaged in conduct that amounted to an inequitable assertion of their power over the purchaser, and the complaint did not allege sufficient facts to show any of the businesses engaged in conduct that was so egregious in nature to result in immoral, unethical, oppressive behavior; rather, their conduct appeared to be nothing more than competitive business activities. S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, — N.C. App. —, 659 S.E.2d 442, 2008 N.C. App. LEXIS 703 (2008).

Exclusive dealing arrangements and territorial restrictions, etc.

In a business dispute involving asserted allegations of breach of a covenant-not-to-compete and other claims, a trial court properly granted summary judgment to plaintiff on defendants' claims asserting violation of the Unfair and Deceptive Trade Practices Act, as the employer/employee relationship does not fall within the intended scope and purpose of the Unfair and Deceptive Trade Practices Act, and a violation of a covenant-not-to-compete, essentially a breach of contract wthin the employer/employee relationship, lies outside the scope of the Unfair and Deceptive Trade Practices Act. Kinesis Adver., Inc. v. Hill, — N.C. App. —, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008).

Per Se Unfair and Deceptive Trade Practice Not Found. — While a violation of G.S. 143-143.10 and G.S. 143-143.13 may be a violation of G.S. 75-1.1, it is not automatically an unfair and deceptive trade practice, and a violation of 11 N.C. Admin. Code 8.0907, which is based on these statutes, is not necessarily an unfair and deceptive trade practice as a matter of law; however, a manufacturer's violations of the regulation are potentially relevant to a claim under G.S. 75-1.1. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

B. Illustrative Cases.

Fraudulent Scheme. —

Trial court erred in granting a potential buyer's motion to dismiss corporations' counterclaim alleging violations of the Unfair and Deceptive Trade Practices Act, G.S. 75-1.1, because the corporations' claim that the buyer engaged in a fraudulent scheme arising from the sale of corporate assets was sufficient to establish a claim under G.S. 75-1.1; the buyer induced the corporations' owner to sign an employment agreement by promising that all compensation paid to him would be reimbursed upon closing of the asset purchase, but the buyer had no intention of closing on the sale and used the pending sale to induce the corporations to continue paying him a salary and profit-sharing bonuses. Gress v. Rowboat Co., — N.C. App. —, 661 S.E.2d 278, 2008 N.C. App. LEXIS 1074 (2008).

Trial court erred in granting a potential buyer's motion to dismiss corporations' counterclaim alleging violations of the Unfair and Deceptive Trade Practices Act (UDTPA), G.S. 75.1.1, because the corporations' allegation that the buyer engaged in a fraudulent scheme arising from the sale of corporate assets was sufficient to establish a claim under G.S. 75-1.1; the general presumption against UDTPA claims between employers and employees did not apply because the facts alleged by the corporations did not establish a true employer-employee relationship but showed a fictitious relationship that would not exist but for the parties' buyer-seller relationship. Gress v. Rowboat Co., — N.C. App. —, 661 S.E.2d 278, 2008 N.C. App. LEXIS 1074 (2008).

Applicability To Check Cashing Business That Charged Usurious Interest Rates. —

Debtor was allowed reasonable attorney's fees of $3,000 because the creditor's taking of a security interest in the debtor's motorcycle and charging a 19.742% per annum interest rate on the revolving line of credit exceeded 1.25% per month in violation of G.S. 24-11(c) and was an unfair and deceptive trade practice under G.S. 75-1.1. Worley v. GE Moneybank (In re Worley), — Bankr. —, 2008 Bankr. LEXIS 1893 (Bankr. E.D.N.C. June 16, 2008).

Defective Mobile Home. — Manufacturer's violations of 11 N.C. Admin. Code 8.0907, which was based on G.S. 143-143.10 and G.S. 143-143.13, were not per se an unfair and deceptive trade practice under G.S. 75-1.1, although the violations of 11 N.C. Admin. Code 8.0907 were evidence of an unfair and deceptive trade practice. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

Defamation Claim. — Plaintiff's claim for unfair and deceptive trade practices was properly dismissed because that claim necessarily depended on the validity of plaintiff's defamation claim, which had been dismissed for failure to state a claim. Craven v. Cope, — N.C. App. —, 656 S.E.2d 729, 2008 N.C. App. LEXIS 266 (2008).

Damages Award Justified. —

Trial court's findings of fact supported the conclusion that campground tenants were entitled to treble damages on the tenants unfair and deceptive trade practices claims after the owners rented campground spaces to the tenants on a monthly basis, charged the tenants for electricity, and electrical interruptions caused damage to the tenants' recreational vehicles. These activities constituted business activities; thus, the owners' acts were in or affecting commerce and the owners' acts in interfering with and disconnecting the tenants' electricity were, at a minimum, unfair. Shepard v. Bonita Vista Props., L.P., — N.C. App. —, 664 S.E.2d 388, 2008 N.C. App. LEXIS 1489 (2008).

Conduct Not Amounting to Unfair Trade Practice. —

Loan servicing company could not be liable to a debtor for an alleged violation of the North Carolina Unfair Trade Practices Act, G.S. 75-1.1, because the loan servicing company as an agent of a successor mortgage company did not actively participate in the alleged unlawful activities during the execution of the mortgage. Tetterton v. Ocwen Fed. Bank (In re Tetterton), 379 B.R. 594, 2007 Bankr. LEXIS 4190 (Bankr. E.D.N.C. 2007).

Where a home was flooded and the homeowner argued that defendants, an insurer and an adjusting company, allowed the mold problem to go unremediated and become more severe, directed verdict was properly granted as to the unfair and deceptive trade practices claim because defendants' response was not the proximate cause of the damage. Burrell v. Sparkkles Reconstruction Co., — N.C. App. —, 657 S.E.2d 712, 2008 N.C. App. LEXIS 422 (2008).

Where a financial company and an analyst published a company update regarding a manufacturer, the manufacturer's claim for unfair or deceptive trade practices failed because (1) the manufacturer's libel per se claim was properly dismissed, and (2) at most, the manufacturer alleged that its former employee breached a confidentiality agreement with the manufacturer when the employee downloaded confidential data and provided information to the analyst. Nucor Corp. v. Prudential Equity Group, LLC, — N.C. App. —, 659 S.E.2d 483, 2008 N.C. App. LEXIS 713 (2008).

Trial court did not err by refusing to determine that the creditors' and the auctioneer's actions in auctioning off the debtors' cattle herd and not delivering any of the proceeds to the secured creditor constituted unfair and deceptive trade practices under G.S. 75-1.1. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

Employees Did Not Violate Non-Competition Agreements When Wrongly Separated. — Trial court did not err in granting employees' judgment on the pleadings on a bank's counterclaims of breach of contract, tortious interference with contractual relations, and unfair competition because the employees did not breach their employment agreements when non-competition provisions did not apply to them prospectively following their termination without cause; because the employees were not bound by the non-competition provisions, the employees did not engage in unfair methods of competition with the bank. Washburn v. Yadkin Valley Bank & Trust Co., — N.C. App. —, 660 S.E.2d 577, 2008 N.C. App. LEXIS 865 (2008).

Litigation Lending Agreement. — Litigation lender violated G.S. 75-1.1 since it did not inform the injured driver that she was executing a contract that violated the Consumer Finance Act, and the contract for an illegal advance violated the public policy of protecting borrowers. Odell v. Legal Bucks, LLC, — N.C. App. —, 665 S.E.2d 767, 2008 N.C. App. LEXIS 1619 (2008).

IV. PLEADING AND PRACTICE.

Plaintiff Held Not Entitled to Proceed Under This Section. —

Manager-member of a limited liability company (LLC) did not state an individual claim for unfair or deceptive trade practices against a comanager-member of the LLC because all of the allegations alleging breach of fiduciary duty, and consequently an unfair or deceptive trade practice claim, related to the parties' relationship through the LLC. Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008).

Complaint Held Sufficient to State Claim. —

A Chapter 7 trustee stated sufficient claims under North Carolina law for deceptive trade practice under G.S. 75-1.1 et seq., and civil conspiracy, to avoid judgment on the pleadings under Fed. R. Bankr. P. 7012(c) and Fed. R. Civ. P. 12(c). Ivey v. McDaniel (In re EBW Laser, Inc.), — Bankr. —, 2008 Bankr. LEXIS 1276 (Bankr. M.D.N.C. Apr. 21, 2008).

Propriety of Arbitration. —

Bankruptcy court denied a debt counseling company's motion to stay a Chapter 11 debtor's adversary proceeding and compel arbitration under a Debt Mediation and Restructuring Agreement the parties entered before the debtor declared bankruptcy. The debtor's claims under 11 U.S.C.S. §§ 544, 548 and 550, G.S. 39-23.1 et seq., and G.S. 75-1.1, alleging fraudulent conveyance and unfair and deceptive trade practices, were core claims under 28 U.S.C.S. § 157(b)(2), the asset in dispute was the only asset left to be recaptured and redistributed in the debtor's Chapter 11 case, and arbitration under the terms of the parties' agreement would have caused great hardship to the debtor, as the debtor was administratively insolvent and had no available funds to pay counsel or its share of the costs of arbitration. Aeronautical Solutions, LLC v. Commer. Debt Counselling Corp. (In re Aeronautical Solutions, LLC), — Bankr. —, 2007 Bankr. LEXIS 4586 (Bankr. E.D.N.C. June 8, 2007).

Election of Remedies. —

Where a matter had to be remanded for a new trial on the issue of damages, if the property owners were awarded both punitive damages and unfair and deceptive trade practices damages based on a contractor's conduct, they had to elect between the two remedies. Decker v. Homes, Inc./Construction Mgmt. & Fin. Group, — N.C. App. —, 654 S.E.2d 495, 2007 N.C. App. LEXIS 2524 (2007).

Copyright Act Preemption. — Copyright Act, 17 U.S.C.S. § 301(a), preempted a doctor's claim against a hospital and two doctors under the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA), G.S. 75-1.1, for unauthorized use of his copyrighted materials because there were not extra elements for the UDTPA claim, and the identical acts supported both causes of action. Rutledge v. High Point Reg'l Health Sys., 558 F. Supp. 2d 611, 2008 U.S. Dist. LEXIS 48033 (M.D.N.C. 2008).

§ 75-16. Civil action by person injured; treble damages.

CASE NOTES

II. Practice and Procedure.
III. Damages.

II. PRACTICE AND PROCEDURE.

Who May Bring Action. —
Daughter had standing to maintain an unfair and deceptive trade practices claim under G.S. 75-16, 143-143.12(c), and 143-143.9(2) against a manufacturer as: (1) her father bought her a defective mobile home, (2) she was the person who selected the interior details for the home, who planned to live in the home, and who was going to make the monthly installment payments, (3) she was a consumer of the mobile home supplied by a manufacturer, and (4) when the manufacturer supplied a defective home, the daughter suffered a resulting injury. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

III. DAMAGES.

Motion to Compel Tax Returns for Purposes of Punitive Damage Award Denied. — Plaintiff failed to overcome the qualified privilege against the disclosure of defendants' tax returns in an action for trademark infringement and violation of the North Carolina Unfair and Deceptive Trade Practices Act and, thus, plaintiff's motion to compel was denied because the returns were not relevant when plaintiff did not assert a punitive damages claim and because the award of damages by a court or jury had nothing to do with defendants' net worth or ability to pay when any enhanced damages in trademark cases and in cases involving unfair and deceptive trade practices are three times the damages award, pursuant to 15 U.S.C.S. § 1117(b) and G.S. 75-16. Water Out Drying Corp. v. Allen, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 37867 (W.D.N.C. June 7, 2006).

Treble Damages Awarded. —
Trial court's findings of fact supported the conclusion that campground tenants were entitled to treble damages on the tenants unfair and deceptive trade practices claims after the owners rented campground spaces to the tenants on a monthly basis, charged the tenants for electricity, and electrical interruptions caused damage to the tenants' recreational vehicles. These activities constituted business activities; thus, the owners' acts were in or affecting commerce and the owners' acts in interfering with and disconnecting the tenants' electricity were, at a minimum, unfair. Shepard v. Bonita Vista Props., L.P., — N.C. App. —, 664 S.E.2d 388, 2008 N.C. App. LEXIS 1489 (2008).

§ 75-16.1. Attorney fee.

CASE NOTES

Attorney's Fees Upheld. —
Since the trial court found that defendants willfully committed unfair and deceptive trade acts or practices in commerce within the meaning of G.S. 75-1.1, there was an unwarranted refusal by defendants to fully resolve the matter which constituted the basis of the suit, and plaintiffs were entitled to an award of reasonable attorney fees pursuant to G.S. 75-16.1, those findings satisfied the trial court's obligation to find that defendants refused to resolve the matter fully. Shepard v. Bonita Vista Props., L.P., — N.C. App. —, 664 S.E.2d 388, 2008 N.C. App. LEXIS 1489 (2008).

Improper Award of Attorney Fees Pursuant to a Rule 60 Motion. — When debtors' motion for attorney's fees, pursuant to G.S. 75-16.1, was denied, it was error for a trial court to grant attorney's fees pursuant to a reconsideration of the court's prior denial, under G.S. 1A-1, N.C. R. Civ. P. 60(b)(6), because the motion to reconsider raised alleged errors of law by claiming the trial court applied the wrong legal standard in denying the attorney's fees motion, and such errors could not properly be considered under a motion to reconsider, but, rather, had to be considered either on appeal or pursuant to a new trial motion under G.S. 1A-1, N.C. R. Civ. P. 59. Catawba Valley Bank v. Porter, — N.C. App. —, 655 S.E.2d 473, 2008 N.C. App. LEXIS 77 (2008).

Trial court erred in using the incorrect standard in its order awarding attorney's fees to the prevailing home sellers in the unfair and deceptive practices claim brought by the home buyer because the standard for awarding attorney's fees under G.S. 75-16.1(2) was that the plaintiff knew, or should have known, the action was frivolous and malicious; the trial court instead applied the lower standard of an unwarranted refusal to resolve the case. Thus, remand of the matter to the trial court was necessary for additional findings of fact and conclusions of law regarding the award of attorney's fees because the appellate court was unable to determine if the trial court would have awarded attorney's fees if it had applied the correct standard. Birmingham v. H&H Home Consultants & Designs, Inc., — N.C. App. —, 658 S.E.2d 513, 2008 N.C. App. LEXIS 646 (Apr. 1, 2008).

Cited in Craven v. Cope, — N.C. App. —, 656 S.E.2d 729, 2008 N.C. App. LEXIS 266 (2008).

§ 75-16.2. Limitation of actions.

CASE NOTES

Accrual of Cause of Action. —
It was error to dismiss the insured's negligence, fraud, constructive fraud, breach of contract, breach of covenant of good faith and fair dealing with punitive damages, unfair and deceptive trade practices, and breach of fiduciary duty claims as untimely under G.S. 1-56, 1-52(1), (5), and (9), and G.S. 75-16.2, as the claims accrued when the insured was denied underinsured motorist (UIM) coverage since: (1) the insured reasonably should have discovered the alleged fraud or negligence committed by the insurer and the agent in allegedly forging the insured's name on a rejection of UIM coverage form when the insured was denied UIM coverage, (2) the insured signed the policy in 1998, and was injured in a car accident in October 2000, (3) the insured filed suit in November 2005, (4) the insured was first informed that the policy did not include UIM coverage in February 2003, and (5) the insured would not have acquired any contractual right to such coverage if it existed until November 2004, when the insured exhausted the other driver's policy. Piles v. Allstate Ins. Co., — N.C. App. —, 653 S.E.2d 181, 2007 N.C. App. LEXIS 2449 (2007).

Denial of Insurance Coverage. — In an action in which an insured alleged that an insurer violated the Unfair and Deceptive Trade Practices Act, G.S. 75-1.1 et seq., by refusing to timely and adequately pay the full amount due under a commercial insurance policy for damage to property, the insured's claims were time-barred under G.S. 75-16.2 to the extent that the claims were based on conduct that occurred more than four years before the complaint was filed. Amatulli & Sons, LLC v. Great N. Ins. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 1589 (W.D.N.C. Jan. 8, 2008).

ARTICLE 2.

Prohibited Acts by Debt Collectors.

§ 75-50. Definitions.

CASE NOTES

Applied in Lofton v. Carolina Fin., LLC (In re Lofton), 385 B.R. 133, 2008 Bankr. LEXIS 1102 (Bankr. E.D.N.C. 2008).

ARTICLE 3.

Motor Fuel Marketing Act.

§ 75-90. Availability of gasoline suitable for blending with fuel alcohol; blender of record.

(a) The following definitions apply in this section:
  (1) Blender. — Defined in G.S. 105-449.60.
  (2) Distributor. — Defined in G.S. 105-449.60.
  (3) Fuel Alcohol. — Defined in G.S. 105-449.60.
  (4) Gasoline. — Defined in G.S. 105-449.60(22)a.

(5) Retailer. — Defined in G.S. 105-449.60.
(6) Supplier. — Defined in G.S. 105-449.60.

(b) A supplier that imports gasoline into the State shall offer gasoline for sale to a distributor or retailer that is not preblended with fuel alcohol and that is suitable for subsequent blending with fuel alcohol.

(c) The General Assembly finds that use of blended fuels reduces dependence on imported oil and is therefore in the public interest. The General Assembly further finds that gasoline may be blended with fuel alcohol below the terminal rack by distributors and retailers as well as above the terminal rack by suppliers and that there is no reason to restrict or prevent blending by suppliers, distributors, or retailers. Therefore, any provision of any contract that would restrict or prevent a distributor or retailer from blending gasoline with fuel alcohol or from qualifying for any federal or State tax credit due to blenders is contrary to public policy and is void. This subsection does not impair the obligation of existing contracts, but does apply if such contract is modified, amended, or renewed. (2008-198, s. 11.7; 2008-222, s. 1.)

Editor's Note. — Session Laws 2008-222, s. 2, made this section effective August 17, 2008.

Session Laws 2008-198, s. 11.7, was contingent on Senate Bill 1339 becoming law, which it did. Senate Bill 1339 was enacted as Session Laws 2008-222.

Effect of Amendments. — Session Laws 2008-198, s. 11.7, effective August 8, 2008, substituted "G.S. 105-449.60(22)a" for "G.S. 105-449.60(15)a" in subdivision (a)(4).

ARTICLE 4.

Telephone Solicitations.

§ 75-104. Restrictions on use of automatic dialing and recorded message players.

(a) Except as provided in this section, no person may use an automatic dialing and recorded message player to make an unsolicited telephone call.

(b) Notwithstanding subsection (a) of this section, a person may use an automatic dialing and recorded message player to make an unsolicited telephone call only under one or more of the following circumstances:

(1) All of the following are satisfied:
  a. The person making the call is any of the following:
    1. A tax-exempt charitable or civic organization.
    2. A political party or political candidate.
    3. A governmental official.
    4. An opinion polling organization, radio station, television station, cable television company, or broadcast rating service conducting a public opinion poll.
  b. No part of the call is used to make a telephone solicitation.
  c. The person making the call clearly identifies the person's name and contact information and the nature of the unsolicited telephone call.
(2) Prior to the playing of the recorded message, a live operator complies with G.S. 75-102(c), states the nature and length in minutes of the recorded message, and asks for and receives prior approval to play the recorded message from the person receiving the call.
(3) The unsolicited telephone call is in connection with an existing debt or contract for which payment or performance has not been completed at the time of the unsolicited telephone call.
(4) The unsolicited telephone call is placed by a person with whom the telephone subscriber has made an appointment, provided that the call

is conveying information only about the appointment, or by a utility, telephone company, cable television company, satellite television company, or similar entity for the sole purpose of conveying information or news about network outages, repairs or service interruptions, and confirmation calls related to restoration of service.

(5) The person plays the recorded message in order to comply with section 16 C.F.R. Part 310.4(b)(4) of the Telemarketing Sales Rule.

(6) The unsolicited telephone call is placed by, or on behalf of, a health insurer as defined in G.S. 58-51-115(a)(2) from whom the telephone subscriber or other covered family member of the health insurer receives health care coverage or the administration of such coverage, provided that the call is conveying information related to the telephone subscriber or family member's health care, preventive services, medication or other covered benefits. (2003-411, s. 3; 2008-124, s. 10.3.)

Editor's Note. —
Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 10.3, effective July 28, 2008, added subdivision (b)(6).

Chapter 75A.

Boating and Water Safety.

Article 1.

Boating Safety Act.

§ 75A-14.1. Lake Norman No-Wake Zone.

Editor's Note. —

For similar provisions regarding the establishment of no-wake zones, see Session Laws 1987 (Reg. Sess., 1988), c. 1045 (no-wake zone in Brunswick County); Session Laws 1993, c. 67 (no-wake zone in city of Southport); Session Laws 1993, c. 434, as amended by 1993, c. 637 (no-wake zone on Waccamaw and Pamlico Rivers in Columbus County and city of Washington); Session Laws 1995 (Reg. Sess., 1996), c. 559 (no-wake zone on Lake Hickory in Catawba County); Session Laws 2001-65, as amended by Session Laws 2005-433, s. 4 (no-wake zone on Intercoastal Waterway between Markers 44 and 46B in area abutting Town of Cedar Point); Session Laws 2002-23 (no-wake zone around Eagle Point Nature Preserve on High Rock Reservoir in Rowan County); Session Laws 2002-39 (no-wake zone in vicinity of Roanoke River Bridge on Highway 17 in Bertie County); Session Laws 2002-141, s. 9.1(a)-(f) (no-wake zone on the Roanoke River in Bertie County); Session Laws 2003-189, ss. 1-5 (no-wake zone on Pembroke Creek in Cowan County); and Session Laws 2008-100 (no-wake speed zone near towns of Holden Beach and Oak Island in Brunswick County).

Session Laws 2008-100, s. 1, provides: "It is unlawful to operate a vessel at greater than a no-wake speed in the Intracoastal Waterway adjacent to the Town of Holden Beach and the Town of Oak Island within 1,000 feet of the center of the intersection of the inlet at the Lockwood Folly River. No-wake speed is idle speed or a slow speed creating no appreciable wake."

Chapter 78A.

North Carolina Securities Act.

Article 4.

Registration and Notice Filing Procedures of Securities.

Sec.
78A-31. Notice filings for securities covered under federal law.

ARTICLE 4.

Registration and Notice Filing Procedures of Securities.

§ 78A-31. Notice filings for securities covered under federal law.

(a) The Administrator, by rule or order, may require the filing of any of the following documents with regard to a security covered under section 18(b)(2) of the Securities Act of 1933 (15 U.S.C. § 77r(b)(2)):

(1) Prior to the initial offer of the security in this State, all documents that are part of a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933, or, in lieu thereof, a form prescribed by the Administrator, together with a consent to service of process signed by the issuer and with the payment of a notice filing fee of two thousand dollars ($2,000).

(2) After the initial offer of the security in this State, all documents that are part of an amendment to a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933, or, in lieu thereof, a form prescribed by the Administrator, which shall be filed concurrently with the Administrator.

(3) A report of the value of securities covered under federal law that are offered or sold in this State.

(4) A notice filing pursuant to this section shall expire on December 31 of each year or some other date not more than one year from its effective date as the Administrator may by rule or order provide. A notice filing of the offer of securities covered under federal law that are to be offered for a period in excess of one year shall be renewed annually by payment of a renewal fee of two thousand dollars ($2,000) and by filing any documents and reports that the Administrator may by rule or order require consistent with this section. The renewal shall be effective upon the expiration of the prior notice period.

(5) A notice filed in accordance with this section may be amended after its effective date to increase the securities specified as proposed to be offered. An amendment becomes effective upon receipt by the Administrator. Every person submitting an amended notice filing shall pay a filing fee of fifty dollars ($50.00) with respect to the additional securities proposed to be offered.

(b) With regard to any security that is covered under section 18(b)(4)(D) of the Securities Act of 1933 (15 U.S.C. § 77r(b)(4)(d)), the Administrator, by rule or order, may require the issuer to file a notice on SEC Form D (17 C.F.R. § 239.500) and a consent to service of process signed by the issuer no later than 15 days after the first sale of the security in this State. There is established a fee of three hundred fifty dollars ($350.00) to recover costs for filing required by this section.

(c) The Administrator, by rule or order, may require the filing of any document filed with the Securities and Exchange Commission under the Securities Act of 1933, with respect to a security covered under section 18(b)(3) or (4) of the Securities Act of 1933 (15 U.S.C. § 77r(b)(3) or (4)). The Administrator may, by rule, establish a fee to recover costs for any filing required under this section, not to exceed one hundred fifty dollars ($150.00).

(d) The Administrator may suspend the offer and sale of a covered security, except a covered security under section 18(b)(1) of the Securities Act of 1933 (15 U.S.C. § 77r(b)(1)), if the Administrator finds that (i) the order is in the public interest, and (ii) there is a failure to comply with any condition established under this section.

(e) The Administrator, by rule or order, may waive any of the requirements set by this section. (1997-419, s. 9; 1998-212, s. 29A.9(d); 2002-126, ss. 29A.24, 29A.37; 2002-189, s. 4; 2003-284, s. 35B.2(a); 2008-107, s. 29.3(a).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 29.3(a), effective July 20, 2008, substituted "two thousand dollars ($2,000)" for "two hundred fifty dollars ($250.00)" in subdivision (a)(4).

Chapter 84.

Attorneys-at-Law.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-2.1. "Practice law" defined.

CASE NOTES

Workbook Created by Bankruptcy Petition Preparers. — Where bankruptcy petition preparers provided customers with a workbook and guide that contained advice to the customer concerning bankruptcy law and how the blanks in the workbook should be completed, the preparers engaged in the unauthorized practice of law. In re Langford, — Bankr. —, 2005 Bankr. LEXIS 3201 (Bankr. M.D.N.C. Nov. 9, 2005).

Defendant Not Practicing Law. — Defendant was not engaged in the "practice of law" when defendant sent a letter and accompanying pages to a witness set to testify against a friend defendant made in jail, because defendant did not hold defendant out as an attorney or as having a law degree, and conceded that defendant's information on the law was acquired through 20 years of being in trouble. The letter did not constitute a "legal document," and defendant repeatedly urged the witness not to rely on defendant and seek advice from an attorney. State v. Williams, 186 N.C. App. 233, 650 S.E.2d 607, 2007 N.C. App. LEXIS 2122 (2007).

§ 84-4. Persons other than members of State Bar prohibited from practicing law.

CASE NOTES

Workbook Created by Bankruptcy Petition Preparers. — Where bankruptcy petition preparers provided customers with a workbook and guide that contained advice to the customer concerning bankruptcy law and how the blanks in the workbook should be completed, the preparers engaged in the unauthorized practice of law. In re Langford, — Bankr. —, 2005 Bankr. LEXIS 3201 (Bankr. M.D.N.C. Nov. 9, 2005).

Evidence Insufficient to Support Conviction for Unauthorized Practice of Law. — Letter and accompanying pages defendant sent to a witness set to testify against a friend defendant made in jail did not constitute the unauthorized practice of law, because defendant did not hold defendant out as an attorney or as having a law degree, defendant conceded that defendant's information on the law was acquired through 20 years of being in trouble, the letter did not constitute a "legal document," and defendant repeatedly urged the witness not to rely on defendant and seek advice from an attorney. State v. Williams, 186 N.C. App. 233, 650 S.E.2d 607, 2007 N.C. App. LEXIS 2122 (2007).

Administrator's Wrongful Death Complaint Was Not a Nullity. — Fact that wrongful death complaint was signed by the estate administrator and not by an attorney did not render the complaint a nullity, and the denial of healthcare providers' motion to dismiss the complaint was proper; any defect in the administrator's complaint was cured by the subsequent appearance of a properly licensed and admitted counsel. Reid v. Cole, — N.C. App. —, 652 S.E.2d 718, 2007 N.C. App. LEXIS 2355 (2007).

§ 84-8. Punishment for violations; legal clinics of law schools and certain law students and lawyers excepted.

CASE NOTES

Cited in In re Langford, — Bankr. —, 2005 Bankr. LEXIS 3201 (Bankr. M.D.N.C. Nov. 9, 2005); State v. Williams, 186 N.C. App. 233, 650 S.E.2d 607, 2007 N.C. App. LEXIS 2122 (2007).

Article 2.

Relation to Client.

§ 84-13. Fraudulent practice, attorney liable in double damages.

CASE NOTES

Double Damages Awarded. — Attorney breached the attorney's fiduciary duty to the two clients by converting funds, which caused a loss to the two clients. Since the attorney's conversion and breach of fiduciary duty were presumed to be fraudulent, the attorney was shown to have committed a fraudulent practice and the two clients were entitled to an award of compensatory damages and an award of double damages pursuant to G.S. 84-13. N.C. State Bar v. Gilbert, — N.C. App. —, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

Interest Improper on Punitive Double Damages. — Trial court should not have awarded prejudgment interest and post-judgment interest on both the compensatory and the G.S. 84-13 punitive double damage award in the state bar's action against the attorney for reimbursement of funds paid to the two clients after the attorney breached the attorney's fiduciary duty to them and converted their funds. G.S. 24-5(b) only allowed interest to be awarded for compensatory damages. N.C. State Bar v. Gilbert, — N.C. App. —, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

Article 4.

North Carolina State Bar.

§ 84-28. Discipline and disbarment.

CASE NOTES

I. General Consideration.
III. Appeals.

I. GENERAL CONSIDERATION.

Cited in N.C. State Bar v. Gilbert, — N.C. App. —, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

III. APPEALS.

Appeals from Decisions of State Bar Disciplinary Hearing Commission. — Clear, cogent, and convincing evidence supported the Disciplinary Hearing Commission's findings and conclusions that the attorney violated N.C. Rev. R. Prof. Conduct Rule 1.16, regarding the termination of representation, Rule 1.3, about neglecting client matters, and Rule 8.4, prejudicing the administration of justice, in violation of an earlier Consent Order of Discipline resulting in the attorney's license suspension. The attorney's conduct violated those rules because the attorney stopped representing the client when the client notified the attorney that she could not pay an additional sum to represent the client on probation violation matters, and the attorney did not obtain permission from the trial court to withdraw from representing her after the attorney had appeared on her behalf. N.C. State Bar v. Key, — N.C. App. —, 654 S.E.2d 55, 2007 N.C. App. LEXIS 2576 (2007), aff'd on rehearing, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008).

§ 84-28.2. Persons immune from suit.

CASE NOTES

Cited in Snyder v. Learning Servs. Corp., — N.C. App. —, 653 S.E.2d 548, 2007 N.C. App. LEXIS 2454 (2007).

Chapter 85B.

Auctions and Auctioneers.

Sec.
85B-3. Auctioneers Commission.

§ 85B-3. Auctioneers Commission.

(a) There shall be a five-member North Carolina Auctioneers Commission having the powers and responsibilities set out in this Chapter. The Governor shall appoint the members of the Commission, at least three of whom, and their successors, may be from nominations submitted by the Auctioneers Association of North Carolina. The Auctioneers Association shall submit, within 45 days of when the vacancy occurs, at least three names for each position for which it is entitled to make a nomination. Of the initial five members of the Commission one shall be appointed for a one-year term, two shall be appointed for two-year terms and two for three-year terms; thereafter, each new member shall be appointed for a term of three years. Any vacancy shall be filled for the remainder of the unexpired term only. Each member shall continue in office until his successor is appointed and qualified. No member shall serve more than two complete consecutive terms.

(b) At least three members of the Commission shall be experienced auctioneers who are licensed under this Chapter. One member shall be a person who shall represent the public at large and shall not be licensed under this Chapter.

(c) The Commission shall employ an executive director and other employees as needed to carry out the duties of this Chapter. All employees shall serve at the pleasure of the Commission.

(d) Any action that may be taken by the Commission may be taken by vote of any three of its members.

(e) The members of the Commission shall elect from among themselves a chairman to serve a one-year term. No person shall serve more than two consecutive terms as chairman.

(f) Repealed by Session Laws 1999-142, s. 1, effective October 1, 1999.

(g) Members of the Commission shall receive the compensation set for members of occupational licensing boards by G.S. 93B-5. (1973, c. 552, s. 3; 1975, c. 648, s. 1; 1983, c. 751, ss. 4, 5; 1991 (Reg. Sess., 1992), c. 819, s. 3; 1999-142, s. 1; 2008-138, s. 1.)

Effect of Amendments. — Session Laws 2008-138, s. 1, effective July 28, 2008, substituted “may” for “shall” in the second sentence of subsection (a).

Chapter 87.

Contractors.

Article 7.

North Carolina Well Construction Act.

Sec.
87-97. (See Editor's note for effective date) Permitting, inspection, and testing of private drinking water wells.

Sec.
87-98. Bernard Allen Memorial Emergency Drinking Water Fund.

Article 1.

General Contractors.

§ 87-1. "General contractor" defined; exceptions.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in Hodgson Constr., Inc. v. Howard, — N.C. App. —, 654 S.E.2d 7, 2007 N.C. App. LEXIS 2439 (2007); Ron Medlin Constr. v. Harris, — N.C. App. —, 658 S.E.2d 6, 2008 N.C. App. LEXIS 537 (Mar. 18, 2008).

§ 87-10. Application for license; examination; certificate; renewal.

CASE NOTES

General contractor did not exceed the authority of its limited license when it built a house for the property owners despite the fact that the stated contract price was more than the $350,000 allowed for a limited license holder; the general contractor only had control over the project regarding an amount less than $350,000, and, thus, should have been allowed to recover the property owners' unpaid balance owed to it. Hodgson Constr., Inc. v. Howard, — N.C. App. —, 654 S.E.2d 7, 2007 N.C. App. LEXIS 2439 (2007).

§ 87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to Board; penalties.

CASE NOTES

Partnership could still bring action for quantum meruit even though signing partner was not licensed. — Because a partnership was not an unlicensed general contractor, and thus its claim was not barred by the licensing requirements, the property owners could not use the licensing statutes as a shield to avoid any quantum meruit obligations owing to the partnership for the building of their home based on the fact that an individual partner, who signed the contract, was not licensed. Ron Medlin Constr. v. Harris, — N.C. App. —, 658 S.E.2d 6, 2008 N.C. App. LEXIS 537 (Mar. 18, 2008).

ARTICLE 7.

North Carolina Well Construction Act.

§ 87-97. (See Editor's note for effective date) Permitting, inspection, and testing of private drinking water wells.

(a) Mandatory Local Well Programs. — Each county, through the local health department that serves the county, shall implement a private drinking water well permitting, inspection, and testing program. Local health departments shall administer the program and enforce the minimum well construction, permitting, inspection, repair, and testing requirements set out in this Article and rules adopted pursuant to this Article.

(b) Permit Required. — Except for those wells required to be permitted by the Environmental Management Commission pursuant to G.S. 87-88, no person shall:

(1) Construct or assist in the construction of a private drinking water well unless a construction permit has been obtained from the local health department.

(2) Repair or assist in the repair of a private drinking water well unless a repair permit has been obtained from the local health department, except that a permit shall not be required for the repair or replacement of a pump or tank.

(c) Permit Not Required for Maintenance or Pump Repair or Replacement. — A repair permit shall not be required for any private drinking water well maintenance work that does not involve breaking or opening the well seal. A repair permit shall not be required for any private drinking water well repair work that involves only the repair or replacement of a pump or tank.

(d) Well Site Evaluation. — The local health department shall conduct a field investigation to evaluate the site on which a private drinking water well is proposed to be located before issuing a permit pursuant to this section. The field investigation shall determine whether there is any abandoned well located on the site, and if so, the construction permit shall be conditioned upon the proper closure of all abandoned wells located on the site in accordance with the requirements of this Article and rules adopted pursuant to this Article. If a private drinking water well is proposed to be located on a site on which a wastewater system subject to the requirements of Article 11 of Chapter 130A of the General Statutes is located or proposed to be located, the application for a construction permit shall be accompanied by a plat or site plan, as defined in G.S. 130A-334.

(e) Issuance of Permit. — The local health department shall issue a construction permit or repair permit if it determines that a private drinking water well can be constructed or repaired and operated in compliance with this Article and rules adopted pursuant to this Article. The local health department may impose any conditions on the issuance of a construction permit or repair permit that it determines to be necessary to ensure compliance with this Article and rules adopted pursuant to this Article.

(f) Expiration and Revocation. — A construction permit or repair permit shall be valid for a period of five years except that the local health department may revoke a permit at any time if it determines that there has been a material change in any fact or circumstance upon which the permit is issued. The foregoing shall be prominently stated on the face of the permit. The validity of a construction permit or a repair permit shall not be affected by a change in ownership of the site on which a private drinking water well is proposed to be located or is located if the location of the well is unchanged and the well and the facility served by the well remain under common ownership.

(f1) Chlorination of the Well. — Upon completion of construction of a private drinking water well, the well shall be sterilized in accordance with the standards of drinking water wells established by the United States Public Health Service.

(g) Certificate of Completion. — Upon completion of construction of a private drinking water well or repair of a private drinking water well for which a permit is required under this section, the local health department shall inspect the well to determine whether it was constructed or repaired in compliance with the construction permit or repair permit. If the local health department determines that the private drinking water well has been constructed or repaired in accordance with the requirements of the construction permit or repair permit, the construction and repair requirements of this Article, and rules adopted pursuant to this Article, the local health department shall issue a certificate of completion. No person shall place a private drinking water well into service without first having obtained a certificate of completion. No person shall return a private drinking water well that has undergone repair to service without first having obtained a certificate of completion.

(h) **(Effective until October 1, 2009)** Drinking Water Testing. — Within 30 days after it issues a certificate of completion for a newly constructed private drinking water well, the local health department shall test the water obtained from the well or ensure that the water obtained from the well has been sampled and tested by a certified laboratory in accordance with rules adopted by the Commission for Public Health. The water shall be tested for the following parameters: arsenic, barium, cadmium, chromium, copper, fluoride, lead, iron, magnesium, manganese, mercury, nitrates, nitrites, selenium, silver, sodium, zinc, pH, and bacterial indicators.

(h) **(Effective October 1, 2009)** Drinking Water Testing. — Within 30 days after it issues a certificate of completion for a newly constructed private drinking water well, the local health department shall test the water obtained from the well or ensure that the water obtained from the well has been sampled and tested by a certified laboratory in accordance with rules adopted by the Commission for Public Health. The water shall be tested for the following parameters: arsenic, barium, cadmium, chromium, copper, fluoride, lead, iron, magnesium, manganese, mercury, nitrates, nitrites, selenium, silver, sodium, zinc, pH, bacterial indicators, methyl tert-butyl ether, ethylene dibromide, 1,2-dichloroethane, 1,2-dichloropropane, isopropyl ether, benzene, toluene, ethylbenzene, xylenes, trichloroethylene, and tetrachloroethylene.

(i) Commission for Public Health to Adopt Drinking Water Testing Rules. — The Commission for Public Health shall adopt rules governing the sampling and testing of well water and the reporting of test results. The rules shall allow local health departments to designate third parties to collect and test samples and report test results. The rules shall also provide for corrective action and retesting where appropriate. The Commission for Public Health may by rule require testing for additional parameters if the Commission makes a specific finding that testing for the additional parameters is necessary to protect public health.

(j) Test Results. — The local health department shall provide test results to the owner of the newly constructed private drinking water well and, to the extent practicable, to any leaseholder of a dwelling unit or other facility served by the well at the time the water is sampled.

(k) Registry of Permits and Test Results. — Each local health department shall maintain a registry of all private drinking water wells for which a construction permit or repair permit is issued. The registry shall specify the physical location of each private drinking water well and shall include the results of all tests of water from each well. The local health department shall retain a record of the results of all tests of water from a private drinking water well until the well is properly closed in accordance with the requirements of this Article and rules adopted pursuant to this Article.

(*l*) Authority Not Limited. — This section shall not be construed to limit any authority of local boards of health, local health departments, the Department of Health and Human Services, or the Commission for Public Health to protect public health. (2006-202, s. 4; 2006-259, ss. 50(b), 50(c), 51; 2007-182, s. 2; 2007-495, s. 1; 2008-198, s. 1.)

Subsection (h) Set Out Twice. — The first version of subsection (h) set out above is effective until October 1, 2009. The second version of subsection (h) set out above is effective October 1, 2009.

Effect of Amendments. —

Session Laws 2008-198, s. 1, effective October 1, 2009, in subsection (h), made a minor grammatical change, and added "methyl tert-butyl ether, ethylene dibromide, 1,2-dichloroethane, 1,2-dichloropropane, isopropyl ether, benzene, toluene, ethylbenzene, xylenes, trichloroethylene, and tetrachloroethylene" at the end.

§ 87-98. Bernard Allen Memorial Emergency Drinking Water Fund.

(a) The Bernard Allen Memorial Emergency Drinking Water Fund is established under the control and direction of the Department. The Fund shall be a nonreverting, interest-bearing fund consisting of monies appropriated by the General Assembly or made available to the Fund from any other source and investment interest credited to the Fund.

(b) The Fund may be used to pay for notification, to the extent practicable, of persons aged 18 and older who reside in any dwelling unit, and the senior official in charge of any business, at which drinking water is supplied from a private drinking water well or improved spring that is located within 1,500 feet of, and at risk from, known groundwater contamination. The senior official in charge of the business shall take reasonable measures to notify all employees of the business of the groundwater contamination, including posting a notice of the contamination in a form and at a location that is readily accessible to the employees of the business. The Fund may also be used by the Department to pay the costs of testing of private drinking water wells and improved springs for suspected contamination up to once every three years upon request by a person who uses the well and for the temporary or permanent provision of alternative drinking water supplies to persons whose drinking water well or improved spring is contaminated. Under this subsection, an alternative drinking water supply includes the repair or replacement of a contaminated well or the connection to a public water supply.

(c) The Department shall disburse monies from the Fund based on financial need and on the risk to public health posed by groundwater contamination and shall give priority to the provision of services under this section to instances when an alternative source of funds is not available. The Fund shall not be used to provide alternative water supply to households with incomes greater than three hundred percent (300%) of the current federal poverty level. The Fund may be used to provide alternative drinking water supplies if the Department determines that the concentration of one or more contaminants in the private drinking water well or improved spring exceeds the federal maximum contaminant level, or the federal drinking water action level as defined in 40 Code of Federal Regulations § 141.1 through § 141.571 (1 July 2007) and 40 Code of Federal Regulations § 143.3 (1 July 2007). For a contaminant for which a federal maximum contaminant level or drinking water action level has not been established, the State groundwater standard established by the Environmental Management Commission for the concentration of that contaminant shall be used to determine whether the Fund may be used to provide alternative drinking water supplies. The Fund may also be used to provide alternative drinking water supplies as provided in this section if the Department determines that the concentration of one or more contaminants in a private drinking water well is increasing over time and that there is a significant risk that the concentration of a contaminant will exceed the federal maximum contaminant level or drinking water action level, or the State groundwater standard. A determination of the concentration of a contaminant shall be based on a sample of water collected from the private drinking water well within the past 12 months.

(c1) In disbursing monies from the Fund, the Department shall give preference to provision of permanent replacement water supplies by connection to public water supplies and repair or replacement of contaminated wells over the provision of temporary water supplies. In providing alternative drinking water supplies, the Department shall give preference to connection to a public water supply system or to construction of a new private drinking water well over the use of a filtration system if the Department determines that the costs of periodic required maintenance of the filtration system would be cost-prohibitive for users of the alternative drinking water supply.

(c2) If the Department provides an alternative drinking water supply by extension of a waterline, the Department may disburse from the Fund no more than ten thousand dollars ($10,000) per household or other service connection. No more than one-third of the total cost of the project may be paid from the Fund. The Department may combine monies from the Fund with monies from other sources in order to pay the total cost of the project.

(c3) The Fund shall be used to provide alternative drinking water supplies only if the Department determines that the person or persons who are responsible for the contamination of the private drinking water well is or are not financially viable or cannot be identified or located and if the Department determines that one of the following applies:

(1) The contamination of the private drinking water well is naturally occurring.

(2) The owner of the property on which the private drinking water well is located did not cause or contribute to the contamination or control the source of the contamination.

(3) The source of the contamination is the application or disposal of a hazardous substance or pesticide that occurred without the consent of the owner of the property on which the private drinking water well is located.

(c4) The Department may use up to one hundred thousand dollars ($100,000) of the monies in the Fund to pay the personnel and other direct costs associated with the implementation of this section.

(c5) The Fund shall not be used for remediation of groundwater contamination.

(c6) Nothing in this section expands, contracts, or modifies the obligation of responsible parties under Article 9 or 10 of Chapter 130A of the General Statutes, this Article, or Article 21A of this Chapter to assess contamination, identify receptors, or remediate groundwater or soil contamination.

(d) The Department shall establish criteria by which the Department is to evaluate applications and disburse monies from this Fund and may adopt any rules necessary to implement this section.

(e) The Department, in consultation with the Commission for Public Health and local health departments, shall report no later than 1 October of each year to the Environmental Review Commission, the House of Representatives and Senate Appropriations Subcommittees on Natural and Economic Resources, and the Fiscal Research Division of the General Assembly on the implementation of this section. The report shall include the purpose and amount of all expenditures from the Fund during the prior fiscal year, a discussion of the benefits and deficiencies realized as a result of the section, and may also include recommendations for any legislative action. (2006-255, s. 5.2; 2007-182, s. 2; 2007-323, s. 12.2(a); 2008-107, s. 12.1.)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 12.1, effective July 1, 2008, rewrote the section.

Chapter 89C.

Engineering and Land Surveying.

§ 89C-2. Declarations; prohibitions.

CASE NOTES

No Specific Standard of Care Created. — Trial court did not abuse the court's discretion in ruling that the method of proof administrators' witness used was not sufficiently reliable as an area for expert testimony because the witness based his opinion solely on a methodology that was previously found to be insufficient to establish the standard of care applicable to professional engineers; G.S. 89C-2 and 89C-3 were analogous to the code of ethics for engineers upon which the witness solely relied to base his expert opinion, but they did not create a specific standard of care for professional engineers. Michael v. Huffman Oil Co., — N.C. App. —, 661 S.E.2d 1, 2008 N.C. App. LEXIS 823 (2008).

§ 89C-3. Definitions.

CASE NOTES

No Specific Standard of Care Created. — Trial court did not abuse the court's discretion in ruling that the method of proof administrators' witness used was not sufficiently reliable as an area for expert testimony because the witness based his opinion solely on a methodology that was previously found to be insufficient to establish the standard of care applicable to professional engineers; G.S. 89C-2 and 89C-3 were analogous to the code of ethics for engineers upon which the witness solely relied to base his expert opinion, but they did not create a specific standard of care for professional engineers. Michael v. Huffman Oil Co., — N.C. App. —, 661 S.E.2d 1, 2008 N.C. App. LEXIS 823 (2008).

§ 89C-23. Unlawful to practice engineering or land surveying without licensure; unlawful use of title or terms; penalties; Attorney General to be legal adviser.

CASE NOTES

Cited in Blaylock Grading Co., LLP v. Smith, — N.C. App. —, 658 S.E.2d 680, 2008 N.C. App. LEXIS 653 (2008).

Chapter 89G.

Irrigation Contractors.

Sec.
89G-1. (Effective January 1, 2009) Definitions.
89G-2. (Effective January 1, 2009) License required.
89G-3. (Effective January 1, 2009) Exemptions.
89G-4. The North Carolina Irrigation Contractors' Licensing Board.
89G-5. (Effective January 1, 2009) Powers and duties.
89G-6. (Effective January 1, 2009) Application; qualifications; examination; issuance.
89G-7. (Effective January 1, 2009) Use of seal; posting license.
Sec.
89G-8. (Effective January 1, 2009) Reciprocity.
89G-9. (Effective January 1, 2009) License renewal and continuing education.
89G-10. (Effective January 1, 2009) Expenses and fees.
89G-11. (Effective January 1, 2009) Disciplinary action.
89G-12. (Effective January 1, 2009) Civil penalties.
89G-13. (Effective January 1, 2009) Injunction to prevent violation; notification of complaints.

§ 89G-1. (Effective January 1, 2009) Definitions.

The following definitions apply in this Chapter:

(1) Board. — The North Carolina Irrigation Contractors' Licensing Board.

(2) Irrigation construction or contracting. — The act of providing services as an irrigation contractor for compensation or other consideration.

(3) Irrigation contractor. — Any person who, for compensation or other consideration, constructs, installs, expands, services, or repairs irrigation systems.

(4) Irrigation system. — All piping, fittings, sprinklers, drip tubing, valves, control wiring of 30 volts or less, and associated components installed for the delivery and application of water for the purpose of irrigation that are downstream of a well, pond or other surface water, potable water or groundwater source, or grey water source and downstream of a backflow prevention assembly. Surface water, potable water or groundwater sources, water taps, utility piping, water service lines, water meters, backflow prevention assemblies, stormwater systems that service only the interior of a structure, and sanitary drainage systems are not part of an irrigation system.

(5) Person. — An individual, firm, partnership, association, corporation, or other legal entity. (2008-177, s. 1.)

Editor's Note. — Session Laws 2008-177, s. 7, provides: "G.S. 89G-4, as enacted in Section 1 of this act, becomes effective October 1, 2008. Section 6 of this act is effective when it becomes law [August 4, 2008]. The remainder of this act becomes effective January 1, 2009, and the exemption provided in G.S. 89G-3(16) applies to irrigation systems installed on or before that date."

The preamble to Session Laws 2008-177, provides: "Whereas, North Carolina has been in an extreme drought, and water is our most basic and precious natural resource; and

"Whereas, the efficient use of water is of utmost importance; and

"Whereas, the North Carolina Green Industry has an annual economic impact of $8.7 billion and offers employment to over 150,000 people in the State; and

"Whereas, the proper design, installation, repair, and maintenance of landscape irrigation systems is critical to increase the efficiency of water use; and

"Whereas, the U.S. Environmental Protection Agency has suggested that proper and efficient irrigation practices can reduce water consumption by at least 20%; and

"Whereas, the North Carolina Green Industry and the Carolinas Irrigation Association recognize the need to require better and more efficient irrigation practices; Now, therefore,"

Subdivisions (2) and (3) as enacted by Session Laws 2008-177, s. 1, were redesignated as subdivisions (3) and (2), respectively, at the direction of the Revisor of Statutes.

Session Laws 2008-177, ss. 2, 3 and 4, provides: "2. Any person who has obtained Certified Irrigation Contractor (CIC) or Certified Irrigation Designer (CID) status through The Irrigation Association may be issued an irrigation contractor's license under Chapter 89G of the General Statutes, as enacted by Section 1 of this act, without the requirement of examination after successfully applying for and meeting all other requirements and qualifications for licensure, provided the person submits a valid application for licensure to the Board within 180 days of the date this act becomes effective.

"3. Any person who is a registered landscape contractor under Chapter 89D of the General Statutes or a licensed plumbing contractor under Article 2 of Chapter 87 of the General Statutes on the date this act becomes effective may be issued an irrigation contractor's license under Chapter 89G of the General Statutes, as enacted by Section 1 of this act, without the requirement of examination after successfully applying for and meeting all other requirements and qualifications for licensure, provided the person submits a valid application for licensure to the Board within 180 days of the date this act becomes effective.

"4. Any person who can document 10 years in business as an irrigation contractor as of the date this act becomes effective, can document competency in the practice of irrigation contracting, as determined by the Board, and meets all other requirements and qualifications for licensure may be issued an irrigation contractor's license under Chapter 89G of the General Statutes, as enacted by Section 1 of this act, without the requirement of examination, provided that the person submits an application for licensure to the Board within 180 days of the date this act becomes effective."

§ 89G-2. (Effective January 1, 2009) License required.

Except as otherwise provided in this Chapter, no person shall engage in the practice of irrigation construction or contracting, use the designation "irrigation contractor," or advertise using any title or description that implies licensure as an irrigation contractor unless the person is licensed as an irrigation contractor as provided by this Chapter. All irrigation construction or contracting performed by an individual, partnership, association, corporation, firm, or other group shall be under the direct supervision of an individual licensed by the Board under this Chapter. (2008-177, s. 1.)

Editor's Note. — Session Laws 2008-177, s. 7, made this section effective January 1, 2009.

§ 89G-3. (Effective January 1, 2009) Exemptions.

The provisions in this Chapter shall not apply to:

(1) Any federal or State agency or any political subdivision performing irrigation construction or contracting work on public property.

(2) Any property owner who performs irrigation construction or contracting work on his or her own property.

(3) A landscape architect registered under Chapter 89A of the General Statutes.

(4) A professional engineer licensed under Chapter 89C of the General Statutes.

(5) Any irrigation construction or contracting work where the price of all contracts for labor, material, and other items for a given jobsite is less than two thousand five hundred dollars ($2,500).

(6) Any person performing irrigation construction or contracting work for temporary irrigation to establish vegetative cover for erosion control.

(7) Any person performing irrigation construction or contracting work to control dust on commercial construction sites or mining operations.

(8) Any person performing irrigation construction or contracting work for use in agricultural production, farming, or ranching, including land application of animal wastewater.

(9) Any person performing irrigation construction or contracting work for use in commercial sod production.
(10) Any person performing irrigation construction or contracting work for use in the commercial production of horticultural crops, including nursery and greenhouse operators.
(11) A general contractor licensed under Article 1 of Chapter 87 of the General Statutes.
(12) A wastewater contractor certified under Article 5 of Chapter 90A of the General Statutes who performs only the construction of or repair to a wastewater dispersal system.
(13) A public utility contractor licensed under Article 1 of Chapter 87 of the General Statutes.
(14) A plumbing contractor licensed under Article 2 of Chapter 87 of the General Statutes who performs only the following work: installation, repairs, or maintenance of water mains, water taps, service lines, water meters, or backflow prevention assemblies supplying water for irrigation systems; or repairs to an irrigation system.
(15) Any person performing irrigation construction or contracting work for a golf course.
(16) **(See editor's note for applicability)** Any person maintaining or repairing an irrigation system owned by the homeowners association of a planned community and located within the planned community's common elements as defined in G.S. 47F-1-103. (2008-177, s. 1.)

Editor's Note. — Session Laws 2008-177, s. 7 provides: "G.S. 89G-4, as enacted in Section 1 of this act, becomes effective October 1, 2008. Section 6 of this act is effective when it becomes law [August 4, 2008]. The remainder of this act becomes effective January 1, 2009, and the exemption provided in G.S. 89G-3(16) applies to irrigation systems installed on or before that date."

§ 89G-4. The North Carolina Irrigation Contractors' Licensing Board.

(a) Composition and Terms. — The North Carolina Irrigation Contractors' Licensing Board is created. The Board shall consist of nine members who shall serve staggered terms. The initial Board shall be selected on or before October 1, 2008, as follows:
(1) The Commissioner of Agriculture, upon the recommendation of the Carolinas Irrigation Association, shall appoint two irrigation contractors, one to serve a one-year term and one to serve a three-year term.
(2) The General Assembly, upon the recommendation of the Speaker of the House of Representatives and pursuant to recommendations from the North Carolina Green Industry Council, shall appoint two members, one who is a registered landscape contractor in good standing with the North Carolina Landscape Contractors Registration Board to serve a one-year term and one who is an irrigation contractor to serve a three-year term.
(3) The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint two irrigation contractors, one to serve a one-year term and one to serve a two-year term.
(4) The President of The University of North Carolina System shall appoint one member from within the ranks of the land grant university community who is knowledgeable in irrigation methods and practices to serve a three-year term. The position is open to both current employees of The University of North Carolina System and persons who have earned emeritus status with The University of North Carolina System.

(5) The Board of Directors of the North Carolina Chapter of the American Society of Landscape Architects shall appoint one member who is a registered landscape architect to serve a two-year term.

(6) The Governor shall appoint one public member to serve a two-year term.

Upon the expiration of the terms of the initial Board members, each member shall be appointed by the appointing authorities designated in subdivisions (1) through (6) of this subsection for a three-year term and shall serve until a successor is appointed and qualified. No member may serve more than two consecutive full terms.

(b) Qualifications. — Members of the Board shall be residents of this State. The irrigation contractor members shall meet the requirements for licensure under this Chapter and remain in good standing with the Board during their terms. The public member of the Board shall not be: (i) trained or experienced in irrigation construction or contracting; (ii) an agent or employee of a person engaged in the practice of irrigation construction or contracting; or (iii) the spouse of an individual who may not serve as a public member of the Board.

(c) Vacancies. — Any vacancy on the Board created by death, resignation, or otherwise shall be filled in the same manner as the original appointment, except that all unexpired terms of Board members appointed by the General Assembly shall be filled in accordance with G.S. 120-122. Appointees to fill vacancies shall serve the remainder of the unexpired term and until their successors are appointed and qualified.

(d) Removal. — The Board may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings in the member's capacity as a licensed irrigation contractor shall be disqualified from participating in the official business of the Board until the charges have been resolved.

(e) Officers and Meetings. — The Board shall elect annually a chair and other officers as it deems necessary to carry out the purposes of this Chapter and shall hold meetings at least twice a year. A majority of the Board shall constitute a quorum.

(f) Compensation. — Each member of the Board may receive per diem and reimbursement for travel and subsistence as set forth in G.S. 93B-5.

(g) Assistance. — The Board shall be entitled to the services of the Attorney General in connection with the affairs of the Board or may, in its discretion, employ an attorney to assist or represent it in the enforcement of this Chapter. (2008-177, s. 1.)

Editor's Note. — Session Laws 2008-177, s. 7 provides: "G.S. 89G-4, as enacted in Section 1 of this act, becomes effective October 1, 2008. Section 6 of this act is effective when it becomes law [August 4, 2008]. The remainder of this act becomes effective January 1, 2009, and the exemption provided in G.S. 89G-3(16) applies to irrigation systems installed on or before that date."

§ 89G-5. (Effective January 1, 2009) Powers and duties.

The Board shall have the following powers and duties:

(1) To administer and enforce the provisions of this Chapter.

(2) To adopt, amend, or repeal rules to carry out the provisions of this Chapter.

(3) To examine and determine the qualifications and fitness of applicants for licensure and licensure renewal.

(4) To issue, renew, deny, restrict, suspend, or revoke licenses.

(5) To reprimand or otherwise discipline licensees under this Chapter.

(6) To receive and investigate complaints from members of the public.

(7) To conduct investigations to determine whether violations of this Chapter exist or constitute grounds for disciplinary action against licensees under this Chapter.
(8) To conduct administrative hearings in accordance with Chapter 150B of the General Statues.
(9) To seek injunctive relief through any court of competent jurisdiction for violations of this Chapter.
(10) To collect fees required by G.S. 89G-10 and other monies permitted by law to be paid to the Board.
(11) To require licensees to file and maintain an adequate surety bond.
(12) To establish and approve continuing educational requirements for persons licensed under this Chapter.
(13) To employ a secretary-treasurer and any other clerical personnel the Board deems necessary to carry out the provisions of this Chapter and to fix compensation for employees.
(14) To maintain a record of all proceedings conducted by the Board and make available to licensees and other concerned parties an annual report of all Board actions.
(15) To adopt and publish a code of professional conduct and practice for all persons licensed under this Chapter. The code shall establish minimum standards for water conservation in the practice of irrigation construction and contracting.
(16) To publish a list of irrigation best management practices to be followed by licensed irrigation contractors.
(17) To adopt a seal containing the name of the Board for use on licenses and official reports issued by the Board. (2008-177, s. 1.)

Editor's Note. — Session Laws 2008-177, s. 7, made this section effective January 1, 2009.

§ 89G-6. (Effective January 1, 2009) Application; qualifications; examination; issuance.

(a) Upon application to the Board and the payment of the required fees, an applicant may be licensed under this Chapter as an irrigation contractor if the applicant submits evidence that demonstrates his or her qualifications as prescribed in rules adopted by the Board and meets all of the following qualifications:
(1) Is at least 18 years of age.
(2) Is of good moral character as determined by the Board.
(3) Has at least three years of experience in irrigation construction or contracting or the educational equivalent. Two years of educational training in irrigation construction or contracting shall be the equivalent of one year of experience.
(4) Files with the Board and maintains a corporate surety bond executed by a company authorized to do business in this State or an irrevocable letter of credit issued by an insured institution. The surety bond or the letter of credit shall be in the amount of ten thousand dollars ($10,000). The surety bond or letter of credit shall be approved by the Board as to form and shall be conditioned upon the obligor's faithfully conforming to and abiding by the provisions of this Chapter. Any person claiming to be injured by an act of a licensed irrigation contractor that constitutes a violation of this Chapter may institute an action to recover against the licensee and the surety.

(b) If the application is satisfactory to the Board, the applicant shall be required to pass an examination administered by the Board. The Board shall establish the scope and subject matter of the examination, and an examination shall be held at least twice a year at a time and place to be determined by the Board. The examination, at a minimum, shall test the applicant's understanding of the following:

(1) Efficiency of water use and conservation in the practice of irrigation construction and contracting.
(2) Proper methods of irrigation construction.
(3) Proper methods for irrigation installation.
(4) Basic business skills.

(c) When the Board determines that an applicant has met all the requirements for licensure, the Board shall issue a license to the applicant. (2008-177, s. 1.)

Editor's Note. — Session Laws 2008-177, s. 7, made this section effective January 1, 2009.

Session Laws 2008-177, ss. 2, 3 and 4, provides: "2. Any person who has obtained Certified Irrigation Contractor (CIC) or Certified Irrigation Designer (CID) status through The Irrigation Association may be issued an irrigation contractor's license under Chapter 89G of the General Statutes, as enacted by Section 1 of this act, without the requirement of examination after successfully applying for and meeting all other requirements and qualifications for licensure, provided the person submits a valid application for licensure to the Board within 180 days of the date this act becomes effective.

"3. Any person who is a registered landscape contractor under Chapter 89D of the General Statutes or a licensed plumbing contractor under Article 2 of Chapter 87 of the General Statutes on the date this act becomes effective may be issued an irrigation contractor's license under Chapter 89G of the General Statutes, as enacted by Section 1 of this act, without the requirement of examination after successfully applying for and meeting all other requirements and qualifications for licensure, provided the person submits a valid application for licensure to the Board within 180 days of the date this act becomes effective.

"4. Any person who can document 10 years in business as an irrigation contractor as of the date this act becomes effective, can document competency in the practice of irrigation contracting, as determined by the Board, and meets all other requirements and qualifications for licensure may be issued an irrigation contractor's license under Chapter 89G of the General Statutes, as enacted by Section 1 of this act, without the requirement of examination, provided that the person submits an application for licensure to the Board within 180 days of the date this act becomes effective."

§ 89G-7. (Effective January 1, 2009) Use of seal; posting license.

(a) Upon licensure by the Board, each irrigation contractor shall obtain a seal of the design authorized by the Board and bearing the name of the licensee, the number of the license, and the legend "N.C. Licensed Irrigation Contractor." An irrigation contractor may use the seal only while the license is valid.

(b) Every irrigation contractor issued a license under this Chapter shall display the license conspicuously in the contractor's place of business. (2008-177, s. 1.)

Editor's Note. — Session Laws 2008-177, s. 7, made this section effective January 1, 2009.

§ 89G-8. (Effective January 1, 2009) Reciprocity.

The Board may issue a license, without examination, to any person who is an irrigation contractor licensed, certified, or registered in another state or country if the requirements for licensure, certification, or registration in the other state or country are substantially equivalent to the requirements for licensure in this State. (2008-177, s. 1.)

Editor's Note. — Session Laws 2008-177, s. 7, made this section effective January 1, 2009.

§ 89G-9. (Effective January 1, 2009) License renewal and continuing education.

(a) Every license issued under this Chapter shall be renewed on or before December 31 of each year. Any person who desires to continue to practice shall apply for license renewal and shall submit the required fees. Licenses that are not renewed shall be automatically revoked. A license may be renewed at any time within one year after its expiration, if: (i) the applicant pays the required renewal fee and late renewal fee; (ii) the Board finds that the applicant has not used the license in a manner inconsistent with the provisions of this Chapter or engaged in the practice of irrigation construction or contracting after notice of revocation; and (iii) the applicant is otherwise eligible for licensure under the provisions of this Chapter. When necessary, the Board may require a licensee to demonstrate continued competence as a condition of license renewal.

(b) As a condition of license renewal, a licensee shall meet continuing education requirements set by the Board. Each licensee shall complete 10 continuing education units per year. Failure to obtain continuing education units shall result in the forfeiture of a license. Upon forfeiture, a person shall be required to submit a new application and retake the examination as provided in this Chapter. (2008-177, s. 1.)

Editor's Note. — Session Laws 2008-177, s. 7, made this section effective January 1, 2009.

§ 89G-10. (Effective January 1, 2009) Expenses and fees.

(a) The Board may impose the following fees not to exceed the amounts listed below:

(1) Application fee	$100.00
(2) Examination fee	200.00
(3) License renewal	100.00
(4) Late renewal fee	50.00
(5) License by reciprocity	250.00
(6) Corporate license	100.00
(7) Duplicate license	25.00.

(b) When the Board uses a testing service for the preparation, administration, or grading of examinations, the Board may charge the applicant the actual cost of the examination services.

(c) The Board must annually review the fees set out in this section to determine whether these fees reflect the actual cost of administering this act and seek legislative changes to the fees if necessary. (2008-177, ss. 1, 5.)

Editor's Note. — Session Laws 2008-177, s. 7, made this section effective January 1, 2009.

Session Laws 2008-177, s. 5, was codified as subsection (c) of this section, effective January 1, 2009, at the direction of the Revisor of Statutes.

§ 89G-11. (Effective January 1, 2009) Disciplinary action.

The Board may deny, restrict, suspend, or revoke a license or refuse to issue or renew a license if a licensee or applicant:

(1) Employs the use of fraud, deceit, or misrepresentation in obtaining or attempting to obtain a license or the renewal of a license.

(2) Practices or attempts to practice irrigation construction or contracting by fraudulent misrepresentation.
(3) Commits an act of gross malpractice or incompetence as determined by the Board.
(4) Has been convicted of or pled guilty or no contest to a crime that indicates that the person is unfit or incompetent to practice as an irrigation contractor or that indicates that the person has deceived or defrauded the public.
(5) Has been declared incompetent by a court of competent jurisdiction.
(6) Has willfully violated any provision in this Chapter or any rules adopted by the Board.
(7) Uses or attempts to use the seal in a fraudulent or unauthorized manner.
(8) Fails to file the required surety bond or letter of credit or to keep the bond or letter of credit in force. (2008-177, s. 1.)

Editor's Note. — Session Laws 2008-177, s. 7, made this section effective January 1, 2009.

§ 89G-12. (Effective January 1, 2009) Civil penalties.

(a) In addition to taking any of the actions permitted under G.S. 89G-11, the Board may assess a civil penalty not in excess of two thousand dollars ($2,000) for each violation of any section of this Chapter or the violation of any rules adopted by the Board. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Before imposing and assessing a civil penalty and fixing the amount of the penalty, the Board shall, as a part of its deliberations, take into consideration the following factors:

(1) The nature, gravity, and persistence of the particular violation.
(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.
(3) Whether the violation was willful and malicious.
(4) Any other factors that would tend to mitigate or aggravate the violation found to exist.

(c) Schedule of Civil Penalties. — The Board shall establish a schedule of civil penalties for violations of this Chapter and rules adopted by the Board. (2008-177, s. 1.)

Editor's Note. — Session Laws 2008-177, s. 7, made this section effective January 1, 2009.

§ 89G-13. (Effective January 1, 2009) Injunction to prevent violation; notification of complaints.

(a) If the Board finds that a person who does not have a license issued under this Chapter is engaging in the practice of irrigation construction or contracting, the Board may appear in its own name in superior court in actions for injunctive relief to prevent any person from violating the provisions of this Chapter or rules adopted by the Board.

(b) A licensed irrigation contractor shall notify the Board by registered mail of any complaints filed against the contractor within 30 days from the date the complaint was filed. (2008-177, s. 1.)

Editor's Note. — Session Laws 2008-177, s. 7, made this section effective January 1, 2009.

Chapter 90.

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90-631.1. Massage and bodywork therapy school approval required.
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ARTICLE 1.

Practice of Medicine.

§ 90-14.8. Appeal from Board's decision taking disciplinary action on a license.

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Cited in In re Advance Am., Cash Advance Ctrs. of N.C. Inc., — N.C. App. —, 657 S.E.2d 405, 2008 N.C. App. LEXIS 426 (2008).

§ 90-14.9. Appeal bond; stay of Board order.

CASE NOTES

Cited in In re Advance Am., Cash Advance Ctrs. of N.C. Inc., — N.C. App. —, 657 S.E.2d 405, 2008 N.C. App. LEXIS 426 (2008).

§ 90-18.5. Limitations on anesthesiologist assistants.

(a) Any person who is licensed to provide anesthesia services as an assistant to an anesthesiologist licensed under Article 1 of this Chapter may use the title "anesthesiologist assistant." Any other person who uses the title in any form or holds himself or herself out to be an anesthesiologist assistant or to be so licensed without first obtaining a license shall be deemed in violation of this Article. A student in any anesthesiologist assistant training program shall be identified as a "student anesthesiologist assistant" or an "anesthesiologist assistant student," but under no circumstances shall the student use or permit to be used on the student's behalf the terms "intern," "resident," or "fellow."

(b) Anesthesiologist assistants are authorized to provide anesthesia services under the supervision of an anesthesiologist licensed under Article 1 of this Chapter under the following conditions:

(1) The North Carolina Medical Board has adopted rules governing the provision of anesthesia services by an anesthesiologist assistant consistent with the requirements of subsection (c) of this section.

(2) The anesthesiologist assistant holds a current license issued by the Board or is a student anesthesiologist assistant participating in a training program leading to certification by the National Commission for Certification of Anesthesiologist Assistants and licensure as an anesthesiologist assistant under G.S. 90-9.4.

(c) The North Carolina Medical Board shall adopt rules to implement this section that include requirements and limitations on the provision of anesthesia services by an anesthesiologist assistant as determined by the Board to be in the best interests of patient health and safety. Rules adopted by the Board pursuant to this section shall include the following requirements:

(1) That an anesthesiologist assistant be supervised by an anesthesiologist licensed under this Article who is actively engaged in clinical practice and immediately available on-site to provide assistance to the anesthesiologist assistant.

(2) That an anesthesiologist may supervise no more than two anesthesi-

ologist assistants or student anesthesiologist assistants at one time. The limitation on the number of anesthesiologist assistants and student anesthesiologist assistants that an anesthesiologist may supervise in no way restricts the number of other qualified anesthesia providers an anesthesiologist may concurrently supervise. After January 1, 2010, the Board may allow an anesthesiologist to supervise up to four licensed anesthesiologist assistants concurrently and may revise the supervision limitations of student anesthesiologist assistants such that the supervision requirements for student anesthesiologist assistants are similar to the supervision requirements for student nurse anesthetists.

(3) That anesthesiologist assistants comply with all continuing education requirements and recertification requirements of the National Commission for Certification of Anesthesiologist Assistants or its successor organization.

(d) Nothing in this section shall limit or expand the scope of practice of physician assistants under existing law. (2007-146, s. 4; 2008-187, s. 14.)

Editor's Note. —
The note referring to G.S. 90-11(a1) appearing under this section in the main volume, has been deleted. Session Laws 2008-187, s. 14, amended the reference in subdivision (b)(2) to correct the error.

Effect of Amendments. — Session Laws 2008-187, s. 14, effective August 7, 2008, substituted "G.S. 90-9.4" for "G.S. 90-11(a1)" in subdivision (b)(2).

§ 90-18.6. Requirements for certain nicotine replacement therapy programs.

The Health and Wellness Trust Fund ("Trust Fund") or the Department of Health and Human Services ("Department") may contract for the operation of a tobacco-use cessation program through which the Trust Fund or the Department, as applicable, may engage agents or contractors for the purpose of (i) recommending to individuals over-the-counter nicotine replacement therapy products and supplying the products free of charge to the individual and (ii) discussing with the individual contraindications and all other aspects of over-the-counter nicotine replacement therapy. All medical aspects of the nicotine replacement therapy programs shall be supervised by a physician who is licensed under this Article to practice medicine and who is under contract to or employed by the Trust Fund or the Department, as applicable, for the purpose of supervising nicotine replacement therapy programs. The physician under contract with or employed by the Trust Fund or the Department, as applicable, shall be responsible for supervision of all agents or contractors of nicotine replacement therapy programs that provide nicotine replacement therapy services to members of the public. The Trust Fund or the Department, as contracting entity, shall report the name of the supervising physician to the North Carolina Medical Board. (2008-107, s. 10.4B.)

Editor's Note. — Session Laws 2008-107, s. 30.6, made this section effective July 1, 2008.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Article 1B.

Medical Malpractice Actions.

§ 90-21.11. Definitions.

CASE NOTES

Certification Required. — Where an estate administratrix sued a hospital, asserting claims based on a decedent's fall from a hospital bed, the hospital was properly granted summary judgment because the complaint did not include certification under N.C. R. Civ. P. 9(j), which was required because the original complaint was for medical malpractice since the administratrix chose to base the complaint on the lack of restraints on decedent and the decision to apply restraints was a professional service. Sturgill v. Ashe Mem'l Hosp., Inc., — N.C. App. —, 652 S.E.2d 302, 2007 N.C. App. LEXIS 2256 (2007).

Expert Qualifications. — In a medical malpractice suit against an oral surgeon, the trial court erred by striking the patient's standard of care witness because (1) the expert fulfilled the "performance of the procedure" and "prior experience" requirements since the expert was licensed to perform oral surgery and performed the surgical extraction of molars, (2) the expert was a general dentist who specialized in the practice of oral surgery, and (3) the expert possessed sufficient familiarity with the city of Charlotte and the practice of dentistry therein. Roush v. Kennon, — N.C. App. —, 656 S.E.2d 603, 2008 N.C. App. LEXIS 216 (2008).

Cited in Knox v. Univ. Health Sys. of E. Carolina, Inc., — N.C. App. —, 652 S.E.2d 722, 2007 N.C. App. LEXIS 2363 (2007).

§ 90-21.12. Standard of health care.

CASE NOTES

Qualification of Expert Witness as to Standard of Care. —

In a medical malpractice suit against an oral surgeon, the trial court erred by striking the patient's standard of care witness because (1) the expert fulfilled the "performance of the procedure" and "prior experience" requirements since the expert was licensed to perform oral surgery and performed the surgical extraction of molars, (2) the expert was a general dentist who specialized in the practice of oral surgery, and (3) the expert possessed sufficient familiarity with the city of Charlotte and the practice of dentistry therein. Roush v. Kennon, — N.C. App. —, 656 S.E.2d 603, 2008 N.C. App. LEXIS 216 (2008).

§ 90-21.13. Informed consent to health care treatment or procedure.

(a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or other person authorized to give consent for the patient where:

(1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and

(2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or

(3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

(b) A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact. A consent that meets the foregoing standards, that is given by a patient, or other authorized person, who under all the surrounding circumstances has capacity to make and communicate health care decisions, is a valid consent.

(c) The following persons, in the order indicated, are authorized to consent to medical treatment on behalf of a patient who is comatose or otherwise lacks capacity to make or communicate health care decisions:

(1) A guardian of the patient's person, or a general guardian with powers over the patient's person, appointed by a court of competent jurisdiction pursuant to Article 5 of Chapter 35A of the General Statutes; provided that, if the patient has a health care agent appointed pursuant to a valid health care power of attorney, the health care agent shall have the right to exercise the authority to the extent granted in the health care power of attorney and to the extent provided in G.S. 32A-19(a) unless the Clerk has suspended the authority of that health care agent in accordance with G.S. 35A-1208(a);

(2) A health care agent appointed pursuant to a valid health care power of attorney, to the extent of the authority granted;

(3) An attorney-in-fact, with powers to make health care decisions for the patient, appointed by the patient pursuant to Article 1 or Article 2 of Chapter 32A of the General Statutes, to the extent of the authority granted;

(4) The patient's spouse;

(5) A majority of the patient's reasonably available parents and children who are at least 18 years of age;

(6) A majority of the patient's reasonably available siblings who are at least 18 years of age; or

(7) An individual who has an established relationship with the patient, who is acting in good faith on behalf of the patient, and who can reliably convey the patient's wishes.

(c1) If none of the persons listed under subsection (c) of this section is reasonably available, then the patient's attending physician, in the attending physician's discretion, may provide health care treatment without the consent of the patient or other person authorized to consent for the patient if there is confirmation by a physician other than the patient's attending physician of the patient's condition and the necessity for treatment; provided, however, that confirmation of the patient's condition and the necessity for treatment are not required if the delay in obtaining the confirmation would endanger the life or seriously worsen the condition of the patient.

(d) No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

(e) In the event of any conflict between the provisions of this section and those of G.S. 35A-1245, 90-21.17, and 90-322, Articles 1A and 19 of Chapter 90, and Article 3 of Chapter 122C of the General Statutes, the provisions of those sections and Articles shall control and continue in full force and effect. (1975, 2nd Sess., c. 977, s. 4; 2003-13, s. 5; 2007-502, s. 13; 2008-187, s. 37(b).)

Editor's Note. —

Session Laws 2008-187, s. 37(c) provides: "This section is effective when it becomes law [August 7, 2008]. Nothing in this section shall affect the validity of a health care power of attorney executed before, on, or after the effective date of this section."

Effect of Amendments. —

Session Laws 2008-187, s. 37(b), effective August 7, 2008, substituted "G.S. 32A-19(a)" for "G. S. 32A-19(b)" in subdivision (c)(1). See Editor's note for applicability.

Article 1C.

Physicians and Hospital Reports.

§ 90-21.20. Reporting by physicians and hospitals of wounds, injuries and illnesses.

(a) Such cases of wounds, injuries or illnesses as are enumerated in subsection (b) shall be reported as soon as it becomes practicable before, during or after completion of treatment of a person suffering such wounds, injuries, or illnesses. If such case is treated in a hospital, sanitarium or other medical institution or facility, such report shall be made by the Director, Administrator, or other person designated by the Director or Administrator, or if such case is treated elsewhere, such report shall be made by the physician or surgeon treating the case, to the chief of police or the police authorities of the city or town of this State in which the hospital or other institution, or place of treatment is located. If such hospital or other institution or place of treatment is located outside the corporate limits of a city or town, then the report shall be made by the proper person in the manner set forth above to the sheriff of the respective county or to one of his deputies.

(b) Cases of wounds, injuries or illnesses which shall be reported by physicians, and hospitals include every case of a bullet wound, gunshot wound, powder burn or any other injury arising from or caused by, or appearing to arise from or be caused by, the discharge of a gun or firearm, every case of illness apparently caused by poisoning, every case of a wound or injury caused, or apparently caused, by a knife or sharp or pointed instrument if it appears to the physician or surgeon treating the case that a criminal act was involved, and every case of a wound, injury or illness in which there is grave bodily harm or grave illness if it appears to the physician or surgeon treating the case that the wound, injury or illness resulted from a criminal act of violence.

(c) Each report made pursuant to subsections (a) and (b) above shall state the name of the wounded, ill or injured person, if known, and the age, sex, race, residence or present location, if known, and the character and extent of his injuries.

(c1) In addition to the reporting requirements of subsection (b) of this section, cases involving recurrent illness or serious physical injury to any child under the age of 18 years where the illness or injury appears, in the physician's professional judgment, to be the result of non-accidental trauma shall be reported by the physician as soon as it becomes practicable before, during, or after completion of treatment. If the case is treated in a hospital, sanitarium, or other medical institution or facility, the report shall be made by the Director, Administrator, or other person designated by the Director or Administrator of the medical institution or facility, or if the case is treated elsewhere, the report shall be made by the physician or surgeon treating the case to the chief of police or the police authorities of the city or town in this State in which the hospital or other institution or place of treatment is located. If the hospital or other institution or place of treatment is located outside the corporate limits of a city or town, then the report shall be made by the proper person in the manner set forth above to the sheriff of the respective county or to one of the sheriff's deputies. This reporting requirement is in addition to the duty set forth in G.S. 7B-301 to report child abuse, neglect, dependence, or the death of any juvenile as the result of maltreatment to the director of the department of social services in the county where the juvenile resides or is found.

(d) Any hospital, sanitarium, or other like institution or Director, Administrator, or other designated person, or physician or surgeon participating in good faith in the making of a report pursuant to this section shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed as the result of the making of such report. (1971, c. 4; 1977, c. 31; c. 843, s. 2; 2008-179, s. 1.)

Effect of Amendments. — Session Laws 2008-179, s. 1, effective December 1, 2008, added subsection (c1).

ARTICLE 1D.

Peer Review.

§ 90-21.22. Peer review agreements.

CASE NOTES

Public Consent Order Issued by Board of Medical Examiners is Discoverable. — As a doctor entered into a consent order with a board of medical examiners knowing it would become a public record, the order was not protected by G.S. 90-21.22 and was discoverable in a medical negligence suit. Cunningham v. Cannon, — N.C. App. —, 654 S.E.2d 24, 2007 N.C. App. LEXIS 2529 (2007).

ARTICLE 4A.

North Carolina Pharmacy Practice Act.

§ 90-85.27. Definitions.

Editor's Note. —

Session Laws 2007-323, s. 10.36(d), as amended by Session Laws 2007-345, ss. 1-3, and as amended by Laws 2008-107, s. 10.10(b), provides: "(d) Services and Payment Bases. — The Department shall spend funds appropriated for Medicaid services in accordance with the following schedule of services and payment bases. All services and payments are subject to the language at the end of this subsection. Unless otherwise provided, services and payment bases will be as prescribed in the State Plan as established by the Department of Health and Human Services and may be changed with the approval of the Director of the Budget.

"(1) Hospital inpatient.

"(2) Hospital outpatient. — Eighty percent (80%) of allowable costs or a prospective reimbursement plan as established by the Department of Health and Human Services.

"(3) Nursing facilities. — Nursing facilities providing services to Medicaid recipients who also qualify for Medicare must be enrolled in the Medicare program as a condition of participation in the Medicaid program. State facilities are not subject to the requirement to enroll in the Medicare program. Residents of nursing facilities who are eligible for Medicare coverage of nursing facility services must be placed in a Medicare-certified bed. Medicaid shall cover facility services only after the appropriate services have been billed to Medicare.

"(4) Physicians, certified nurse midwife services, certified registered nurse anesthetists, nurse practitioners. — Fee schedules as developed by the Department of Health and Human Services.

"(5) Community Alternative Program, EPSDT Screens. — Payments in accordance with rate schedule developed by the Department of Health and Human Services.

"(6) Home health and related services, durable medical equipment. — Payments according to reimbursement plans developed by the Department of Health and Human Services.

"(7) Hearing aids. — Wholesale cost plus dispensing fee to provider.

"(8) Rural health clinical services. — Provider-based, reasonable cost; nonprovider-based, single-cost reimbursement rate per clinic visit.

"(9) Family planning. — Negotiated rate for local health departments. For other providers see specific services, e.g., hospitals, physicians.

"(10) Independent laboratory and X-ray services. — Uniform fee schedules as developed by the Department of Health and Human Services.

"(11) Ambulatory surgical centers.

"(12) Private duty nursing, clinic services, prepaid health plans.

"(13) Intermediate care facilities for the mentally retarded.

"(14) Chiropractors, podiatrists, optometrists, dentists.

"(15) Limitations on Dental Coverage. — Dental services shall be provided on a restricted basis in accordance with criteria adopted by the Department to implement this subsection.

"(16) Medicare Buy-In. — Social Security Administration premium.

"(17) Ambulance services. — Uniform fee schedules as developed by the Department of Health and Human Services. Public ambulance providers will be reimbursed at cost.

"(18) Optical supplies. — Payment for materials is made to a contractor in accordance with 42 C.F.R. § 431.54(d). Fees paid to dispensing providers are negotiated fees established by the State agency based on industry charges.

"(19) Medicare crossover claims. — The Department shall apply Medicaid medical policy to Medicare claims for dually eligible recipients. The Department shall pay an amount up to the actual coinsurance or deductible or both, in accordance with the State Plan, as approved by the Department of Health and Human Services. The Department may disregard application of this policy in cases where application of the policy would adversely affect patient care.

"(20) Physical therapy, occupational therapy, and speech therapy. — Services limited to EPSDT-eligible children. Payments are to be made only to qualified providers at rates negotiated by the Department of Health and Human Services. Physical therapy, occupational therapy, and speech therapy services are subject to prior approval and utilization review.

"(21) Personal care services. Payment in accordance with the State Plan developed by the Department of Health and Human Services.

"(22) Case management services. — Reimbursement in accordance with the availability of funds to be transferred within the Department of Health and Human Services.

"(23) Hospice.

"(24) Medically necessary prosthetics or orthotics. — In order to be eligible for reimbursement, providers must be licensed or certified by the occupational licensing board or the certification authority having authority over the provider's license or certification. Medically necessary prosthetics and orthotics are subject to prior approval and utilization review.

"(25) Health insurance premiums.

"(26) Medical care/other remedial care. — Services not covered elsewhere in this section include related services in schools; health professional services provided outside the clinic setting to meet maternal and infant health goals; and services to meet federal EPSDT mandates.

"(27) Pregnancy-related services. — Covered services for pregnant women shall include nutritional counseling, psychosocial counseling, and predelivery and postpartum home visits by maternity care coordinators and public health nurses.

"(28) Drugs. — Reimbursements. Reimbursements shall be available for prescription drugs as allowed by federal regulations plus a professional services fee per month, excluding refills for the same drug or generic equivalent during the same month. Payments for drugs are subject to the provisions of this subdivision or in accordance with the State Plan adopted by the Department of Health and Human Services, consistent with federal reimbursement regulations. Payment of the professional services fee shall be made in accordance with the State Plan adopted by the Department of Health and Human Services, consistent with federal reimbursement regulations. The professional services fee shall be five dollars and sixty cents ($5.60) per prescription for generic drugs and four dollars ($4.00) per prescription for brand-name drugs. Adjustments to the professional services fee shall be established by the General Assembly. In addition to the professional services fee, the Department may pay an enhanced fee for pharmacy services.

"Limitations on quantity. — The Department of Health and Human Services may establish authorizations, limitations, and reviews for specific drugs, drug classes, brands, or quantities in order to manage effectively the Medicaid pharmacy program, except that the Department shall not impose limitations on brand-name medications for which there is a generic equivalent in cases where the prescriber has determined, at the time the drug is prescribed, that the brand-name drug is medically necessary and has written on the prescription order the phrase 'medically necessary.'

"Dispensing of generic drugs. — Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, or any other law to the contrary, under the Medical Assistance Program (Title XIX of the Social Security Act), and except as otherwise provided in this subsection for atypical antipsychotic drugs and drugs listed in the narrow therapeutic index, a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber has determined, at the time the drug is prescribed, that the brand-name drug is medically necessary and has written on the prescription order the phrase "medically necessary." An initial prescription order for an atypical antipsychotic drug or a drug listed in the narrow therapeutic drug index that does not contain the phrase "medically necessary" shall be considered an order for the drug by its established or generic name, except that a pharmacy shall not substitute a generic or established name prescription drug for subsequent brand or trade name prescription orders of the same prescription drug without explicit oral or written approval of the prescriber given at the time the order is filled. Generic drugs shall be dispensed at a lower cost to the Medical Assistance Program rather than trade or brand-name drugs. As used in this subsection, "brand name" means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and "established name" has the same meaning as in section 502(e)(3) of the Federal Food, Drug, and Cosmetic Act as amended, 21 U.S.C. § 352(e)(3).

"Prior authorization. — The Department of Health and Human Services shall not impose prior authorization requirements or other restrictions under the State Medical Assistance Program on medications prescribed for Medicaid recipients for the treatment of (i) mental illness, including but not limited to, medications for schizophrenia, bipolar disorder, or major depressive disorder, or (ii) HIV/AIDS, except that the Department of Health and Human Services shall continually review utilization of medications under the State Medical Assistance Program prescribed for Medicaid recipients for the treatment of mental illness, including but not limited to, medications for schizophrenia, bipolar disorder, or major depressive disorder. For individuals 18 years of age and under who are prescribed three or more psychotropic medications, the Department shall implement clinical edits that target inefficient, ineffective, or potentially harmful prescribing patterns. When such patterns are identified, the Medical Director for the Division of Medical Assistance and the Chief of Clinical Policy for the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services shall require a peer-to-peer consultation with the target prescribers. Alternatives discussed during the peer-to-peer consultations shall be based upon:

"a. Evidence-based criteria available regarding efficacy or safety of the covered treatments; and

"b. Policy approval by a majority vote of the North Carolina Physicians Advisory Group (NCPAG).

"The target prescriber has final decision-making authority to determine which prescription drug to prescribe or refill.

"The Department shall report on the implementation of this subdivision not later than January 1, 2008, and quarterly thereafter to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, the Fiscal Research Division, and the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services.

"(29) Other mental health services. — Unless otherwise covered by this section, coverage is limited to:

"a. Services as defined by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services and approved by the Centers for Medicare and Medicaid Services (CMS) when provided in agencies meeting the requirements of the rules established by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services and reimbursement is made in accordance with a State Plan developed by the Department of Health and Human Services not to exceed the upper limits established in federal regulations, and

"b. For children eligible for EPSDT services provided by:

"1. Licensed or certified psychologists, licensed clinical social workers, certified clinical nurse specialists in psychiatric mental health advanced practice, nurse practitioners certified as clinical nurse specialists in psychiatric mental health advanced practice, licensed psychological associates, licensed professional counselors, licensed marriage and family therapists, licensed clinical addictions specialists, and certified clinical supervisors, when Medicaid-eligible children are referred by the Community Care of North Carolina primary care physician, a Medicaid-enrolled psychiatrist, or the area mental health program or local management entity, and

"2. Institutional providers of residential services as defined by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services and approved by the Centers for Medicare and Medicaid Services (CMS) for children and Psychiatric Residential Treatment Facility services that meet federal and State requirements as defined by the Department.

"c. For Medicaid-eligible adults, services provided by licensed or certified psychologists, licensed clinical social workers, certified clinical nurse specialists in psychiatric mental health advanced practice, and nurse practitioners certified as clinical nurse specialists in psychiatric mental health advanced practice, licensed psychological associates, licensed professional counselors, licensed marriage and family therapists, licensed clinical addictions specialists, and certified clinical supervisors, Medicaid-eligible adults may be self-referred.

"d. Payments made for services rendered in accordance with this subdivision shall be to qualified providers in accordance with approved policies and the State Plan. Nothing in sub-subdivision b. or c. of this subdivision shall be interpreted to modify the scope of practice of any service provider, practitioner, or licensee, nor to modify or attenuate any collaboration or supervision requirement related to the professional activities of any service provider, practitioner, or licensee. Nothing in sub-subdivision b. or c. of this subdivision shall be interpreted to require any private health insurer or health plan to make direct third-party reimbursements or payments to any service provider, practitioner, or licensee.

"Notwithstanding G.S. 150B-21.1(a), the Department of Health and Human Services may adopt temporary rules in accordance with Chapter 150B of the General Statutes further defining the qualifications of providers and referral procedures in order to implement this subdivision. Coverage policy for services defined by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services under sub-subdivisions a. and b.2. of this subdivision shall be established by the Division of Medical Assistance."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

ARTICLE 5.

North Carolina Controlled Substances Act.

§ 90-95. Violations; penalties.

CASE NOTES

I. General Consideration.
III. Sale or Delivery.
IV. Possession.
  A. In General.
  B. Possession with Intent to Sell or Deliver.
V. Trafficking.

I. GENERAL CONSIDERATION.

Defendant's Convictions Under This Section Properly Used to Establish Habitual Felon Status. —

For purposes of an inmate's motion to vacate, set aside, or correct sentence under 28 U.S.C.S. § 2255, the inmate's counsel was not ineffective for failing to challenge the inmate's prior convictions used to enhance his sentence; because the offenses were punishable by more than one years' imprisonment, the sentence was properly enhanced under G.S. 90-95(b)(1). McRae v. United States, 521 F. Supp. 2d 515, 2007 U.S. Dist. LEXIS 85966 (W.D.N.C. 2007).

Cited in State v. Scott, — N.C. App. —, 653 S.E.2d 908, 2007 N.C. App. LEXIS 2552 (2007); State v. Davis, — N.C. App. —, 656 S.E.2d 632, 2008 N.C. App. LEXIS 278 (2008); Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

III. SALE OR DELIVERY.

No Conviction for Sale and Delivery of Controlled Substance from One Transaction. —

Because a defendant could not be convicted under subdivision (a)(1) of G.S. 90-95 of both the sale and the delivery of a controlled substance arising from a single transfer, defendant was improperly sentenced for both the sale and the delivery of marijuana and cocaine. Under North Carolina Supreme Court precedent, remand for resentencing was required. State v. Rogers, — N.C. App. —, 652 S.E.2d 276, 2007 N.C. App. LEXIS 2238 (2007).

Sufficient Evidence to Show Sale or Delivery. —

State introduced sufficient evidence to show that defendant was involved in both the sale and delivery of cocaine. The State showed that police observed defendant (1) approach a car with a baggie containing a white substance, (2) enter the car with the substance, and (3) sell the substance to driver, which allowed the jury to conclude that defendant (1) possessed contraband, (2) intended to sell the contraband, and (3) then sold and delivered the contraband to the driver. State v. Mack, — N.C. App. —, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

State of North Carolina failed to produce evidence that defendant transported a half kilo of cocaine, or that defendant was present or constructively present at the scene of the crime when another man transported the cocaine in a car to an informant with whom defendant had just met. Although the State's evidence showed that defendant maintained telephone contact withthe other man during the commission of the crime, it did not show that defendant was present or nearby when the other man retrieved the half kilo of cocaine nor when the other man drove it to the restaurant parking lot where the informant was waiting; thus, the State did not produce any evidence that defendant was close enough during the commission of the crime to provide assistance to the other man if needed or to encourage the actual execution of the crime. State v. Zamora-Ramos, — N.C. App. —, 660 S.E.2d 151, 2008 N.C. App. LEXIS 896 (2008).

IV. POSSESSION.

A. In General.

Evidence Insufficient to Establish Constructive Possession. —

Trial court erred in denying defendant's motion to dismiss a cocaine possession charge where the evidence, including his lack of nervousness, the presence of his birth certificate in the room, and his relative proximity to the drugs on the bed, did not support a finding of constructive possession; rather, the evidence raised nothing more than a suspicion of guilt. State v. Miller, — N.C. App. —, 661 S.E.2d 770, 2008 N.C. App. LEXIS 1170 (June 17, 2008).

Possession In Local Confinement Facility. —

Denial of defendant's motion to dismiss the charge of possession on the premises of a local confinement facility was proper, because defendant, who was brought to the sheriff's department for booking, was clearly on such premises within the plain meaning of G.S. 90-95(c)(9). State v. Moncree, — N.C. App. —, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008).

Evidence Sufficient. —

Evidence was sufficient to support defendant's conviction for possession of a controlled substance since it was a reasonable inference that the clean, undisturbed bag of cocaine found on top of grass that was bent during the chase, on the precise route defendant took while being chased by police, came from defendant. State v. Sinclair, — N.C. App. —, 663 S.E.2d 866, 2008 N.C. App. LEXIS 1473 (Aug. 5, 2008).

Instruction on Constructive Possession. —

Since defendant was not found in actual possession of crack cocaine, the case was one of constructive possession and the trial court properly instructed the jury on constructive possession. State v. Sinclair, — N.C. App. —, 663 S.E.2d 866, 2008 N.C. App. LEXIS 1473 (Aug. 5, 2008).

B. Possession with Intent to Sell or Deliver.

Evidence Supported Possession and Possession With Intent to Sell or Distribute. — Defendant could be convicted of both felony possession and possession with intent to sell or distribute under G.S. 90-95 based on the same contraband. State v. Spencer, — N.C. App. —, 664 S.E.2d 601, 2008 N.C. App. LEXIS 1533 (2008).

Defendant's motion to dismiss the charge of possession with intent to sell or deliver cocaine was properly denied, etc.

State presented sufficient evidence from which a jury could find that defendant possessed with intent to sell or deliver cocaine and, thus, the trial court was not required to grant defendant's motion to dismiss that charge. The State showed that police observed defendant (1) approach a car with a baggie containing a white substance, (2) enter the car, and (3) sell the substance to the driver, which enabled the jury to conclude that defendant (1) possessed contraband later identified as crack cocaine, (2) intended to sell contraband and (3) did in fact sell contraband to the driver of the car. State v. Mack, — N.C. App. —, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

Evidence Sufficient to Withstand Motion to Dismiss. — Trial court did not err by denying defendant's motions to dismiss the charges of felony possession of methamphetamine and misdemeanor possession of drug paraphernalia at the close of the State's evidence and again at the close of all evidence on the grounds that the evidence was insufficient to establish each element of the crimes and defendant's identity as the perpetrator as the State offered testimony from an agent that the residue inside the pen barrel found at defendant's home was methamphetamine, and that the residue on the aluminum foil was a legal, uncontrolled substance that was often converted into methamphetamine. Further, defendant's voluntary statement admitted the possession, therefore, the evidence was sufficient as a matter of law to withstand a motion to dismiss. State v. Davis, 186 N.C. App. 242, 650 S.E.2d 612, 2007 N.C. App. LEXIS 2109 (2007).

V. TRAFFICKING.

"Recreational Facility." — State presented substantial evidence that the recreational facility in question contained at least three separate apparatuses, even thought they were attached; thus, the State satisfied its burden of showing that defendant sold drugs within 1000 feet of a park. State v. Tyson, — N.C. App. —, 658 S.E.2d 285, 2008 N.C. App. LEXIS 652 (Apr. 1, 2008).

Jury Instructions. —

Trial court was not required to instruct the jury that the jury could not properly find defendant guilty of possession with the intent to sell or deliver cocaine based upon the same evidence the jury used to find defendant guilty of trafficking in cocaine by possession. State v. Doe, — N.C. App. —, 661 S.E.2d 272, 2008 N.C. App. LEXIS 1085 (2008).

Evidence held sufficient, etc.

Sufficient evidence was presented to submit the charge of trafficking in cocaine by transportation to the jury because (1) a witness testified that defendant obtained nine ounces of cocaine recovered from a vehicle from a third-party, that the witness and defendant delivered cocaine together, and drove the vehicle to where a drug transaction that was arranged with a confidential informant was to have occurred; (2) the cocaine was located in defendant's jacket or on the floorboard of the back seat toward the passenger seat where defendant was sitting prior to police intervention; and (3) defendant presented the cocaine to the confidential informant. State v. Doe, — N.C. App. —, 661 S.E.2d 272, 2008 N.C. App. LEXIS 1085 (2008).

Elements. —

Evidence in defendant's case of trafficking in cocaine by possession of 28 grams or more, but less than 200 grams, of cocaine in violation of G.S. 90-95(h)(3)a proved every element of that offense beyond a reasonable doubt. The evidence showed that: (1) defendant planned to sell cocaine to an informant providing information to police regarding drug activity; (2) two detectives identified the substance found at defendant's second residence as cocaine; and (3) the two detectives testified that they weighed the substance found and determined that it was 55 grams of cocaine. State v. Llamas-Hernandez, — N.C. App. —, 659 S.E.2d 79, 2008 N.C. App. LEXIS 714 (2008).

§ 90-108. Prohibited acts; penalties.

CASE NOTES

Intentional Act. —

There is no bright line test in G.S. 90-108(a)(7), which bars the maintaining of a dwelling for the keeping and/or selling of controlled substances, or in the case law regarding how much money, coupled with the presence of drugs, qualifies as substantial evidence to demonstrate an intent to sell, and, as with a large quantity of drugs, the presence of cash, alone, is insufficient to infer an intent to sell or distribute. State v. Thompson, — N.C. App. —, 654 S.E.2d 814, 2008 N.C. App. LEXIS 82 (2008).

"Keep." — "Keep," for purposes of a charge under G.S. 90-108(a)(7) of maintaining a dwelling for the keeping and/or selling of controlled substances denotes not just possession, but possession that occurs over a duration of time. State v. Thompson, — N.C. App. —, 654 S.E.2d 814, 2008 N.C. App. LEXIS 82 (2008).

Maintaining Dwelling Used for Controlled Substances. —

Motion to dismiss a charge of maintaining a dwelling for the keeping and/or selling of controlled substances, under G.S. 90-108(a)(7), should be denied if there is sufficient evidence for a jury to infer that defendant is guilty because (a) defendant did (1) knowingly (2) keep or maintain (3) a dwelling (4) which was resorted to (5) by persons unlawfully using controlled substances (6) for the purpose of using controlled substances, or (b) defendant did (1) knowingly (2) keep or maintain (3) a dwelling (4) which was used for the keeping or selling (5) of controlled substances. State v. Thompson, — N.C. App. —, 654 S.E.2d 814, 2008 N.C. App. LEXIS 82 (2008).

Maintaining Dwelling — Evidence Held Sufficient. —

Conviction for keeping dwelling for keeping and selling of cocaine was supported by sufficient evidence, including evidence that, inter alia, (1) defendant resided with his children at the home in question, (2) watched the children while his fiancee worked in the evenings, (3) contributed money toward household expenses, (4) used, treated, described, and perceived the dwelling as his residence, and (4) two separate drug transactions actually transpired at the home. State v. Moore, — N.C. App. —, 656 S.E.2d 287, 2008 N.C. App. LEXIS 208 (2008).

State presented evidence, in the form of defendant's purported confession to police, that defendant resided at the subject residence and thus, because defendant failed to argue that the State's evidence was insufficient as to any other element of the offense of maintaining a dwelling for purposes of keeping or selling of a controlled substance, there was sufficient evidence to support defendant's conviction. State v. Spencer, — N.C. App. —, 664 S.E.2d 601, 2008 N.C. App. LEXIS 1533 (2008).

Maintaining Dwelling — Evidence Held Insufficient. —

Charge of knowingly maintaining a dwelling for the purpose of keeping controlled substances should have been dismissed because the State failed to present evidence that defendant paid for hotel room or stayed in the room for more than 24 hours. State v. Toney, — N.C. App. —, 653 S.E.2d 187, 2007 N.C. App. LEXIS 2448 (2007).

Defendant's conviction for intentionally maintaining a dwelling used for the keeping and/or selling of controlled substances, under G.S. 90-108(a)(7), was reversed because (1) the State did not prove defendant knowingly let others resort to defendant's home to consume drugs, as there was no evidence anyone used drugs there, and (2) there was no evidence defendant used defendant's home to "keep" cocaine over a duration of time or sold drugs. State v. Thompson, — N.C. App. —, 654 S.E.2d 814, 2008 N.C. App. LEXIS 82 (2008).

State of North Carolina failed to present sufficient evidence tending to show defendant kept a bedroom for the purpose of keeping or selling cocaine because, while police officers recovered six and a half grams of cocaine from a boot located inside defendant's bedroom closet, no other evidence or paraphernalia tending to indicate the sale of cocaine recovered from a vehicle came from defendant's bedroom. Furthermore, defendant asserted the cocaine recovered from the boot was solely for defendant's personal use, as defendant admitted to being a habitual user, and denied any intent or plans to sell the cocaine recovered from the boot in the bedroom closet. State v. Doe, — N.C. App. —, 661 S.E.2d 272, 2008 N.C. App. LEXIS 1085 (2008).

Evidence Held Insufficient. —

In a case in which defendant was prosecuted under G.S. 90-108(a)(7) for allegedly maintaining a dwelling for the keeping and/or selling of controlled substances, an officer's testimony that the amount of cocaine defendant possessed could be divided into smaller amounts and sold and that defendant's possession of cash consisting of twenties, tens and fives showed defendant sold cocaine for those amounts was insufficient to survive a motion to dismiss the charge. State v. Thompson, — N.C. App. —, 654 S.E.2d 814, 2008 N.C. App. LEXIS 82 (2008).

Jury Instructions. — Trial court was not required to instruct the jury that the jury could not properly find defendant guilty of possession with the intent to sell or deliver cocaine based upon the same evidence the jury used to find defendant guilty of trafficking in cocaine by possession. State v. Doe, — N.C. App. —, 661 S.E.2d 272, 2008 N.C. App. LEXIS 1085 (2008).

ARTICLE 5B.

Drug Paraphernalia.

§ 90-113.21. General provisions.

CASE NOTES

Applied in State v. Spencer, — N.C. App. —, 664 S.E.2d 601, 2008 N.C. App. LEXIS 1533 (2008).

§ 90-113.22. Possession of drug paraphernalia.

CASE NOTES

Evidence Sufficient to Withstand Motion to Dismiss. — Trial court did not err by denying defendant's motions to dismiss the charges of felony possession of methamphetamine and misdemeanor possession of drug paraphernalia at the close of the State's evidence and again at the close of all evidence on the grounds that the evidence was insufficient to establish each element of the crimes and defendant's identity as the perpetrator as the State offered testimony from an agent that the residue inside the pen barrel found at defendant's home was methamphetamine, and that the residue on the aluminum foil was a legal, uncontrolled substance that was often converted into methamphetamine. Further, defendant's voluntary statement admitted the possession, therefore, the evidence was sufficient as a matter of law to withstand a motion to dismiss. State v. Davis, 186 N.C. App. 242, 650 S.E.2d 612, 2007 N.C. App. LEXIS 2109 (2007).

Jury instructions that substantially conformed to the pattern jury instruction defendant agreed to was sufficient. State v. Spencer, — N.C. App. —, 664 S.E.2d 601, 2008 N.C. App. LEXIS 1533 (2008).

Article 5C.

North Carolina Substance Abuse Professional Practice Act.

§ 90-113.31A. Definitions.

The following definitions shall apply in this Article:

(1) Applicant. — A person who has initiated a process to become a substance abuse professional pursuant to this Article.

(2) Applicant supervisor. — A person who provides supervision as required by the Board to persons applying for registration, certification, or licensure as a substance abuse professional pursuant to this Article.

(3) Board. — The North Carolina Substance Abuse Professional Practice Board.

(4) Certified clinical supervisor. — A person certified by the Board to practice as a clinical supervisor in accordance with the provisions of this Article.

(5) Certified criminal justice addictions professional. — A person certified by the Board to practice as a criminal justice addictions professional who, under supervision, provides direct services to clients or offenders exhibiting substance abuse disorders and works in a program determined by the Board to be involved in a criminal justice setting.

(6) Certified substance abuse counselor. — A person certified by the Board to practice under the supervision of a practice supervisor as a substance abuse counselor in accordance with the provisions of this Article.

(7) Certified substance abuse prevention consultant. — A person certified by the Board to practice substance abuse prevention in accordance with the provisions of this Article.

(8) Certified substance abuse residential facility director. — A person certified by the Board to practice as a substance abuse residential facility director in accordance with the provisions of this Article.

(9) Repealed by Session Laws 2008-130, s. 1, effective July 28, 2008.

(10) Clinical supervisor intern. — A person designated by the Board to practice as a clinical supervisor under the supervision of a certified clinical supervisor for a period not to exceed three years without a showing of good cause in accordance with the provisions of this Article.

(11) Counseling. — The utilization of special skills to assist individuals, families, or groups in achieving objectives, including the following:
  a. Exploring a problem and its ramifications.
  b. Examining attitudes and feelings.
  c. Considering alternative solutions.
  d. Decision making.

(12) Credential. — Any registration, certification, or license issued by the Board.

(13) Credentialing body. — A board that licenses, certifies, registers, or otherwise regulates a profession or practice.

(14) Criminal history. — A history of conviction of a State crime, whether a misdemeanor or felony, that bears on an applicant's fitness for licensure to practice substance abuse professional services. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act in Article 5 of Chapter 90 of the General Statutes and alcohol-related offenses including sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(15) Deemed status. — Recognition by the Board of the credentials offered by a professional discipline whereby the individuals certified, licensed, or otherwise recognized by the discipline as having met the standards of a clinical addictions specialist may apply individually for licensure as a licensed clinical addictions specialist.

(16) Dual relationship. — A relationship in addition to the professional relationship with a person to whom the substance abuse professional delivers services in the Twelve Core Functions or the performance domains, both as defined in rules adopted by the Board, or as provided in a supervisory capacity. These relationships may result in grounds for disciplinary action.

(17) Human services field. — An area of study that focuses on the biological, psychological, behavioral, and social aspects of human welfare with focus on the direct services designed to improve it.

(18) Independent study. — Any course of study that is not traditional classroom-based that must be preapproved by the Board or any organization that has deemed status with the Board.

(19) Licensed clinical addictions specialist. — A person licensed by the Board to practice as a clinical addictions specialist in accordance with the provisions of this Article.

(20) Practice supervisor. — A certified clinical supervisor, clinical supervisor intern, or licensed clinical addictions specialist who provides oversight and responsibility in a face-to-face capacity for each certified substance abuse counselor or criminal justice addictions professional.

(21) Prevention. — The reduction, delay, or avoidance of alcohol and of other drug use behavior. 'Prevention' includes the promotion of positive environments and individual strengths that contribute to

personal health and well-being over an entire life and the development of strategies that encourage individuals, families, and communities to take part in assessing and changing their lifestyles and environments.

(22) Professional discipline. — A field of study characterized by the technical, educational, and ethical standards of a profession.

(22a) Provisional licensed clinical addictions specialist. — A registrant who successfully completes 300 hours of Board-approved supervised practical training in pursuit of licensure as a clinical addictions specialist.

(23) Registrant. — A person who completes all requirements to be registered with the Board and is supervised by a certified clinical supervisor or clinical supervisor intern.

(24) Substance abuse counseling. — The assessment, evaluation, and provision of counseling and therapeutic service to persons suffering from substance abuse or dependency.

(25) Substance abuse counselor intern. — A registrant who successfully completes 300 hours of Board-approved supervised practical training in pursuit of credentialing as a substance abuse counselor.

(26) Substance abuse professional. — A registrant, certified substance abuse counselor, substance abuse counselor intern, certified substance abuse prevention consultant, certified clinical supervisor, provisional licensed clinical addictions specialist, licensed clinical addictions specialist, certified substance abuse residential facility director, clinical supervisor intern, or certified criminal justice addictions professional. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s.2; 1999-164, s. 1; 1999-456, s. 24; 2001-370, s. 1; 2005-431, s. 1; 2008-130, s. 1.)

Effect of Amendments. — Session Laws 2008-130, s. 1, effective July 28, 2008, deleted subdivision (9), which defined clinical addictions specialist intern; added subdivision (22a); in subdivision (25), substituted “registrant” for “person” and deleted “and passes a written examination” following “supervised practical training”; and in subdivision (26), substituted “provisional licensed clinical addictions specialist” for “clinical addictions specialist intern” and inserted “clinical supervisor intern.”

§ 90-113.32. Board; composition; voting.

(a) The Board is created as the authority to credential substance abuse professionals in North Carolina.

(b) Repealed by Session Laws 2008-130, s. 2, effective July 28, 2008.

(c) After the initial Board members’ terms expire, the Board shall consist of the following members, all of whom shall reside in North Carolina, appointed or elected as follows:

(1) Eleven professionals credentialed pursuant to this Article and elected by the credentialed professionals, at least two of whom shall serve each of the four Division of Mental Health, Developmental Disabilities, and Substance Abuse Services regions of the State. Three members shall serve as members at large.

(2) Three members at large chosen from laypersons or other professional disciplines who have shown a special interest in the field of substance abuse, nominated by the Nominating and Elections Committee established by subsection (d) of this section and elected by the Board.

(3) Two members from the Department of Health and Human Services, appointed by the Chief of Community Policy Management of the Division of Mental Health, Developmental Disabilities, and Sub-

stance Abuse Services, at least one of whom administers substance abuse services.

(4) One member of the public at large appointed by the Governor.

(5) One member of the public at large appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121 and one member of the public at large appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.

(6) One member shall represent each of the professional disciplines granted deemed status under G.S. 90-113.41A. The member may be appointed by the professional discipline on or before a date set by the Board. If the professional discipline has at least one association in the State, the member shall be chosen from a list of nominees submitted to the association. The members appointed or elected under this subdivision shall be certified as substance abuse specialists by the professional discipline that the members represent.

No member of the General Assembly shall serve on the Board.

(c1) Every member of the Board shall have the right to vote on all matters before the Board, except for the President who shall vote only in case of a tie or when another member of the Board abstains on the question of whether the professional discipline the member represents shall retain its deemed status.

(d) The Board shall appoint five professionals from the field of substance abuse counseling and substance abuse prevention consulting to serve on the Nominating and Elections Committee. Of these five, at least three shall not be members of the Board. The Board shall appoint a member of the Nominating and Elections Committee to serve as chair. The Committee's purpose is to accept nominations from professionals certified or licensed by the Board to fill vacancies on the Board in membership categories prescribed by subdivisions (1) and (2) of subsection (c) of this section and to conduct the election of Board members. The Committee shall solicit nominations from all professionals it has certified or licensed under this Article when elected members' terms are due to expire. The certified or licensed professionals shall submit to the Committee all nominations beginning 90 days and ending 28 days before the election of new Board members. The Committee shall furnish all certified or licensed professionals with a ballot containing all the nominees for each elected Board member vacancy. In soliciting and making nominations for this process, the Committee shall give consideration to factors that promote representation on the Board by professionals certified or licensed by the Board. The Committee shall serve for a two-year term, its successors to be appointed for the same term by the Board.

(e) Members of the Board shall serve for four-year terms. No Board member shall serve for more than two consecutive terms, but a person who has been a member for two consecutive terms may be reappointed after being off the Board for a period of at least one year. When a vacancy occurs in an unexpired term, the Board shall, as soon as practicable, appoint temporary members to serve until the end of the unexpired terms. Time spent as a temporary member does not count in determining the limitation on consecutive terms.

(f) If a member becomes ineligible to serve on the Board for any reason, except when the member has committed an ethical violation that results in the suspension or revocation of the member's professional credentials, that member may fulfill the remainder of his or her term on the Board. (1993 (Reg. Sess., 1994), c. 685, s. 1; c. 773, s. 15.2(a), (b); 1997-443, s. 11A.118(a); 1997-492, s. 3; 1999-164, ss. 2-4; 2005-431, s. 1; 2008-130, ss. 2, 3.)

Editor's Note. —

Session Laws 2008-130, s. 9, provides: "Notwithstanding G.S. 90-113.32(e), members currently serving on the North Carolina Substance

Abuse Professional Practice Board who began serving a second consecutive four-year term as of September 1, 2005, may continue to serve on the Board for an additional four-year term."

Effect of Amendments. — Session Laws 2008-130, ss. 2 and 3, effective July 28, 2008, deleted subsection (b) regarding membership of the initial board; and rewrote subdivision (c)(3).

§ 90-113.33. Board; powers and duties.

Editor's Note. — Session Laws 2008-130, s. 9, provides: "Notwithstanding G.S. 90-113.32(e), members currently serving on the North Carolina Substance Abuse Professional Practice Board who began serving a second consecutive four-year term as of September 1, 2005, may continue to serve on the Board for an additional four-year term."

§ 90-113.40. Requirements for certification and licensure.

(a) The Board shall issue a certificate certifying an applicant as a "Certified Substance Abuse Counselor" or as a "Certified Substance Abuse Prevention Consultant" if:

(1) The applicant is of good moral character.

(2) The applicant is not and has not engaged in any practice or conduct that would be grounds for disciplinary action under G.S. 90-113.44.

(3) The applicant is qualified for certification pursuant to the requirements of this Article and any rules adopted pursuant to it.

(4) The applicant has, at a minimum, a high school diploma or a high school equivalency certificate.

(5) The applicant has signed a form attesting to the intention to adhere fully to the ethical standards adopted by the Board.

(5a) The applicant submits to a complete criminal history record check pursuant to G.S. 90-113.46A.

(6) The applicant has completed 270 hours of Board-approved education. The Board may prescribe that a certain number of hours be in a course of study for substance abuse counseling and that a certain number of hours be in a course of study for substance abuse prevention consulting. Independent study hours shall not compose more than fifty percent (50%) of the total number of hours required for initial credentialing.

(7) The applicant has documented completion of a minimum of 300 hours of Supervised Practical Training, has provided a Board-approved supervision contract between the applicant and an applicant supervisor, and has been deemed recommended by the applicant supervisor to advance in the credentialing process.

(8) The applicant for substance abuse counselor has completed a total of 6,000 hours of supervised experience in the field, whether paid or volunteer. The applicant for substance abuse prevention consultant has completed a total of 6,000 hours supervised experience in the field, whether paid or volunteer, or 4,000 hours if the applicant has at least a bachelors degree in a human services field from a regionally accredited college or university.

(9) The applicant has obtained a passing score on a written examination.

(b) The Board shall issue a certificate certifying an individual as a "Certified Clinical Supervisor" if the applicant:

(1) Submits proof of designation by the Board as a clinical supervisor intern.

(2) Submits proof that the applicant has a minimum of a master's degree in a human services field with a clinical application from a regionally accredited college or university.

(3) Has 4,000 hours experience as a substance abuse clinical supervisor as documented by his or her certified clinical supervisor.

(4) Has 30 hours of substance abuse clinical supervision specific education or training. These hours shall be reflective of the Twelve Core Functions in the applicant's clinical application and practice and may also be counted toward the applicant's renewal as a substance abuse counselor or a clinical addictions specialist.

(5) Submits a letter of reference from a certified clinical supervisor who can attest to the applicant's supervisory competence and two letters of reference from either counselors who have been supervised by the applicant or professionals who can attest to the applicant's competence.

(6) Obtains a passing score on a written examination administered by the Board.

(b1) The Board shall designate an applicant as a "Clinical Supervisor Intern" if, in addition to meeting the requirements of subdivisions (a)(1) through (5a) of this section, the applicant meets the following qualifications:

(1) Submits an application, resume, and official transcript showing that the applicant has obtained a master's degree in a human services field with a clinical application from a regionally accredited college or university.

(2) Submits verification statements.

(3) Submits proof of credentialing as a licensed clinical addictions specialist.

(4) Submits documentation establishing that the applicant has completed at least fifty percent of the required clinical supervision specific training hours as defined by the Board.

(c) The Board shall issue a license credentialing an applicant as a "Licensed Clinical Addictions Specialist" if, in addition to meeting the requirements of subdivisions (a)(1) through (5a) of this section, the applicant meets one of the following criteria:

(1) Criteria A. — The applicant:

a. Has a minimum of a master's degree with a clinical application in a human services field from a regionally accredited college or university.

b. Has two years postgraduate supervised substance abuse counseling experience.

c. Submits three letters of reference from licensed clinical addictions specialists or certified substance abuse counselors who have obtained master's degrees.

d. Has achieved a passing score on a master's level written examination administered by the Board.

e. Has attained 180 hours of substance abuse specific training from either a regionally accredited college or university, which may include unlimited independent study, or from training events of which no more than fifty percent (50%) shall be in independent study. All hours shall be credited according to the standards set forth in G.S. 90-113.41A.

f. The applicant has documented completion of a minimum of 300 hours of supervised practical training and has provided a Board-approved supervision contract between the applicant and an applicant supervisor.

(2) Criteria B. — The applicant:

a. Has a minimum of a master's degree with a clinical application in a human services field from a regionally accredited college or university.

b. Has been certified as a substance abuse counselor.

c. Repealed by Session Laws 2008-130, s. 4, effective July 28, 2008.

d. Has achieved a passing score on a master's level written examination administered by the Board.

e. Submits three letters of reference from either licensed clinical addictions specialists or certified substance abuse counselors who have obtained master's degrees.

(3) Criteria C. — The applicant:

a. Has a minimum of a master's degree in a human services field with both a clinical application and a substance abuse specialty from a regionally accredited college or university that includes 180 hours of substance abuse specific education and training pursuant to G.S. 90-113.41A.

b. Has one year of postgraduate supervised substance abuse counseling experience.

c. Has achieved a passing score on a master's level written examination administered by the Board.

d. Submits three letters of reference from licensed clinical addictions specialists or certified substance abuse counselors who have obtained master's degrees.

(4) Criteria D. — The applicant has a substance abuse certification from a professional discipline that has been granted deemed status by the Board.

(d) The Board shall issue a certificate certifying an applicant as a "Substance Abuse Residential Facility Director" if the applicant:

(1) Has been credentialed as a substance abuse counselor or a clinical addictions specialist.

(2) Has 50 hours of Board approved academic or didactic management specific training or a combination thereof. Independent study may compose up to fifty percent (50%) of the total number of hours required for initial credentialing.

(3) Submits letters of reference from the applicant's current supervisor and a colleague or coworker.

(d1) The Board shall issue a certificate certifying an applicant as a "Certified Criminal Justice Addictions Professional", with the acronym "CCJP", if in addition to meeting the requirements of subdivisions (a)(1) through (5a) of this section, the applicant:

(1) Has attained 270 hours of Board-approved education or training, unless the applicant has attained a minimum of a masters degree with a clinical application and a substance abuse specialty from a regionally accredited college or university whereby the applicant must only obtain 180 hours. The hours of education shall be specifically related to the knowledge and skills necessary to perform the tasks within the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, Incorporated, "IC&RC/AODA, Inc.," criminal justice addictions professional performance domains as they relate to both adults and juveniles. Independent study may compose up to fifty percent (50%) of the total number of hours obtained for initial certification or renewal.

(2) Has documented 300 hours of Board-approved supervised practical training. This supervision shall mean the administrative, clinical, and evaluative process of monitoring, assessing, and enhancing professional performance. A minimum of 10 hours of supervision in each criminal justice domain established by the IC&RC/AODA, Inc., is required.

(3) Has provided documentation of supervised work experience providing direct service to clients or offenders involved in one of the three branches of the criminal justice system, which include law enforce-

ment, the judiciary, and corrections. The applicant must meet one of the following criteria:

a. Criteria A. — In addition to having a high school degree or GED, the applicant has a minimum of 6,000 hours of documented work experience in direct services in criminal justice or addictions services or any combination of these services that have been obtained during the past 10 years.

b. Criteria B. — In addition to having an associate degree, the applicant has a minimum of 5,000 hours of documented work experience in direct services in criminal justice or addictions services or any combination of these services obtained during the past 10 years.

c. Criteria C. — In addition to having at least a bachelors degree, the applicant has a minimum of 4,000 hours of documented work experience in direct services in criminal justice or addictions services, or any combination of these services, and this experience has been obtained during the past 10 years.

d. Criteria D. — In addition to having at least a masters degree in a human services field, the applicant has a minimum of 2,000 hours of documented work experience in direct services in criminal justice or addictions services or any combination of these services that has been obtained during the past 10 years.

e. Criteria E. — In addition to having at least a masters degree in a human services field with a specialty from a regionally accredited college or university that includes 180 hours of substance abuse specific education or training, the applicant has a minimum of 2,000 hours of postgraduate supervised substance abuse counseling experience.

f. Criteria F. — In addition to having obtained the credential of a certified clinical addictions specialist or other advanced credential in a human services field from an organization that has obtained deemed status with the Board, the applicant has a minimum of 1,000 hours of documented work experience in direct services in criminal justice or addictions services that has been obtained during the past 10 years.

(4) Has passed the IC&RC/AODA, Inc., certified criminal justice addictions professional written examination.

(e) The Board shall publish from time to time information in order to provide specifics for potential applicants of an acceptable educational curriculum and the terms of acceptable supervised fieldwork experience.

(f) Effective January 1, 2003, only a person who is certified as a certified clinical supervisor or a clinical supervisor intern shall be qualified to supervise applicants for certified clinical supervisor and certified substance abuse counselor and applicants for licensed clinical addictions specialist who meet the qualifications of their credential other than through deemed status as provided in G.S. 90-113.40(c)(4). (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 9; 1998-217, s. 10; 1999-164, s. 10; 2005-431, s. 1; 2008-130, s. 4.)

Effect of Amendments. — Session Laws 2008-130, s. 4, effective July 28, 2008, deleted the former last sentence of subdivision (a)(9) pertaining to an applicant for certification as a substance abuse counselor obtaining a passing score on an oral examination; and rewrote subsections (b), (b1)(3), and (c).

§ 90-113.42. Violations; exemptions.

(a) It shall be unlawful for any person not licensed or otherwise credentialed as a substance abuse professional pursuant to this Article to engage in those activities set forth in the scope of practice of a substance abuse professional under G.S. 90-113.31B, unless that person is regulated by another profession or is a registrant or intern as defined by this Article.

(b) It is not the intent of this Article to regulate members of other regulated professions who provide substance abuse services or consultation in the normal course of the practice of their profession.

(c) This Article does not apply to any person registered, certified, or licensed by the State or federal government to practice any other occupation or profession while rendering substance abuse services or consultation in the performance of the occupation or profession for which the person is registered, certified, or licensed.

(d) Only individuals registered, certified, or licensed under this Article may use the title "Certified Substance Abuse Counselor", "Certified Substance Abuse Prevention Consultant", "Certified Clinical Supervisor", "Licensed Clinical Addictions Specialist", "Certified Substance Abuse Residential Facility Director", "Certified Criminal Justice Addictions Professional", "Substance Abuse Counselor Intern", "Provisional Licensed Clinical Addictions Specialist", "Clinical Supervisor Intern", or "Registrant". (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 12; 2005-431, s. 1; 2008-130, s. 5.)

Effect of Amendments. — Session Laws 2008-130, s. 5, effective July 28, 2008, substituted "Provisional Licensed Clinical Addictions Specialist" for "Clinical Addictions Specialist Intern" in subsection (d).

§ 90-113.43. Illegal practice; misdemeanor penalty.

(a) Except as otherwise authorized in this Article, no person shall:

(1) Offer substance abuse professional services, practice, attempt to practice, or supervise while holding himself or herself out to be a certified substance abuse counselor, certified substance abuse prevention consultant, certified clinical supervisor, licensed clinical addictions specialist, provisional licensed clinical addictions specialist, certified substance abuse residential facility director, certified criminal justice addictions professional, clinical supervisor intern, substance abuse counselor intern, or registrant without first having obtained a notification of registration, certification, or licensure from the Board.

(2) Use in connection with any name any letters, words, numerical codes, or insignia indicating or implying that this person is a registrant, certified substance abuse counselor, certified substance abuse prevention consultant, certified clinical supervisor, licensed clinical addictions specialist, certified substance abuse residential facility director, substance abuse counselor intern, certified criminal justice addictions professional, or provisional licensed clinical addictions specialist unless this person is registered, certified, or licensed pursuant to this Article.

(3) Practice or attempt to practice as a certified substance abuse counselor, certified substance abuse prevention consultant, certified clinical supervisor, licensed clinical addictions specialist, certified criminal justice addictions professional, substance abuse counselor intern, provisional licensed clinical addictions specialist, clinical supervisor intern, certified substance abuse residential facility director or registrant with a revoked, lapsed, or suspended certification or license.

(4) Aid, abet, or assist any person to practice as a certified substance abuse counselor, certified substance abuse prevention consultant, certified criminal justice addictions professional, certified clinical

supervisor, licensed clinical addictions specialist, certified substance abuse residential facility director, registrant, substance abuse counselor intern, provisional licensed clinical addictions specialist, or clinical supervisor intern in violation of this Article.

(5) Knowingly serve in a position required by State law or rule or federal law or regulation to be filled by a registrant, certified substance abuse counselor, certified substance abuse prevention consultant, certified criminal justice addictions professional, certified clinical supervisor, licensed clinical addictions specialist, certified substance abuse residential facility director, substance abuse counselor intern, provisional licensed clinical addictions specialist, or clinical supervisor intern unless that person is registered, certified, or licensed under this Article.

(6) Repealed by S.L. 1997-492, s. 13.

(7) Repealed by Session Laws 2008-130, s. 6, effective July 28, 2008.

(b) A person who engages in any of the illegal practices enumerated by this section is guilty of a Class 1 misdemeanor. Each act of unlawful practice constitutes a distinct and separate offense. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 13; 2005-431, s. 1; 2008-130, s. 6.)

Effect of Amendments. — Session Laws 2008-130, s. 6, effective July 28, 2008, designated the former undesignated first and last paragraphs as present subsections (a) and (b); rewrote subdivisions (a)(1) through (5); and deleted subdivision (a)(7), which read: "Practice, supervise, or attempt to practice or supervise or knowingly serve in a position required by State law or rule or federal law or regulation to be filled by a designated substance abuse intern without being designated as such by the Board."

ARTICLE 9A.

Nursing Practice Act.

§ 90-171.23. Duties, powers, and meetings.

Editor's Note. —
Session Laws 2008-14, s. 1, provides: "Pursuant to G.S. 150B-21.3(b1), 21 NCAC 36 .0318 (Faculty), as adopted by the North Carolina Board of Nursing on May 18, 2007, and approved by the Rules Review Commission on June 28, 2007, is disapproved." G.S. 90-171.23, 90-171.38, and 90-171.83 were listed as authority under the disapproved rule.

§ 90-171.37. Revocation, discipline, suspension, probation, or denial of licensure.

CASE NOTES

Discipline Not Warranted. — None of the evidence, nor even the North Carolina Board of Nursing's findings of fact, supported a conclusion that a nurse acted willfully to harass, abuse, or intimidate a patient, which was required to reprimand the nurse pursuant to G.S. 90-171.37 and 21 N.C. Admin. Code 36.0217(c)(10), when the nurse unsuccessfully searched a patient's home for missing medication because the nurse was concerned that the patient might be inappropriately taking the missing medication. Elshoff v. N.C. Bd. of Nursing, — N.C. App. —, 658 S.E.2d 65, 2008 N.C. App. LEXIS 538 (Mar. 18, 2008).

§ 90-171.38. Standards for nursing programs.

Editor's Note. —

Session Laws 2008-14, s. 1, provides: "Pursuant to G.S. 150B-21.3(b1), 21 NCAC 36 .0318 (Faculty), as adopted by the North Carolina Board of Nursing on May 18, 2007, and approved by the Rules Review Commission on June 28, 2007, is disapproved." G.S. 90-171.23, 90-171.38, and 90-171.83 were listed as authority under the disapproved rule.

ARTICLE 9D.

Nursing Scholars Program.

§ 90-171.62. Terms of loans; receipt and disbursement of funds.

(a) **(Effective until January 1, 2009)** All scholarship loans shall be evidenced by notes made payable to the State Education Assistance Authority that bear interest at the rate of ten percent (10%) per year beginning 90 days after completion of the nursing education program, or 90 days after termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated upon the recipient's withdrawal from school or by the recipient's failure to meet the standards set by the Commission.

(a) **(Effective January 1, 2009)** All scholarship loans shall be evidenced by notes made payable to the State Education Assistance Authority that bear interest at a rate not to exceed ten percent (10%) per year as set by the Authority and beginning 90 days after completion of the nursing education program, or 90 days after termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated upon the recipient's withdrawal from school or by the recipient's failure to meet the standards set by the Commission.

(b) The State Education Assistance Authority shall forgive the loan if, within seven years after graduation from a nursing education program, the recipient practices nursing in North Carolina for one year for every year a scholarship loan was provided. If the recipient repays the scholarship loan by cash payments, all indebtedness shall be repaid within ten years. The Authority may provide for accelerated repayment and for less than full-time employment options to encourage the practice of nursing in either geographic or nursing specialty shortage areas. The Authority shall adopt specific rules to designate these geographic areas and these nursing specialty shortage areas, upon recommendations of the North Carolina Center for Nursing. The North Carolina Center for Nursing shall base its recommendations on objective information provided by interested groups or agencies and upon objective information collected by the Center. The Authority may forgive the scholarship loan if it determines that it is impossible for the recipient to practice nursing in North Carolina for a sufficient time to repay the loan because of the death or permanent disability of the recipient within ten years following graduation or termination of enrollment in a nursing education program.

(c) All funds appropriated to or otherwise received by the Nursing Scholars Program for scholarships, all funds received as repayment of scholarship loans, and all interest earned on these funds, shall be placed in a revolving fund. This revolving fund may be used only for scholarship loans granted under the Nursing Scholars Program. (1989, c. 594, s. 1; 1991, c. 550, s. 1.1; 1993 (Reg. Sess., 1994), c. 769, s. 17.11(b); 2008-204, s. 5.1.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until January 1, 2009. The second version of subsection (a) set out above is effective January 1, 2009.

Editor's Note. — Session Laws 2008-204, s. 5.4, provides: "This section becomes effective January 1, 2009, and applies to all scholarship loans issued on and after July 1, 2009."

Effect of Amendments. — Session Laws 2008-204, s. 5.1, effective January 1, 2009, and applicable to all scholarship loans issued on and after July 1, 2009, substituted "a rate not to exceed ten percent (10%) per year as set by the Authority and beginning" for "the rate of ten percent (10%) per year beginning" in subsection (a).

ARTICLE 9G.

Nurse Licensure Compact.

§ 90-171.83. General provisions and jurisdiction.

Editor's Note. — Session Laws 2008-14, s. 1, provides: "Pursuant to G.S. 150B-21.3(b1), 21 NCAC 36 .0318 (Faculty), as adopted by the North Carolina Board of Nursing on May 18, 2007, and approved by the Rules Review Commission on June 28, 2007, is disapproved." G.S. 90-171.23, 90-171.38, and 90-171.83 were listed as authority under the disapproved rule.

ARTICLE 9H.

Graduate Nurse Scholarship Program for Faculty Production.

§ 90-171.101. Terms of loans; receipt and disbursement of funds.

(a) **(Effective until January 1, 2009)** All scholarship loans shall be evidenced by notes made payable to the State Education Assistance Authority that bear interest at the rate of ten percent (10%) per year beginning 90 days after completion of the nursing education program, or 90 days after termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated upon the recipient's withdrawal from school or by the recipient's failure to meet the standards set by the Commission.

(a) **(Effective January 1, 2009)** All scholarship loans shall be evidenced by notes made payable to the State Education Assistance Authority that bear interest at a rate not to exceed ten percent (10%) per year as set by the Authority and beginning 90 days after completion of the nursing education program, or 90 days after termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated upon the recipient's withdrawal from school or by the recipient's failure to meet the standards set by the Commission.

(b) The State Education Assistance Authority shall forgive the loan if, within seven years after graduation from a nursing education program, the recipient teaches in a public or private nursing education program in a public or private educational institution in North Carolina for one year for every year a scholarship loan was provided, unless the recipient was a nursing faculty member of a community college. In those circumstances, the State Education Assistance Authority shall forgive the loan if, within seven years after graduation from a nursing education program, the recipient teaches in a community college nursing education program in North Carolina for one year for every year a scholarship loan was provided. If the recipient repays the scholarship loan by cash payments, all indebtedness shall be repaid within 10 years. The Authority may provide for accelerated repayment and for less than full-time employment options to encourage the practice of nursing education in either geographic or nursing specialty shortage areas. The Authority shall adopt specific rules to designate these geographic areas and these nursing specialty shortage areas, upon recommendations of the North Carolina Center for Nursing. The North Carolina Center for Nursing shall base its recommendations on objective information provided by interested groups or agencies and upon objective information collected by the Center. The Authority may forgive the scholarship loan if it determines that it is impossible for the recipient to teach in a public or private nursing program, or in a community college nursing program if that was a condition of the scholarship loan, in North Carolina for a sufficient time to repay the loan because of the death or permanent disability of the recipient within 10 years following graduation or termination of enrollment in a nursing education program.

(c) All funds appropriated to or otherwise received by the Graduate Nurse Scholarship Program for Faculty Production for scholarships, all funds received as repayment of scholarship loans, and all interest earned on these funds shall be placed in a revolving fund. This revolving fund may be used only for scholarship loans granted under the Graduate Nurse Scholarship Program for Faculty Production. (2006-66, s. 9.6; 2007-323, s. 9.6(b); 2008-204, s. 5.2.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until January 1, 2009. The second version of subsection (a) set out above is effective January 1, 2009.

Editor's Note. —

Session Laws 2008-204, s. 5.4, provides: "This section becomes effective January 1, 2009, and applies to all scholarship loans issued on and after July 1, 2009."

Effect of Amendments. —

Session Laws 2008-204, s. 5.2, effective January 1, 2009, and applicable to all scholarship loans issued on and after July 1, 2009, substituted "a rate not to exceed ten percent (10%) per year as set by the Authority and beginning" for "the rate of ten percent (10%) per year beginning" in subsection (a).

ARTICLE 13F.

Cremations.

§ 90-210.124. Authorizing agent.

(a) The following person, in the priority list below, shall have the right to serve as an "authorizing agent":

(1) An individual at least 18 years of age may authorize the type, place, and method of disposition of the individual's own dead body by methods in the following order:

- a. Pursuant to a preneed funeral contract executed pursuant to Article 13D of Chapter 90 of the General Statutes or pursuant to a cremation authorization form executed pursuant to Article 13C of Chapter 90 of the General Statutes.
- b. Pursuant to a health care power of attorney to the extent provided in Article 3 of Chapter 32A of the General Statutes.
- c. Pursuant to a written will.
- d. Pursuant to a written statement other than a will signed by the individual and witnessed by two persons who are at least 18 years old.

When an individual has authorized his or her own cremation and disposition in accordance with this subsection, the individual or institution designated by that individual shall act as the authorizing agent for that individual.

(2) If a decedent has left no written authorization for the cremation and disposition of the decedent's body as permitted under subdivision (1)

of this subsection, the following competent persons in the order listed may authorize the type, method, place, cremation, and disposition of the decedent's body:

a. The surviving spouse.
b. A majority of the surviving children who are at least 18 years of age and can be located after reasonable efforts.
c. The surviving parents.
d. A majority of the surviving siblings who are at least 18 years of age and can be located after reasonable efforts.
e. A majority of the persons in the classes of the next degrees of kinship, in descending order, who, under State law, would inherit the decedent's estate if the decedent died intestate who are at least 18 years of age and can be located after reasonable efforts.
f. A person who has exhibited special care and concern for the decedent and is willing and able to make decisions about the cremation and disposition.
g. In the case of indigents or any other individuals whose final disposition is the responsibility of the State or any of its instrumentalities, a public administrator, medical examiner, coroner, State-appointed guardian, or any other public official charged with arranging the final disposition of the decedent may serve as the authorizing agent.
h. In the case of individuals who have donated their bodies to science or whose death occurred in a nursing home or private institution and in which the institution is charged with making arrangements for the final disposition of the decedent, a representative of such institution may serve as the authorizing agent in the absence of any of the above.
i. In the absence of any of the above, any person willing to assume responsibility as authorizing agent, as specified in this act.

This subsection does not grant to any person the right to cancel a preneed funeral contract executed pursuant to Article 13D of Chapter 90 of the General Statutes or to cause or prohibit the substitution of a preneed licensee as authorized under G.S. 90-210.63 or permit modification of preneed contracts under G.S. 90-210.63A. If a person under this subsection is incompetent at the time of the decedent's death, the person shall be treated as if he or she predeceased the decedent. An attending physician may certify the incompetence of a person and the certification shall apply to the rights under this subsection only. Any person under this subsection may waive his or her rights under this subsection by any written statement notarized by a notary public or signed by two witnesses.

(b) A person who does not exercise his or her right to dispose of the decedent's body under subdivision (a)(2) of this section within five days of notification or 10 days from date of death, whichever is earlier, shall be deemed to have waived his or her right to authorize disposition of the decedent's body or to contest disposition in accordance with this section.

(c) An individual at least 18 years of age may, in a writing signed by the individual, authorize the cremation and disposition of one or more of the individual's body parts that has been or will be removed. If the individual does not authorize the cremation and disposition, a person listed in subdivision (a)(2) of this section may authorize the cremation and disposition as if the individual were deceased.

(d) This section does not apply to the disposition of dead human bodies as anatomical gifts under Part 3A of Article 16 of Chapter 130A of the General Statutes or the right to perform autopsies under Part 2 of Article 16 of Chapter 130A of the General Statutes. (2003-420, s. 2; 2007-531, s. 22; 2008-153, s. 5.)

Effect of Amendments. — Session Laws 2008-153, s. 5, effective August 2, 2008, substituted "Part 3A" for "Part 3" in subsection (d).

§ 90-210.129. Cremation procedures.

(a) In deaths certified by the attending physician, the body shall not be cremated before the crematory licensee receives a death certificate signed by the attending physician, which shall contain at a minimum the following information:

(1) Decedent's name;
(2) Date of death;
(3) Date of birth;
(4) Sex;
(5) Place of death;
(6) Facility name (if not institution, give street and number);
(7) County of death;
(8) City of death; and
(9) Time of death (if known).

(b) When required by G.S. 130A-388 and the rules adopted pursuant to that section or by successor statute and the rules pursuant to it, a cremation authorization form signed by a medical examiner shall be received by the crematory prior to cremation.

(c) In deaths coming under full investigation by the Office of the Chief Medical Examiner, a burial-transit permit/cremation authorization form must be received by the crematory before cremation.

(d) No body shall knowingly be cremated with a pacemaker or defibrillator or other potentially hazardous implant or condition in place. The authorizing agent for the cremation of the human remains shall be responsible for taking all necessary steps to ensure that any pacemaker or defibrillator or other potentially hazardous implant or condition is removed or corrected prior to cremation. If an authorizing agent informs the funeral director and the crematory licensee on the cremation authorization form of the presence of a pacemaker or defibrillator or other potentially hazardous implant or condition in the human remains, then the funeral director shall be responsible for ensuring that all necessary steps have been taken to remove the pacemaker or defibrillator or other potentially hazardous implant or to correct the hazardous condition before delivering the human remains to the crematory.

(e) Human remains shall not be cremated within 24 hours after the time of death, unless such death was a result of an infectious, contagious, or communicable and dangerous disease as listed by the Commission for Public Health, pursuant to G.S. 130A-134, and unless such time requirement is waived in writing by the medical examiner, county health director, or attending physician where the death occurred.

(f) No unauthorized person shall be permitted in view of the cremation chamber or in the holding and processing facility while any human remains are being removed from the cremation container, processed, or pulverized. Relatives of the deceased and their invitees, the authorizing agent and the agent's invitees, medical examiners, Inspectors of the North Carolina Board of Funeral Service, and law enforcement officers in the execution of their duties shall be authorized to have access to the crematory area, subject to the rules adopted by the crematory licensee governing the safety of such individuals.

(g) Human remains shall be cremated only while enclosed in a cremation container. Upon completion of the cremation, and insofar as is possible, all of the recoverable residue of the cremation process shall be removed from the cremation chamber. Insofar as is possible, all residue of the cremation process shall then be separated from any foreign residue or anything else other than bone fragments and then be processed by pulverization so as to reduce the cremated remains to unidentifiable particles. Any foreign residue and anything other than the particles of the cremated remains shall be removed from the cremated remains as far as possible and shall be disposed of by the crematory licensee. This section does not apply where law otherwise provides for commingling of human remains. The fact that there is incidental and unavoidable residue in the cremation chamber used in a prior cremation is not a violation of this subsection.

(h) The simultaneous cremation of the human remains of more than one person within the same cremation chamber is forbidden.

(i) Every crematory shall have a holding and processing facility, within the crematory, designated for the retention of human remains prior to cremation. The holding and processing facility must comply with any applicable public health laws and rules and must meet all of the standards established pursuant to rules adopted by the Board.

(j) Crematory licensees shall comply with standards established by the Board for the processing and pulverization of human remains by cremation.

(k) Nothing in this Article shall require a crematory licensee to perform a cremation that is impossible or impractical to perform.

(*l*) The cremated remains with proper identification shall be placed in an initial container or the urn selected or provided by the authorizing agent. The initial container or urn contents shall not be contaminated with any other object, unless specific authorization has been received from the authorizing agent or as provided in subsection (g) of this section.

(m) If the cremated remains are greater than the dimensions of an initial container or urn, the excess cremated remains shall be returned to the authorizing agent or its representative in a separate container or urn.

(n) If the cremated remains are to be shipped, the initial container or urn shall be packed securely in a suitable shipping container that complies with the requirements of the shipper. Cremated remains shall be shipped only by a method which has an internal tracing system available and which provides a receipt signed by the person accepting delivery, unless otherwise authorized in writing by the authorizing agent. Cremated remains shall be shipped to the proper address as stated on the cremation authorization form signed by the authorizing agent.

(o) Unless the provisions of G.S. 130A-114 apply, before cremation the crematory licensee shall receive a written statement, on a form prescribed by the Board and signed by the attending physician, acknowledging the circumstances, date, and time of the delivery of the fetal remains from the mother. If after reasonable efforts no physician can be identified with knowledge and information sufficient to complete the written statement required by this subsection, the crematory licensee shall obtain documentation of the circumstances, date, and time of delivery of the fetal remains prepared by a hospital, medical facility, law enforcement agency, or other entity. Notwithstanding any other provision of law, health care providers may release to a licensee, in accordance with the federal Standards for Privacy of Individually Identifiable Health Information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), medical records that document the circumstances, date, and time of delivery of fetal remains. If the crematory licensee cannot identify documents sufficient to meet the requirements of this subsection, the licensee shall report to the local medical examiner pursuant to G.S. 130A-383(a).

(p) If the provisions of Article 4 of Chapter 130A of the General Statutes apply, the crematory licensee shall receive a fetal report of death as prescribed in G.S. 130A-114.

(q) Before the cremation of amputated body parts, the crematory licensee shall receive a written statement, on a form prescribed by the Board and signed by the attending physician, acknowledging the circumstances of the amputation. If after reasonable efforts no physician can be identified with knowledge and information sufficient to complete the written statement required by this subsection, the crematory licensee shall notify the local medical examiner pursuant to G.S. 130A-383(b). This section does not apply to the disposition of body parts cremated pursuant to Part 3A of Article 16 of Chapter 130A of the General Statutes. (1989 (Reg. Sess., 1990), c. 988, s. 1; 1997-399, s. 19; 2003-420, s. 2; 2007-182, s. 1.2; 2007-531, s. 23; 2008-153, s. 6.)

Effect of Amendments. — Session Laws 2008-153, s. 6, effective August 2, 2008, substituted "Part 3A" for "Part 3" in subsection (q).

Article 18D.

Occupational Therapy.

§ 90-270.69. Powers and duties of the Board.

The Board shall have the following powers and duties:

(1) Establish and determine the qualifications and fitness of applicants for licensure to practice occupational therapy in this State.

(2) Conduct investigations, subpoena individuals and records, and do all other things necessary and proper to discipline persons licensed under this Article and to enforce this Article.

(2a) Communicate disciplinary actions to relevant State and federal authorities and to other state occupational therapy licensing authorities.

(3) Issue and renew, and deny, suspend, revoke or refuse to issue or renew any license under this Article.

(4) Adopt, amend, or repeal any reasonable rules or regulations necessary to carry out the purposes of this Article, including but not limited to rules establishing ethical standards of practice.

(5) Employ professional, clerical, investigative or special personnel necessary to carry out the provisions of this Article, and purchase or rent office space, equipment and supplies.

(6) Adopt a seal by which it shall authenticate its proceedings, official records, and licenses.

(7) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a "contested case" as defined in G.S. 150B-2(2) arises under this Article.

(8) Establish reasonable fees for applications, initial and renewal licenses, and other services provided by the Board.

(9) Submit an annual report to the Governor and General Assembly of all its official actions during the preceding year, together with any recommendations and findings regarding improvement of the profession of occupational therapy.

(10) Publish and make available upon request the licensure standards prescribed under this Article and all rules and regulations established by the Board.

(11) Conduct a training program as needed for new Board members designed to familiarize new members with their duties. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 1987, c. 827, ss. 1, 77; 2005-432, s. 4; 2008-187, s. 40(a).)

Effect of Amendments. — Session Laws 2008-187, s. 40(a), effective August 7, 2008, deleted "limited permits" following "fees for applications" in subdivision (8).

§ 90-270.73. Issuance of license.

(a) The Board shall issue a license to any individual who meets the requirements of this Article upon payment of the license fee prescribed in G.S. 90-270.77.

(b) Any individual licensed as an occupational therapist under this Article may use the words "occupational therapist" and may use the letters "O.T." or "O.T./L." in connection with his or her name or place of business.

(c) Any individual licensed as an occupational therapy assistant under this Article may use the words "occupational therapy assistant" and may use the letters "O.T.A." or "O.T.A./L." in connection with his or her name or place of business.

(d) Repealed by Session Laws 2008-187, s. 40(b), effective August 7, 2008. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 2005-432, s. 8; 2008-187, s. 40(b).)

Effect of Amendments. — Session Laws 2008-187, s. 40(b), effective August 7, 2008, repealed subsection (d).

§ 90-270.78. False representation of license prohibited.

(a) It is unlawful for any person who is not licensed in accordance with this Article or whose license has been suspended, revoked or not renewed by the Board to:

(1) Engage in the practice of occupational therapy.

(2) Orally, in writing, in print or by sign, or in any other manner, directly or by implication, represent that he or she is engaging in occupational therapy.

(3) Use in connection with his or her name or place of business the words "occupational therapist", "occupational therapy assistant", "occupational therapist or the letters "O.T.", "O.T./L.", "O.T.A.", or "O.T.A./L." or any other words, letters, abbreviations or insignia indicating or implying that the person is an occupational therapist, or occupational therapy assistant.

(b) Any person who resides in another state or foreign country and who, by use of electronic or other medium, performs any of the acts described as the practice of occupational therapy pursuant to this Article, but is not licensed pursuant to this Article, shall be regarded as practicing occupational therapy without a North Carolina license and is subject to the provisions of this Article and appropriate regulation by the Board. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 2005-432, s. 13; 2008-187, s. 40(c).)

Editor's Note. — Subdivision (a)(3) of this section formerly contained the phrase "'occupational therapist limited permittee'"; Session Laws 2008-187, s. 40(c) (see Effect of Amendments note) deleted the words "'limited permittee,'" but inadvertently failed to delete "the words 'occupational therapist.'"

Effect of Amendments. — Session Laws 2008-187, s. 40(c), effective August 7, 2008, in subdivision (a)(3), deleted "'limited permittee', or 'occupational therapy assistant limited permittee'" following "occupational therapist" near the beginning, substituted "or 'O.T.A./L.'" for "'O.T.A./L.'', 'O.T./L.P.', or 'O.T.A./L.P.'," and substituted "or occupational therapy assistant" for "occupational therapy assistant, occupational therapist limited permittee, or occupational therapy assistant limited permittee" at the end.

ARTICLE 20.

Nursing Home Administrator Act.

§ 90-285.1. Suspension, revocation or refusal to issue a license.

The Board may suspend, revoke, or refuse to issue a license or may reprimand or otherwise discipline a licensee after due notice and an opportunity to be heard at a formal hearing, upon substantial evidence that a licensee:

(1) Has violated the provisions of this Article or the rules adopted by the Board;
(2) Has violated the provisions of Part 2 of Article 6 of Chapter 131E of the General Statutes and rules promulgated thereunder;
(3) Has been convicted of, or has tendered and has had accepted a plea of no contest to, a criminal offense showing professional unfitness;
(4) Has practiced fraud, deceit, or misrepresentation in securing or procuring a nursing home administrator license;
(5) Is incompetent to engage in the practice of nursing home administration or to act as a nursing home administrator;
(6) Has practiced fraud, deceit, or misrepresentation in his capacity as a nursing home administrator;
(7) Has committed acts of misconduct in the operation of a nursing home under his jurisdiction;
(8) Is a habitual drunkard;
(9) Is addicted or dependent upon the use of morphine, opium, cocaine, or other drugs recognized as resulting in abnormal behavior;
(10) Has practiced without being registered biennially;
(11) Has transferred or surrendered possession of, either temporarily or permanently, his license or certificate to any other person;
(12) Has paid, given, has caused to be paid or given or offered to pay or to give to any person a commission or other valuable consideration for the solicitation or procurement, either directly or indirectly, of nursing home patronage;
(13) Has been guilty of fraudulent, misleading, or deceptive advertising;
(14) Has falsely impersonated another licensee;
(15) Has failed to exercise regard for the safety, health or life of the patient;
(16) Has permitted unauthorized disclosure of information relating to a patient or his records; or
(17) Has discriminated among patients, employees, or staff on account of race, sex, religion, color, or national origin. (1981, c. 722, s. 12; 2001-153, s. 3; 2008-187, s. 41.)

Effect of Amendments. — Session Laws 2008-187, s. 41, effective August 7, 2008, substituted "Part 2" for "Part B" in subdivision (2).

§ 90-288.01. Criminal history record checks of applicants for licensure.

(a) The following definitions apply in this section:

(1) Applicant. — A person applying for initial licensure pursuant to either G.S. 90-278 or G.S. 90-287 or applying for renewal of licensure pursuant to G.S. 90-286.

(2) Criminal history. — A history of conviction of a state or federal crime, whether a misdemeanor or felony, that bears on an applicant's fitness for licensure as a nursing home administrator. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses, including sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(b) Criminal History Record Check. — The Board shall require a criminal history record check of all applicants. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny licensure to an applicant. The Board shall provide to the North Carolina Department of Justice the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal history record check and the use of fingerprints and other identifying information required by the State or National Repositories, and any additional information required by the Department of Justice. The Board shall keep all information obtained pursuant to this section confidential. The Board shall collect any fees required by the Department of Justice and shall remit the fees to the Department of Justice for expenses associated with conducting the criminal history record check.

(c) Convictions. — If the applicant's criminal history record check reveals one or more convictions listed under subdivision (2) of subsection (a) of this section, the conviction shall not automatically bar licensure. The Board shall consider all of the following factors regarding the conviction:

(1) The level of seriousness of the crime.
(2) The date of the crime.
(3) The age of the applicant at the time of the conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the applicant and the job duties of the position to be filled.
(6) The applicant's prison, jail, probation, parole, rehabilitation, and employment records since the date the crime was committed.
(7) The subsequent commission by the applicant of a crime listed in subsection (a) of this section.

(d) Denial of Licensure. — If the Board refuses to issue or renew a license based on information obtained in a criminal history record check, the Board must disclose to the applicant the information contained in the criminal history record check that is relevant to the Board's actions. The Board shall not provide a copy of the criminal history record check to the applicant. An applicant has the right to appear before the Board to appeal the Board's decision. An appearance before the Board shall constitute an exhaustion of administrative remedies in accordance with Chapter 150B of the General Statutes.

(e) Limited Immunity. — The Board, its officers and employees, acting in good faith and in compliance with this section, shall be immune from civil liability for its actions based on information provided in an applicant's criminal history record check. (2008-183, s. 1.)

Editor's Note. — Session Laws 2008-183, s. 3 made this section effective December 1, 2008, and applicable to nursing home administrator applications and renewals submitted to the Board on or after this date.

Article 23.

Right to Natural Death; Brain Death.

§ 90-321. Right to a natural death.

(a) The following definitions apply in this Article:

(1) Declarant. — A person who has signed a declaration in accordance with subsection (c) of this section.

(1a) Declaration. — Any signed, witnessed, dated, and proved document meeting the requirements of subsection (c) of this section.

(2) Repealed by Session Laws 2007-502, s. 11(a), effective October 1, 2007.

(2a) Life-prolonging measures. — As defined in G.S. 32A-16(4).

(3) Physician. — Any person licensed to practice medicine under Article 1 of Chapter 90 of the laws of the State of North Carolina.

(4) Repealed by Session Laws 2007-502, s. 11(a), effective October 1, 2007.

(b) If a person has expressed through a declaration, in accordance with subsection (c) of this section, a desire that the person's life not be prolonged by life-prolonging measures, and the declaration has not been revoked in accordance with subsection (e) of this section; and

(1) It is determined by the attending physician that the declarant's present condition is a condition described in subsection (c) of this section and specified in the declaration for applying the declarant's directives, and

(2) There is confirmation of the declarant's present condition as set out in subdivision (b)(1) of this section by a physician other than the attending physician;

then the life-prolonging measures identified by the declarant shall or may, as specified by the declarant, be withheld or discontinued upon the direction and under the supervision of the attending physician.

(c) The attending physician shall follow, subject to subsections (b), (e), and (k) of this section, a declaration:

(1) That expresses a desire of the declarant that life-prolonging measures not be used to prolong the declarant's life if, as specified in the declaration as to any or all of the following:

a. The declarant has an incurable or irreversible condition that will result in the declarant's death within a relatively short period of time; or

b. The declarant becomes unconscious and, to a high degree of medical certainty, will never regain consciousness; or

c. The declarant suffers from advanced dementia or any other condition resulting in the substantial loss of cognitive ability and that loss, to a high degree of medical certainty, is not reversible.

(2) That states that the declarant is aware that the declaration authorizes a physician to withhold or discontinue the life-prolonging measures; and

(3) That has been signed by the declarant in the presence of two witnesses who believe the declarant to be of sound mind and who state that they (i) are not related within the third degree to the declarant or to the declarant's spouse, (ii) do not know or have a reasonable expectation that they would be entitled to any portion of the estate of the declarant upon the declarant's death under any will of the declarant or codicil thereto then existing or under the Intestate Succession Act as it then provides, (iii) are not the attending physician, licensed health care providers who are paid employees of the attending physician, paid employees of a health facility in which the declarant is a patient, or paid employees of a nursing home or any adult care home in which the declarant resides, and (iv) do not have a claim against any portion of the estate of the declarant at the time of the declaration; and

(4) That has been proved before a clerk or assistant clerk of superior court, or a notary public who certifies substantially as set out in subsection (d1) of this section. A notary who takes the acknowledgement may but is not required to be a paid employee of the attending physician, a paid employee of a health facility in which the declarant is a patient, or a paid employee of a nursing home or any adult care home in which the declarant resides.

(d) Repealed by Session Laws 2007-502, s. 11(b), effective October 1, 2007.

(d1) The following form is specifically determined to meet the requirements of subsection (c) of this section:

ADVANCE DIRECTIVE FOR A NATURAL DEATH ("LIVING WILL")

NOTE: YOU SHOULD USE THIS DOCUMENT TO GIVE YOUR HEALTH CARE PROVIDERS INSTRUCTIONS TO WITHHOLD OR WITHDRAW LIFE-PROLONGING MEASURES IN CERTAIN SITUATIONS. THERE IS NO LEGAL REQUIREMENT THAT ANYONE EXECUTE A LIVING WILL.

GENERAL INSTRUCTIONS: You can use this Advance Directive ("Living Will") form to give instructions for the future if you want your health care providers to withhold or withdraw life-prolonging measures in certain situations. You should talk to your doctor about what these terms mean. The Living Will states what choices you would have made for yourself if you were able to communicate. Talk to your family members, friends, and others you trust about your choices. Also, it is a good idea to talk with professionals such as your doctors, clergypersons, and lawyers before you complete and sign this Living Will.

You do not have to use this form to give those instructions, but if you create your own Advance Directive you need to be very careful to ensure that it is consistent with North Carolina law.

This Living Will form is intended to be valid in any jurisdiction in which it is presented, but places outside North Carolina may impose requirements that this form does not meet.

If you want to use this form, you must complete it, sign it, and have your signature witnessed by two qualified witnesses and proved by a notary public. Follow the instructions about which choices you can initial very carefully. **Do not sign this form until** two witnesses and a notary public are present to watch you sign it. You then should consider giving a copy to your primary physician and/or a trusted relative, and should consider filing it with the Advanced Health Care Directive Registry maintained by the North Carolina Secretary of State: http://www.nclifelinks.org/ahcdr/

My Desire for a Natural Death

I, ________________________________, being of sound mind, desire that, as specified below, my life not be prolonged by life-prolonging measures:

1. **When My Directives Apply**

My directions about prolonging my life shall apply *IF* my attending physician determines that I lack capacity to make or communicate health care decisions and:

NOTE: YOU MAY INITIAL ANY AND ALL OF THESE CHOICES.

____
(Initial) I have an incurable or irreversible condition that will result in my death within a relatively short period of time.

____
(Initial) I become unconscious and my health care providers determine that, to a high degree of medical certainty, I will never regain my consciousness.

____
(Initial) I suffer from advanced dementia or any other condition which results in the substantial loss of my cognitive ability and my health care providers determine that, to a high degree of medical certainty, this loss is not reversible.

2. **These are My Directives about Prolonging My Life:**

In those situations I have initialed in Section 1, I direct that my health care providers:

NOTE: INITIAL ONLY IN ONE PLACE.

____
(Initial) may withhold or withdraw life-prolonging measures.

____
(Initial) shall withhold or withdraw life-prolonging measures.

3. **Exceptions — "Artificial Nutrition or Hydration"**

NOTE: INITIAL ONLY IF YOU WANT TO MAKE EXCEPTIONS TO YOUR INSTRUCTIONS IN PARAGRAPH 2.

EVEN THOUGH I do not want my life prolonged in those situations I have initialed in Section 1:

____
(Initial) I *DO* want to receive BOTH artificial hydration AND artificial nutrition (for example, through tubes) in those situations.
NOTE: DO NOT INITIAL THIS BLOCK IF ONE OF THE BLOCKS BELOW IS INITIALED.

____
(Initial) I *DO* want to receive ONLY artificial hydration (for example, through tubes) in those situations.

NOTE: DO NOT INITIAL THE BLOCK ABOVE OR BELOW IF THIS BLOCK IS INITIALED.

____
(Initial) I *DO* want to receive ONLY artificial nutrition (for example, through tubes) in those situations.

NOTE: **DO NOT INITIAL EITHER OF THE TWO BLOCKS ABOVE IF THIS BLOCK IS INITIALED.**

4. **I Wish to be Made as Comfortable as Possible**

I direct that my health care providers take reasonable steps to keep me as clean, comfortable, and free of pain as possible so that my dignity is maintained, even though this care may hasten my death.

5. **I Understand my Advance Directive**

I am aware and understand that this document directs certain life-prolonging measures to be withheld or discontinued in accordance with my advance instructions.

6. **If I have an Available Health Care Agent**

If I have appointed a health care agent by executing a health care power of attorney or similar instrument, and that health care agent is acting and available and gives instructions that differ from this Advance Directive, then I direct that:

____
(Initial) Follow Advance Directive: This Advance Directive will **override** instructions my health care agent gives about prolonging my life.

____
(Initial) Follow Health Care Agent: My health care agent has authority to **override** this Advance Directive.

NOTE: DO NOT INITIAL BOTH BLOCKS. *IF YOU DO NOT INITIAL EITHER BOX, THEN YOUR HEALTH CARE PROVIDERS WILL FOLLOW THIS ADVANCE DIRECTIVE AND IGNORE THE INSTRUCTIONS OF YOUR HEALTH CARE AGENT ABOUT PROLONGING YOUR LIFE.*

7. **My Health Care Providers May Rely on this Directive**

My health care providers shall not be liable to me or to my family, my estate, my heirs, or my personal representative for following the instructions I give in this instrument. Following my directions shall not be considered suicide, or the cause of my death, or malpractice or unprofessional conduct. If I have revoked this instrument but my health care providers do not know that I have done so, and they follow the instructions in this instrument in good faith, they shall be entitled to the same protections to which they would have been entitled if the instrument had not been revoked.

8. **I Want this Directive to be Effective Anywhere**

I intend that this Advance Directive be followed by any health care provider in any place.

9. **I have the Right to Revoke this Advance Directive**

I understand that at any time I may revoke this Advance Directive in a writing I sign or by communicating in any clear and consistent manner my intent to revoke it to my attending physician. I understand that if I revoke this instrument I should try to destroy all copies of it.

This the ________ day of ________, ________.

____

Print Name ________________

I hereby state that the declarant, ________________, being of sound mind, signed (or directed another to sign on declarant's behalf) the foregoing Advance Directive for a Natural Death in my presence, and that I am not related to the declarant by blood or marriage, and I would not be entitled to any portion of the estate of the declarant under any existing will or codicil of the declarant or as an heir under the Intestate Succession Act, if the declarant died on this date without a will. I also state that I am not the declarant's attending physician, nor a licensed health care provider who is (1) an employee of the declarant's attending physician, (2) nor an employee of the health facility in which the declarant is a patient, or (3) an employee of a nursing home or any adult care home where the declarant resides. I further state that I do not have any claim against the declarant or the estate of the declarant.

Date: ________________________________ Witness:
____

Date: ________________________________ Witness:
____

________________ COUNTY, ________________ STATE
Sworn to (or affirmed) and subscribed before me this day by

____
(type/print name of declarant)

____
(type/print name of witness)

____
(type/print name of witness)

Date ________________ ________________
(Official Seal) *Signature of Notary Public*

________________, Notary Public
Printed or typed name

My commission expires: ________________

(e) A declaration may be revoked by the declarant, in writing or in any manner by which the declarant is able to communicate the declarant's intent to revoke in a clear and consistent manner, without regard to the declarant's mental or physical condition. A health care provider shall have no liability for acting in accordance with a revoked declaration unless the provider has actual notice of the revocation. A health care agent may not revoke a declaration unless the health care power of attorney explicitly authorizes that revocation; however, a health care agent may exercise any authority explicitly given to the health care agent in a declaration. A guardian of the person of the declarant or general guardian may not revoke a declaration.

(f) The execution and consummation of declarations made in accordance with subsection (c) shall not constitute suicide for any purpose.

(g) No person shall be required to sign a declaration in accordance with subsection (c) as a condition for becoming insured under any insurance contract or for receiving any medical treatment.

(h) The withholding or discontinuance of life prolonging measures in accordance with this section shall not be considered the cause of death for any civil or criminal purposes nor shall it be considered unprofessional conduct or a lack of professional competence. Any person, institution or facility against whom criminal or civil liability is asserted because of conduct in compliance with this section may interpose this section as a defense. The protections of this section extend to any valid declaration, including a document valid under subsection (l) of this section; these protections are not limited to declarations prepared in accordance with the statutory form provided in subsection (d1) of this section, or to declarations filed with the Advance Health Care Directive Registry maintained by the Secretary of State. A health care provider may rely in good faith on an oral or written statement by legal counsel that a document appears to meet the statutory requirements for a declaration.

(i) Use of the statutory form prescribed in subsection (d1) of this section is an optional and nonexclusive method for creating a declaration and does not affect the use of other forms of a declaration, including previous statutory forms.

(j) The form provided by this section may be combined with or incorporated into a health care power of attorney form meeting the requirements of Article 3 of Chapter 32A of the General Statutes; provided, however, that the resulting form shall be signed, witnessed, and proved in accordance with the provisions of this section.

(k) Notwithstanding subsection (c) of this section:

(1) An attending physician may decline to honor a declaration that expresses a desire of the declarant that life-prolonging measures not be used if doing so would violate that physician's conscience or the conscience-based policy of the facility at which the declarant is being treated; provided, an attending physician who declines to honor a declaration on these grounds must not interfere, and must cooperate reasonably, with efforts to substitute an attending physician whose conscience would not be violated by honoring the declaration, or transfer the declarant to a facility that does not have policies in force that prohibit honoring the declaration.

(2) An attending physician may decline to honor a declaration if after reasonable inquiry there are reasonable grounds to question the genuineness or validity of a declaration. The subsection imposes no duty on the attending physician to verify a declaration's genuineness or validity.

(*l*) Notwithstanding subsection (c) of this section, a declaration or similar document executed in a jurisdiction other than North Carolina shall be valid in this State if it appears to have been executed in accordance with the applicable requirements of that jurisdiction or this State. (1977, c. 815; 1979, c. 112, ss. 1-6; 1981, c. 848, ss. 1-3; 1991, c. 639, s. 3; 1993, c. 553, s. 28; 2001-455, s. 4; 2001-513, s. 30(b); 2007-502, ss. 11(a)-(e).)

Editor's Note. — The section is set out in the supplement to correct an error in the main volume.

ARTICLE 35.

Accident-Trauma Victim Identification.

§ 90-602. Routine search for donor information; notification of hospital; definitions as provided in the Revised Uniform Anatomical Gift Act.

(a) For the purposes of this section, the terms "anatomical gift," "document of gift," "donor," and "refusal" have the same meaning as in G.S. 130A-412.4.

(a1) The following persons may make a reasonable search of an individual who the person reasonably believes is dead or near death for a document of gift or other information identifying the individual as a donor or as an individual who made a refusal:

(1) A law enforcement officer,
(2) A firefighter,
(3) A paramedic, or
(4) Another official emergency rescuer finding the individual.

If a document of gift or a refusal is located by a search under this subsection and the individual or deceased individual to whom it relates is taken to a hospital, the person conducting the search shall send the document of gift or refusal to the hospital or cause it to be sent.

(a2) If no other source of information is immediately available, a hospital shall make a reasonable search of an individual who the hospital reasonably believes is dead or near death, as soon as practical after the individual arrives at the hospital, for a document of gift or other information identifying the individual as a donor or as an individual who made a refusal.

(b) Any law enforcement officer or other person listed in subsection (a1) or (a2) of this section may conduct an administrative search of the accident-trauma victim's Division of Motor Vehicles driver record to ascertain whether the individual is a donor. If a document of gift or a refusal is located by a search under this subsection and the individual or deceased individual to whom it relates is taken to a hospital, the person conducting the search shall notify the hospital of the results or cause the hospital to be notified.

(c) A physical search pursuant to subsection (a1) or (a2) of this section shall be limited to those personal effects of the individual where a drivers license reasonably may be stored. Any information, document, tangible objects, or other items discovered during the search shall be used solely for the purpose of ascertaining the individual's identity, notifying the individual's next of kin, and determining whether the individual intends to make an anatomical gift, and in no event shall any such discovered material be admissible in any subsequent criminal or civil proceeding, unless obtained pursuant to a lawful search on other grounds.

(d) A hospital or other person with duties under this section is not subject to criminal or civil liability for failing to discharge those duties but may be subject to administrative sanctions.

(e) A person that acts under this section with due care, or attempts in good faith to do so, is not liable for the act in a civil action, criminal prosecution, or administrative proceeding. (1997-443, s. 20.12(b); 2008-153, s. 1.)

Effect of Amendments. — Session Laws 2008-153, s. 1, effective August 2, 2008, rewrote the section.

ARTICLE 36.

Massage and Bodywork Therapy Practice.

§ 90-621. Declaration of purpose.

The purpose of this Article is to ensure the protection of the health, safety, and welfare of the citizens of this State receiving massage and bodywork therapy services. This purpose is achieved by establishing education and testing standards that ensure competency in the practice of massage and bodywork therapy. Mandatory licensure of those engaged in the practice of massage and bodywork therapy assures the public that each individual has satisfactorily met the standards of the profession and continues to meet both the ethical and competency goals of the profession. (1998-230, s. 10; 2008-224, s. 1.)

Editor's Note. — Session Laws 2008-224, s. 21, provides, in part, that the amendment made by s. 1 of the act is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

Effect of Amendments. — Session Laws 2008-224, s. 1, effective August 17, 2008, rewrote the section. For applicability, see Editor's note.

§ 90-622. Definitions.

The following definitions apply in this Article:

(1) Accreditation. — Status granted to a postsecondary institution of higher learning that has met standards set by an accrediting agency recognized by the Secretary of the United States Department of Education. The accreditation for massage and bodywork schools may be institutional or programmatic in nature.

(1a) Board. — The North Carolina Board of Massage and Bodywork Therapy.

(2) Board-approved school. — Any massage and bodywork therapy school or training program in this State or another state that is not otherwise exempt from Board approval, that has met the standards set forth in this Article, and been granted approval by the Board.

(2a) Criminal history record check. — A report resulting from a request made by the Board to the North Carolina Department of Justice for a history of conviction of a crime, whether a misdemeanor or felony, that bears on an applicant's fitness for licensure to practice massage and bodywork therapy.

(3) Massage and bodywork therapy. — Systems of activity applied to the soft tissues of the human body for therapeutic, educational, or relaxation purposes. The application may include:

a. Pressure, friction, stroking, rocking, kneading, percussion, or passive or active stretching within the normal anatomical range of movement.

b. Complementary methods, including the external application of water, heat, cold, lubricants, and other topical preparations.

c. The use of mechanical devices that mimic or enhance actions that may possibly be done by the hands.

(3a) Massage and bodywork therapy school. — Any educational institution that conducts a training program or curriculum for a tuition charge, which is intended to teach adults the knowledge, skills, and abilities necessary for the safe, effective, and ethical practice of massage and bodywork therapy.

(4) Massage and bodywork therapist. — A person licensed under this Article.

(5) Practice of massage and bodywork therapy. — The application of massage and bodywork therapy to any person for a fee or other consideration. (1998-230, s. 10; 2008-224, s. 2.)

Editor's Note. — Session Laws 2008-224, s. 21, provides, in part, that the amendment made by s. 2 of the act is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

Effect of Amendments. — Session Laws 2008-224, s. 2, effective August 17, 2008, rewrote the section. For applicability, see Editor's note.

§ 90-623. License required.

(a) A person shall not practice or hold out himself or herself to others as a massage and bodywork therapist without first applying for and receiving from the Board a license to engage in that practice.

(b) A person holds out himself or herself to others as a massage and bodywork therapist when the person adopts or uses any title or description including “massage therapist”, “bodywork therapist”, “masseur”, “masseuse”, “massagist”, “somatic practitioner”, “body therapist”, “structural integrator”, or any derivation of those terms that implies this practice.

(c) It shall be unlawful to advertise using the term “massage therapist” or “bodywork therapist” or any other term that implies a soft tissue technique or method in any public or private publication or communication by a person not licensed under this Article as a massage and bodywork therapist. Any person who holds a license to practice as a massage and bodywork therapist in this State may use the title “Licensed Massage and Bodywork Therapist”. No other person shall assume this title or use an abbreviation or any other words, letters, signs, or figures to indicate that the person using the title is a licensed massage and bodywork therapist. An establishment employing or contracting with persons licensed under this Article may advertise on behalf of those persons.

(d) The practice of massage and bodywork therapy shall not include any of the following:

(1) The diagnosis of illness or disease.

(2) Medical procedures, chiropractic adjustive procedures, electrical stimulation, ultrasound, or prescription of medicines.

(3) The use of modalities for which a license to practice medicine, chiropractic, nursing, physical therapy, occupational therapy, acupuncture, or podiatry is required by law.

(4) Sexual activity, which shall mean any direct or indirect physical contact, by any person or between persons, which is intended to erotically stimulate either person, or which is likely to cause such stimulation and includes sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse. As used in this subdivision, masturbation means the manipulation of any body tissue with the intent to cause sexual arousal. Sexual activity can involve the use of any device or object and is not dependent on whether penetration, orgasm, or ejaculation has occurred. (1998-230, s. 10; 2008-224, s. 3.)

Editor's Note. — Session Laws 2008-224, s. 21, provides, in part, that the amendment made by s. 3 of the act is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

Effect of Amendments. — Session Laws 2008-224, s. 3, effective August 17, 2008, added subsection (d). For applicability, see Editor's note.

§ 90-625. North Carolina Board of Massage and Bodywork Therapy.

(a) The North Carolina Board of Massage and Bodywork Therapy is created. The Board shall consist of seven members who are residents of this State and are as follows:

(1) Five members shall be massage and bodywork therapists who have been licensed under this Article and have been in the practice of massage and bodywork therapy for at least five of the last seven years prior to their serving on the Board. Consideration shall be given to geographical distribution, practice setting, clinical specialty, involvement in massage and bodywork therapy education, and other factors that will promote diversity of the profession on the Board. Two of the five members shall be appointed by the General Assembly, upon the recommendation of the Speaker of the House of Representatives, two shall be appointed by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate, and one shall be appointed by the Governor.

(2) One member shall be a physician licensed pursuant to Article 1 of Chapter 90 of the General Statutes or a person once licensed as a physician whose license lapsed while the person was in good standing with the profession and eligible for licensure. The appointment shall be made by the Governor and may be made from a list provided by the North Carolina Medical Society.

(3) One member shall be a member of the general public who shall not be licensed under Chapter 90 of the General Statutes or the spouse of a person who is so licensed, or have any financial interest, directly or indirectly, in the profession regulated under this Article. The appointment shall be made by the Governor.

(b) Legislative appointments shall be made in accordance with G.S. 120-121. A vacancy in a legislative appointment shall be filled in accordance with G.S. 120-122.

(c) Each member of the Board shall serve for a term of three years, ending on June 30 of the last year of the term. A member shall not be appointed to serve more than two consecutive terms.

(d) The Board shall elect annually a chair and other officers as it deems necessary. The Board shall meet as often as necessary for the conduct of business but no less than twice a year. The Board shall establish procedures governing the calling, holding, and conducting of regular and special meetings. A majority of the Board shall constitute a quorum.

(e) Each member of the Board may receive per diem and reimbursement for travel and subsistence as set forth in G.S. 93B-5.

(f) Members may be removed by the official who appointed the member for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings as a licensee or other professional credential shall be disqualified from participating in the official business of the Board until the charges have been resolved by a determination that the misconduct does not rise to the level of disciplinary action resulting in the suspension or revocation of the member's professional credential. (1998-230, s. 10; 2008-224, s. 4.)

Editor's Note. — Session Laws 2008-224, s. 21, provides, in part, that the amendment made by s. 4 of the act is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

Session Laws 2008-224, s. 5 provides: "The current terms of the two members of the Board appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate are each extended to a total period of five years, ending on June 30 of the last year of each extended term. Upon the completion of these five-year terms, all future members of the Board shall serve three-year terms, as provided in G.S. 90-625(c)."

Effect of Amendments. — Session Laws 2008-224, s. 4, effective August 17, 2008, in subdivision (a)(1), deleted the second sentence and inserted "involvement in massage and bodywork therapy education" in the third sentence; added "or a person once licensed as a physician whose license lapsed while the person was in good standing with the profession and eligible for licensure" at the end of subdivision (a)(2); and in subsection (f), inserted "or other professional credential" and added "by a determination that the misconduct does not rise to the level of disciplinary action resulting in the suspension or revocation of the member's professional credential" at the end. For applicability, see Editor's note.

§ 90-626. Powers and duties.

The Board shall have the following powers and duties:

(1) Represent the diversity within the profession at all times when making decisions and stay current and informed regarding the various branches of massage and bodywork therapy practice.

(2) Evaluate the qualifications of applicants for licensure under this Article.

(3) Issue, renew, deny, suspend, or revoke licenses under this Article.

(4) Reprimand or otherwise discipline licensees under this Article.

(5) Conduct investigations to determine whether violations of this Article exist or constitute grounds for disciplinary action against licensees under this Article.

(5a) Approve and regulate massage and bodywork schools, not otherwise exempt from the requirements of Board approval, by formulating the criteria and standards for approval of massage and bodywork schools, investigating massage and bodywork schools applying for approval, issuing approvals to massage and bodywork schools that meet the standards established by the Board, providing periodic inspections of approved massage and bodywork schools, and requiring periodic reports of approved massage and bodywork schools.

(6) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a contested case, as defined in G.S. 150B-2(2), arises under this Article.

(7) Employ professional, clerical, or other special personnel necessary to carry out the provisions of this Article and purchase or rent necessary office space, equipment, and supplies.

(8) Pursuant to the maximum amounts set by this Article and other specific authority authorizing fees, establish reasonable fees for applications for examination, certificates of licensure and renewal, approval of massage and bodywork therapy schools, and other services provided by the Board.

(9) Adopt, amend, or repeal any rules necessary to carry out the purposes of this Article and the duties and responsibilities of the Board, including rules related to the approval of massage and bodywork therapy schools, continuing education providers, examinations for licensure, the practice of advanced techniques or specialties, and massage and bodywork therapy establishments. Any rules adopted or amended shall take into account the educational standards of na-

tional bodywork and massage therapy associations and professional organizations.

(10) Appoint from its own membership one or more members to act as representatives of the Board at any meeting where such representation is deemed desirable.

(11) Maintain a record of all proceedings and make available to certificate holders and other concerned parties an annual report of the Board.

(12) Adopt a seal containing the name of the Board for use on all certificates and official reports issued by it.

(13) Provide a system for grievances to be presented and resolved.

(14) Assess civil penalties pursuant to G.S. 90-634.1.

(15) Assess the costs of disciplinary actions pursuant to G.S. 90-634.1(d).

The powers and duties set out in this section are granted for the purpose of enabling the Board to safeguard the public health, safety, and welfare against unqualified or incompetent practitioners and are to be liberally construed to accomplish this objective. (1998-230, s. 10; 2003-348, s. 3; 2008-224, ss. 6, 7.)

Editor's Note. — Session Laws 2008-224, s. 21, provides, in part, that the amendments made by ss. 6 and 7 of the act are applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

Effect of Amendments. — Session Laws 2008-224, ss. 6 and 7, effective August 17, 2008, added subdivision (5a); and rewrote subdvision (8). For applicability, see Editor's note.

§ 90-628. Expenses and fees.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article or from funds received from other sources. In no case shall any salary, expense, or other obligations of the Board be charged against the General Fund.

(b) The Board may impose the following fees up to the amounts listed below:

(1) Application for license	$20.00
(2) Initial license fee	150.00
(3) License renewal	100.00
(4) Late renewal penalty	75.00
(5) Repealed by Session Laws 2008-224, s. 8, effective August 17, 2008.	
(6) Duplicate license	25.00
(7) Repealed by Session Laws 2008-224, s. 8, effective August 17, 2008.	

(1998-230, s. 10; 2008-224, s. 8.)

Editor's Note. — Session Laws 2008-224, s. 21, provides, in part, that the amendments made by s. 8 of the act are applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

Effect of Amendments. — Session Laws 2008-224, s. 8, effective August 17, 2008, rewrote subsection (b). For applicability, see Editor's note.

§ 90-629. Requirements for licensure.

Upon application to the Board and the payment of the required fees, an applicant may be licensed as a massage and bodywork therapist if the applicant meets all of the following qualifications:

(1) Has obtained a high school diploma or equivalent.

(2) Is 18 years of age or older.

(3) Is of good moral character as determined by the Board.
(4) Has successfully completed a training program consisting of a minimum of 500 in-class hours of supervised instruction at a Board-approved school.
(5) Has passed a competency assessment examination that meets generally accepted psychometric principles and standards and is approved by the Board.
(6) Has submitted fingerprint cards in a form acceptable to the Board at the time the license application is filed and consented to a criminal history record check by the North Carolina Department of Justice. (1998-230, s. 10; 2008-224, s. 9.)

Editor's Note. — Session Laws 2008-224, s. 21, provides, in part, that the amendment made by s. 9 of the act is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

Effect of Amendments. — Session Laws 2008-224, s. 9, effective August 17, 2008, rewrote the section. For applicability, see Editor's note.

§ 90-629.1. Criminal history record checks of applicants for licensure.

(a) All applicants for licensure shall consent to a criminal history record check. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny licensure to an applicant. The Board shall ensure that the State and national criminal history of an applicant is checked. The Board shall be responsible for providing to the North Carolina Department of Justice the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories, and any additional information required by the Department of Justice. The Board shall keep all information obtained pursuant to this section confidential.

(b) The cost of the criminal history record check and the fingerprinting shall be borne by the applicant.

(c) If an applicant's criminal history record check reveals one or more criminal convictions, the conviction shall not automatically bar licensure. The Board shall consider all of the following factors regarding the conviction:
(1) The level of seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of the conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
(6) The person's prison, jail, probation, parole, rehabilitation, and employment records since the date the crime was committed.

If, after reviewing the factors, the Board determines that any of the grounds set forth in the subdivisions of G.S. 90-633(a) exist, the Board may deny licensure of the applicant. The Board may disclose to the applicant information contained in the criminal history record check that is relevant to the denial. The Board shall not provide a copy of the criminal history record check to the applicant. The applicant shall have the right to appear before the Board to appeal the Board's decision. However, an appearance before the full Board shall constitute an exhaustion of administrative remedies in accordance with Chapter 150B of the General Statutes.

(d) The Board, its officers, and employees, acting in good faith and in compliance with this section, shall be immune from civil liability for denying licensure to an applicant based on information provided in the applicant's criminal history record check. (2008-224, s. 10.)

Editor's Note. — Session Laws 2008-224, s. 21, made this section effective August 17, 2008. Session Laws 2008-224, s. 21, further provides that this section is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

§ 90-630: Repealed by Session Laws 2008-224, s. 11, effective August 17, 2008.

§ 90-630.1. Licensure by endorsement.

(a) The Board may issue a license to a practitioner who is duly licensed, certified, or registered as a massage and bodywork therapist under the laws of another jurisdiction. The practitioner shall be eligible for licensure by endorsement if all of the following qualifications are met:

(1) The applicant meets the requirements of G.S. 90-629(1), (2), (3), and (6) and submits the required application and fees to the Board.
(2) The applicant currently holds a valid license, certificate, or registration as a massage and bodywork therapist in another jurisdiction, and that jurisdiction's requirements for licensure, certification, or registration as a massage and bodywork therapist are substantially equivalent to or exceed the requirements for licensure under this Article.
(3) The applicant is currently a practitioner in good standing, with no disciplinary proceeding or unresolved complaint pending in any jurisdiction at the time a license is to be issued in this State.
(4) The applicant passes a jurisprudence examination administered by the Board regarding laws and rules adopted by the Board for licensure under this Article.
(5) The applicant, including applicants credentialed in a foreign country, demonstrates satisfactory proof of proficiency in the English language.

(b) The Board may issue a license by endorsement to a practitioner from another state that does not license, certify, or register massage and bodywork therapists if all of the following qualifications are met:

(1) The applicant meets the requirements of G.S. 90-629(1), (2), (3), and (6) and submits the required application and fees to the Board.
(2) The applicant has passed a competency assessment examination that meets generally accepted psychometric principles and standards and is approved by the Board.
(3) The applicant has graduated from a massage and bodywork therapy school that: (i) offers a curriculum that meets or is substantially equivalent to the standards set forth in the Board's criteria for school approval; and (ii) is licensed or approved by the regulatory authority for schools of massage and bodywork therapy in the state, province, territory, or country in which it operates or is exempt by law.
(4) The applicant is currently a practitioner in good standing, with no disciplinary proceeding or unresolved complaint pending in any jurisdiction at the time a license is to be issued in this State.
(5) The applicant passes a jurisprudence examination administered by the Board regarding laws and rules adopted by the Board for licensure under this Article.

(6) The applicant, including an applicant credentialed in a foreign country, demonstrates satisfactory proof of proficiency in the English language.

(7) Notwithstanding the requirements of subdivisions (2) and (3) of this subsection, the applicant has other credentials, to be reviewed by the Board on a case-by-case basis, that are deemed by the Board to be substantially equivalent to the requirements in subdivisions (2) and (3) of this subsection.

(c) The Board shall maintain a list of jurisdictions whose regulatory standards for the practice of massage and bodywork therapy have been determined by the Board to be substantially equivalent to or to exceed the requirements for licensure under this Article. (2008-224, s. 12.)

Editor's Note. — Session Laws 2008-224, s. 21, made this section effective August 17, 2008. Session Laws 2008-224, s. 21, further provides that this section is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

§ 90-631. Massage and bodywork therapy schools.

(a) The Board shall establish rules for the approval of massage and bodywork therapy schools. These rules shall include:

(1) Basic curriculum standards that ensure graduates have the education and skills necessary to carry out the safe and effective practice of massage and bodywork therapy.

(2) Standards for faculty and learning resources.

(3) Requirements for reporting changes in instructional staff and curriculum.

(4) A description of the process used by the Board to approve a school.

Any school that offers a training program in massage and bodywork therapy, not otherwise exempt from the requirements of Board approval, shall submit an application for approval to the Board. If a massage and bodywork therapy school offers training programs at more than one physical location, each location shall constitute a separate massage and bodywork therapy school. The Board shall grant approval to a school, whether in this State or another state, that meets the criteria established by the Board. The Board shall maintain a list of approved schools and a list of community college programs operating pursuant to subsection (b) of this section.

(a1) The Board shall have general supervision over massage and bodywork therapy schools, not otherwise exempt from the requirements of Board approval, in this State for the purpose of protecting the health, safety, and welfare of the public by requiring that massage and bodywork therapy schools carry out their advertised promises and contracts made with their students and patrons and by requiring that approved massage and bodywork therapy schools maintain:

(1) Adequate, safe, and sanitary facilities.

(2) Sufficient and qualified instructional and administrative staff.

(3) Satisfactory programs of operation and instructions.

(b) A massage and bodywork therapy program operated by a North Carolina community college that is accredited by the Southern Association of Colleges and Schools is exempt from the approval process, licensure process, or both, established by the Board. The college shall certify annually to the Board that the program meets or exceeds the minimum standards for curriculum, faculty, and learning resources established by the Board. Students who complete the program shall qualify for licenses from the Board as if the program were approved, licensed, or both, by the Board.

(c) A massage and bodywork therapy program operated by a degree or diploma granting college or university that offers a degree or diploma in massage therapy and is accredited by any accrediting agency that is recognized by the United States Department of Education and is licensed by the North Carolina Community College System or The University of North Carolina Board of Governors is exempt from the approval process, licensure process, or both, established by the Board. The college or university shall certify annually to the Board that the program meets or exceeds the minimum standards for curriculum, faculty, and learning resources established by the Board. Students who complete the program shall qualify for licenses from the Board as if the program were approved, licensed, or both, by the Board. (1998-230, s. 10; 2005-276, s. 8.15(a); 2008-224, ss. 13, 14.)

Editor's Note. —

Session Laws 2008-224, s. 21, provides, in part, that the amendments made by ss. 13 and 14 of the act are applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

Effect of Amendments. —

Session Laws 2008-224, ss. 13 and 14, effective August 17, 2008, rewrote the last paragraph of subsection (a); and added subsection (a1). For applicability, see Editor's note.

§ 90-631.1. Massage and bodywork therapy school approval required.

Unless exempt from the Board approval process, no individual, association, partnership, corporation, or other entity shall open, operate, or advertise a massage and bodywork therapy school in this State unless it has first complied with all the requirements of this Article and rules adopted by the Board and has been approved by the Board. (2008-224, s. 15.)

Editor's Note. — Session Laws 2008-224, s. 21, made this section effective August 17, 2008. Session Laws 2008-224, s. 21, further provides that this section is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

§ 90-631.2. Authority to establish fees for massage and bodywork therapy school approval.

(a) The Board shall establish a schedule of fees for approvals and renewals granted and for inspections performed pursuant to this Article. The fees collected under this section are intended to cover the administrative costs of the approval programs. No fee for application approval or renewal of approval shall be refunded in the event the application is rejected or the approval suspended or revoked.

(b) Fees for Board approval of schools are as follows:

(1) Request for Application Approval Package	$20.00
(2) Initial application for approval (one program)	2,000.00
(3) Initial application for approval of additional programs (same location)	750.00
(4) Inspection for initial approval or renewal (one program)	1,500.00
(5) Inspection for initial approval or renewal of additional programs (same location)	500.00
(6) Renewal of approval (one program)	1,000.00
(7) Renewal of approval (each additional program)	750.00

(c) Renewal inspections shall not occur more frequently than every three years, unless necessary.

(d) A school that is required to have more than one inspection in a fiscal year in order to investigate or verify areas of noncompliance with the standards for school approval shall pay a fee of one thousand five hundred dollars ($1,500) for each additional inspection. (2008-224, s. 15.)

Editor's Note. — Session Laws 2008-224, s. 21, made this section effective August 17, 2008. Session Laws 2008-224, s. 21, further provides that this section is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

§ 90-631.3. Grounds for suspension, revocation, or refusal of massage and bodywork therapy school approval; notice and hearing; judicial review.

(a) The Board may deny, suspend, revoke, or refuse to approve a massage and bodywork therapy school for any of the following reasons:

(1) The employment of fraud, deceit, or misrepresentation in obtaining or attempting to obtain approval of a massage and bodywork therapy school.

(2) Engaging in any act or practice in violation of any of the provisions of this Article or of any of the rules adopted by the Board, or aiding, abetting, or assisting any other person in the violation of the provisions of this Article or rules adopted by the Board.

(3) Failure to require that its students must complete the minimum standards in order to graduate.

(4) Operating a massage and bodywork therapy school without approval from this Board.

(5) Engaging in conduct that could result in harm or injury to the public.

(6) The employment of fraud, deceit, or misrepresentation when communicating with the general public, health care professionals, or other business professionals.

(7) Falsely holding out a massage and bodywork therapy school as approved by this Board.

(8) Failure to allow authorized representatives of the Board to conduct inspections of the massage and bodywork therapy school or refusing to make available to the Board, following written notice to the massage and bodywork therapy school, the requested information pertaining to the requirements for approval set forth in this Article.

(9) Failure to notify the Board in writing within 30 days of any notification it receives from its accrediting agency or the United States Department of Education Office of Postsecondary Education of a show cause action, probation action, or denial of accreditation.

(10) The applicant for or holder of massage and bodywork therapy school approval has pleaded guilty, entered a plea of nolo contendere, or has been found guilty of a crime involving moral turpitude by a judge or jury in any state or federal court.

(b) A refusal to issue, refusal to renew, or suspension or revocation of massage and bodywork therapy school approval under this section shall be made in accordance with Chapter 150B of the General Statutes. (2008-224, s. 15.)

Editor's Note. — Session Laws 2008-224, s. 21, made this section effective August 17, 2008. Session Laws 2008-224, s. 21, further provides that this section is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

§ 90-632. License renewal and continuing education.

(a) The license to practice under this Article shall be renewed every two years.

(b) The continuing education requirement for the initial license renewal is as follows:

(1) If the licensure period is two years or more, each licensee shall submit to the Board evidence of the successful completion of at least 24 hours of study, as approved by the Board, since the initial licensure application date in the practice of massage and bodywork therapy.

(2) If the licensure period is less than two years, but more than one year, each licensee shall submit to the Board evidence of the successful completion of at least 12 hours of study, as approved by the Board, since the initial licensure application date in the practice of massage and bodywork therapy.

(c) For subsequent license renewals, each licensee shall submit to the Board evidence of the successful completion of at least 24 hours of study, as approved by the Board, since the previous licensure renewal submission date in the practice of massage and bodywork therapy. (1998-230, s. 10; 2008-224, s. 16.)

Editor's Note. — Session Laws 2008-224, s. 21, provides, in part, that the amendment made by s. 16 of the act is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

Effect of Amendments. — Session Laws 2008-224, s. 16, effective August 17, 2008, deleted the last sentence of subsection (a); and added subsections (b) and (c). For applicability, see Editor's note.

§ 90-633. Disciplinary action.

(a) The Board may deny, suspend, revoke, or refuse to license a massage and bodywork therapist or applicant for any of the following:

(1) The employment of fraud, deceit, or misrepresentation in obtaining or attempting to obtain a license or the renewal of a license.

(2) The use of drugs or intoxicating liquors to an extent that affects professional competency.

(3) Conviction of an offense under any municipal, State, or federal narcotic or controlled substance law.

(4) Conviction of a felony or other public offense involving moral turpitude.

(5) An adjudication of insanity or incompetency.

(6) Engaging in any act or practice in violation of any of the provisions of this Article or of any of the rules adopted by the Board, or aiding, abetting, or assisting any other person in the violation of these provisions or rules. For purposes of this subdivision, the phrase "aiding, abetting, or assisting any other person" does not include acts intended to inform the individual who is not in compliance with this Article of the steps necessary to comply with this Article or any rules adopted by the Board.

(7) The commission of an act of malpractice, gross negligence, or incompetency.

(8) Practice as a licensee under this Article without a valid certificate or renewal.

(9) Engaging in conduct that could result in harm or injury to the public.

(10) The employment of fraud, deceit, or misrepresentation when communicating with the general public, health care professionals, or other business professionals.

(11) Falsely holding out himself or herself as licensed or certified in any discipline of massage and bodywork therapy without successfully completing training approved by the Board in that specialty.

(12) The application of systems of activity by a massage and bodywork therapist during the course of therapy with the intent of providing sexual stimulation or otherwise pursuing sexual contact.

(b) The Board may reinstate a revoked license, revoke censure or other judgment, or remove other licensure restrictions if the Board finds that the reasons for revocation, censure, or other judgment or other licensure restrictions no longer exist and the massage and bodywork therapist or applicant can reasonably be expected to safely and properly practice as a massage and bodywork therapist. (1998-230, s. 10; 2008-224, s. 17.)

Editor's Note. — Session Laws 2008-224, s. 21, provides, in part, that the amendment made by s. 17 of the act is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

Effect of Amendments. — Session Laws 2008-224, s. 17, effective August 17, 2008, deleted "until proof of rehabilitation can be established" in subdivisions (a)(3) and (a)(4); deleted "until proof of recovery from the condition can be established" in subdivision (a)(5); added the second sentence in subdivision (a)(6); added subdivision (a)(12); and added subsection (b). For applicability, see Editor's note.

§ 90-634. Enforcement; injunctive relief.

(a) It is unlawful for a person not licensed or exempted under this Article to engage in any of the following:

(1) Practice of massage and bodywork therapy.

(2) Advertise, represent, or hold out himself or herself to others to be a massage and bodywork therapist.

(3) Use any title descriptive of any branch of massage and bodywork therapy, as provided in G.S. 90-623, to describe his or her practice.

(b) A person who violates subsection (a) of this section shall be guilty of a Class 1 misdemeanor.

(b1) Unless exempt from the approval process, it is unlawful for an individual, association, partnership, corporation, or other entity to open, operate, or advertise a massage and bodywork therapy school without first having obtained the approval required by G.S. 90-637.1.

(b2) An individual, association, partnership, corporation, or other entity that violates subsection (b1) of this section shall be guilty of a Class 3 misdemeanor.

(c) The Board may make application to superior court for an order enjoining a violation of this Article. Upon a showing by the Board that a person, association, partnership, corporation, or other entity has violated or is about to violate this Article, the court may grant an injunction, restraining order, or take other appropriate action. (1998-230, s. 10; 2008-224, s. 18.)

Editor's Note. — Session Laws 2008-224, s. 21, provides, in part, that the amendment made by s. 18 of the act is applicable to offenses committed on or after December 1, 2008. Prosecutions for offenses committed before December 1, 2008 are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

Effect of Amendments. — Session Laws 2008-224, s. 18, effective December 1, 2008, added subsections (b1) and (b2); and inserted "association, partnership, corporation, or other entity" in subsection (c). For applicability, see Editor's note.

CASE NOTES

Practicing Without License. — State presented sufficient evidence to show that defendant, a massage therapist, practiced massage therapy without a license on the two occasions that defendant made sexual contact with a salon's female clients, and, thus, that evidence existed to support the charge of practicing without that license. The record showed that defendant had defendant's massage therapy license revoked before defendant went to work for the salon and that defendant did not subsequently get the license reinstated. State v. Viera, — N.C. App. —, 658 S.E.2d 529, 2008 N.C. App. LEXIS 608 (Apr. 1, 2008).

State submitted substantial evidence to show both that defendant, a salon's massage therapist, had sexual contact with two female clients through the use of force and against their will, and, thus, committed two sexual batteries in violation of G.S. 14-27.5(a)(1), and that defendant while working at the salon was practicing massage therapy without a license in violation of G.S. 90-634(a)(1). As a result, dismissal of those charges on defendant's motion was not warranted. State v. Viera, — N.C. App. —, 658 S.E.2d 529, 2008 N.C. App. LEXIS 608 (Apr. 1, 2008).

§ 90-634.1. Civil penalties; disciplinary costs.

(a) Authority to Assess Civil Penalties. — The Board may assess a civil penalty not in excess of one thousand dollars ($1,000) for the violation of any section of this Article or the violation of any rules adopted by the Board. The continuation of the same act for which the penalty is imposed shall not be the basis for an additional penalty unless the penalty is imposed against the same party who has repeated the same act for which the discipline has previously been imposed. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Consideration Factors. — Before imposing and assessing a civil penalty, the Board shall consider the following factors:

(1) The nature, gravity, and persistence of the particular violation.
(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.
(3) Whether the violation was willful and malicious.
(4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) Schedule of Civil Penalties. — The Board shall establish a schedule of civil penalties for violations of this Article and rules adopted by the Board.

(d) Transcriptions Costs. — The Board may assess the costs of transcriptions of a disciplinary hearing held by the Board or the Office of Administrative Hearings to include the recording of the hearing by a court reporter and transcription of the proceeding against a person found to be in violation of this Article or rules adopted by the Board. (2003-348, s. 4; 2008-224, s. 19.)

Editor's Note. — Session Laws 2008-224, s. 21, provides, in part, that the amendment made by s. 19 of the act is applicable to the actions of therapists and schools on or after August 17, 2008, to massage and bodywork therapist applications for licensure, and to massage and bodywork therapy school applications for Board approval submitted to the Board on or after August 17, 2008.

Session Laws 2008-224, s. 19, deleted the subsection (d) designation. The last paragraph has been designated as subsection (d) at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2008-224, s. 19, effective August 17, 2008, added the second sentence in subsection (a); and rewrote subsection (d). For applicability, see Editor's note.

Chapter 93E.

North Carolina Appraisers Act.

Article 1.

Real Estate Appraiser.

Sec.
93E-1-5. Appraisal Board.

Article 1.

Real Estate Appraiser.

§ 93E-1-5. Appraisal Board.

(a) There is created the North Carolina Appraisal Board for the purposes set forth in this Chapter. The Board shall consist of nine members. The Governor shall appoint five members of the Board, and the General Assembly shall appoint four members in accordance with G.S. 120-121, two upon the recommendation of the President Pro Tempore of the Senate and two upon the recommendation of the Speaker of the House of Representatives. Members appointed by the Governor shall be appointed from geographically diverse areas of the State. The appointees recommended by the Speaker of the House of Representatives and the appointees of the Governor shall be persons who have been engaged in the business of real estate appraising in this State for at least five years immediately preceding their appointment and are also State-licensed or State-certified real estate appraisers. No more than three of the appointees may be members of the same appraiser trade organization at any one time. The appointees recommended by the President Pro Tempore of the Senate shall be a person not involved directly or indirectly in the real estate, real estate appraisal, or the real estate lending industry. Members of the Board shall serve three-year terms, so staggered that the terms of three members expire in one year, the terms of three members expire in the next year, and the terms of three members expire in the third year of each three-year period. The members of the Board shall elect one of their members to serve as chairman of the Board for a term of one year. The Governor may remove any member of the Board appointed by the Governor for misconduct, incompetency, or neglect of duty. The General Assembly may remove any member appointed by it for the same reasons. Successors shall be appointed by the appointing authority making the original appointment. All vacancies occurring on the Board shall be filled, for the unexpired term, by the appointing authority making the original appointment. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Initial terms of office commenced July 1, 1994.

(b) The Board is an occupational licensing agency governed by Chapter 150B of the General Statutes; its decisions are final agency decisions subject to judicial review under Article 4 of Chapter 150B of the General Statutes.

(c) Members of the Board shall be paid the per diem, subsistence, and travel allowances at the rates set forth in G.S. 93B-5; provided that none of the expenses of the Board or the compensation or expenses of any officer or employee thereof shall be payable out of the treasury of the State of North Carolina; the total expenses of the administration of this Chapter shall not exceed the total income therefrom; and neither the Board nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt, or other financial obligation binding upon the State of North Carolina.

(d) The Board shall adopt a seal for its use, which shall bear thereon the words "North Carolina Appraisal Board". Copies of all papers in the office of the Board duly certified and authenticated by the seal of the Board shall be received in evidence in all courts and administrative bodies and with like effect as the originals.

(e) The Board may employ an Executive Director and professional and clerical staff as may be necessary to carry out the provisions of this Chapter and to put into effect the rules that the Board may promulgate. The Board shall fix salaries. The Board shall have the authority to issue to its employees credentials or other means of identification.

(f) The Board shall be entitled to the services of the Attorney General in connection with the affairs of the Board or may, in its discretion, employ an attorney to assist or represent it in the enforcement of this Chapter.

(g) The Board may prefer a complaint for violation of this Chapter before any court of competent jurisdiction, and it may take the necessary legal steps through the proper legal offices of the State to enforce the provisions of this Chapter.

(h) The Board shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to the approval of the Governor and the Council of State. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board.

(i) The Board may purchase, rent, or lease equipment and supplies and purchase liability insurance or other insurance to cover the activities of the Board, its operations, or its employees. (1993, c. 419, s. 6; 1995, c. 482, s. 5; 1996, 2nd Ex. Sess., c. 15, s. 16; 2001-399, s. 1; 2008-177, s. 6(a).)

Editor's Note. — Session Laws 2008-177, s. 6(b), provides: "The initial term of the additional members appointed by the General Assembly under G.S. 93E-1-5(a), as amended by this act, will commence for the terms beginning July 1, 2008. To continue the staggered terms as required under G.S. 93E-1-5, the initial appointment of the additional member appointed by the President Pro Tempore of the Senate shall serve a one-year term and the initial appointment of the additional member appointed by the Speaker of the House of Representatives shall serve a three-year term."

Effect of Amendments. — Session Laws 2008-177, s. 6(a), effective August 4, 2008, in subsection (a), substituted "nine members" for "seven members," "four members" for "two members," "two upon the recommendation" for "one upon the recommendation" twice, "appointees" for "appointee" twice, and "three members" for "two members" twice.

Chapter 95.

Department of Labor and Labor Regulations.

Article 21.

Retaliatory Employment Discrimination.

Sec.
95-241. Discrimination prohibited.

ARTICLE 2A.

Wage and Hour Act.

§ 95-25.2. Definitions.

CASE NOTES

Severance Payments and Benefits Required under Agreement. — Employees were entitled to judgment on the pleadings on their claims against a bank under the North Carolina Wage and Hour Act because their employment agreements provided that the employees were entitled to severance payments and benefits in the event the agreements were terminated, and the bank violated the Act by failing to provide the payments and benefits. Washburn v. Yadkin Valley Bank & Trust Co., — N.C. App. —, 660 S.E.2d 577, 2008 N.C. App. LEXIS 865 (2008).

§ 95-25.6. Wage payment.

CASE NOTES

Employees Entitled to Severance Payments and Benefits Upon Termination of Employment Agreements. — Employees were entitled to judgment on the pleadings on their claims against a bank under the North Carolina Wage and Hour Act because their employment agreements provided that the employees were entitled to severance payments and benefits in the event the agreements were terminated, and the bank violated the Act by failing to provide the payments and benefits. Washburn v. Yadkin Valley Bank & Trust Co., — N.C. App. —, 660 S.E.2d 577, 2008 N.C. App. LEXIS 865 (2008).

§ 95-25.7. Payment to separated employees.

CASE NOTES

Employees Entitled to Severance Payments and Benefits Upon Termination of Employment Agreements. — Employees were entitled to judgment on the pleadings on their claims against a bank under the North Carolina Wage and Hour Act because their employment agreements provided that the employees were entitled to severance payments and benefits in the event the agreements were terminated, and the bank violated the Act by failing to provide the payments and benefits. Washburn v. Yadkin Valley Bank & Trust Co., — N.C. App. —, 660 S.E.2d 577, 2008 N.C. App. LEXIS 865 (2008).

§ 95-25.22. Recovery of unpaid wages.

CASE NOTES

Award of Attorney's Fees and Costs Appropriate to Employee. — Former employer failed to show that a trial court abused the court's discretion when, pursuant to G.S. 95-25.22(d), the court awarded attorney's fees and costs to a former employee on the employee's claim for unpaid wages because the employer failed to show that the trial court, in making the court's findings did not: (1) hear all of the attorneys' arguments; (2) observe their litigation strategies; (3) watch their examination of witnesses; (4) rule on their evidentiary objections; (5) read their briefs; (6) listen to their summations of the evidence; and (7) consider their posttrial motions. Williams v. New Hope Found., Inc., — N.C. App. —, 665 S.E.2d 586, 2008 N.C. App. LEXIS 1608 (2008).

Article 16.

Occupational Safety and Health Act of North Carolina.

§ 95-129. Rights and duties of employers.

CASE NOTES

Cited in Hamby v. Profile Prods., L.L.C., 361 N.C. 630, 652 S.E.2d 231, 2007 N.C. LEXIS 1105 (2007).

Article 21.

Retaliatory Employment Discrimination.

§ 95-241. Discrimination prohibited.

(a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:

(1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:
  a. Chapter 97 of the General Statutes.
  b. Article 2A or Article 16 of this Chapter.
  c. Article 2A of Chapter 74 of the General Statutes.
  d. G.S. 95-28.1.
  e. Article 16 of Chapter 127A of the General Statutes.
  f. G.S. 95-28.1A.
  g. Article 52 of Chapter 143 of the General Statutes.

(2) Cause any of the activities listed in subdivision (1) of this subsection to be initiated on an employee's behalf.

(3) Exercise any right on behalf of the employee or any other employee afforded by Article 2A or Article 16 of this Chapter, by Article 2A of Chapter 74 of the General Statutes, or by Article 52 of Chapter 143 of the General Statutes.

(4) Comply with the provisions of Article 27 of Chapter 7B of the General Statutes.

(5) Exercise rights under Chapter 50B. Actions brought under this subdivision shall be in accordance with the provisions of G.S. 50B-5.5.

(b) It shall not be a violation of this Article for a person to discharge or take any other unfavorable action with respect to an employee who has engaged in protected activity as set forth under this Article if the person proves by the greater weight of the evidence that it would have taken the same unfavorable action in the absence of the protected activity of the employee. (1991 (Reg. Sess., 1992), c. 1021, s. 1; 1993, c. 423, s. 1; 1997-153, s. 7; 1997-350, s. 3; 1998-202, s. 7; 1999-423, s. 4; 2004-186, s. 18.2; 2008-212, s. 1.)

Effect of Amendments. — Session Laws 2008-212, s. 1, effective August 11, 2008, added subdivision (a)(1)g; and in subdivision (a)(3), added "or by Article 52 of Chapter 143 of the General Statutes," and made a related change.

ARTICLE 23.

Workplace Violence Prevention.

§ 95-260. Definitions.

Editor's Note. — Former G.S. 14-277.3, referred to above, was repealed by Session Laws 2008-167, s. 1, effective December 1, 2008. For current provisions as to stalking, see G.S. 14-277.3A.

Chapter 96.

Employment Security.

Article 1.

Employment Security Commission.

Sec.
96-5. Employment Security Administration Fund.

Article 2.

Unemployment Insurance Division.

Sec.
96-9. Contributions.

ARTICLE 1.

Employment Security Commission.

§ 96-5. Employment Security Administration Fund.

(a) Special Fund. — There is hereby created in the State treasury a special fund to be known as the Employment Security Administration Fund. All moneys which are deposited or paid into this fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this Chapter, and shall not lapse at any time or be transferred to any other fund. The Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the State Budget Act (Chapter 143C of the General Statutes) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund which are received from the federal government or any agency thereof or which are appropriated by this State for the purpose described in G.S. 96-20 shall be expended solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of this Chapter. The fund shall consist of all moneys appropriated by this State, all moneys received from the United States of America, or any agency thereof, including the Secretary of Labor, and all moneys received from any other source for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the Employment Security Administration Fund or by reason of damage to equipment or supplies purchased from moneys in such fund, and any proceeds realized from the sale or disposition of any such equipment or supplies which may no longer be necessary for the proper administration of this Chapter: Provided, any interest collected on contributions and/or penalties collected pursuant to this Chapter shall be paid into the Special Employment Security Administration Fund created by subsection (c) of this section. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Employment Security Administration Fund shall be deposited in said fund.

(b) Replacement of Funds Lost or Improperly Expended. — If any moneys received from the Secretary of Labor under Title III of the Social Security Act, or any unencumbered balances in the Employment Security Administration Fund or any moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, or any moneys made available by this State or its political subdivisions and matched by such moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, are found by the Secretary of Labor, because of any action or contingency, to have been lost or expended for purposes other than, or in amounts in excess of those found necessary by the Secretary of Labor for the proper administration of this Chapter, it is the policy of this State that such moneys, not available from the Special Employment Security Administration Fund established by subsection (c) of this section, shall be replaced by moneys appropriated for such purpose from the general funds of this State to the Employment Security Administration Fund for expenditure as provided in subsection (a) of this section. Upon receipt of notice of such a finding by the Secretary of Labor, the Commission shall promptly pay from the Special Employment Security Administration Fund such sum if available in such fund; if not available, it shall promptly report the amount required for such replacement to the Governor and the Governor shall, at the earliest opportunity, submit to the legislature a request for the appropriation of such amount.

(c) There is hereby created in the State treasury a special fund to be known as the Special Employment Security Administration Fund. All interest and penalties, regardless of when the same became payable, collected from employers under the provisions of this Chapter subsequent to June 30, 1947 as well as any appropriations of funds by the General Assembly, shall be paid into this fund. No part of said fund shall be expended or available for expenditure in lieu of federal funds made available to the Commission for the administration of this Chapter. Said fund shall be used by the Commission for the payment of costs and charges of administration which are found by the Secretary of Labor not to be proper and valid charges payable out of any funds in the Employment Security Administration Fund received from any source and shall also be used by the Commission for: (i) extensions, repairs, enlargements and improvements to buildings, and the enhancement of the work environment in buildings used for Commission business; (ii) the acquisition of real estate, buildings and equipment required for the expeditious handling of Commission business; and (iii) the temporary stabilization of federal funds cash flow. The Employment Security Commission may use funds either from the Special Employment Security Commission Administration Fund created by this subsection or from federal funds, or from a combination of the two, to offset the costs of compliance with Article 7A of Chapter 163 of the General Statutes of North Carolina or compliance with P.L. 103-31. Refunds of interest allowable under G.S. 96-10, subsection (e) shall be made from this special fund: Provided, such interest was deposited in said fund: Provided further, that in those cases where an employer takes credit for a previous overpayment of interest on contributions due by such employer pursuant to G.S. 96-10, subsection (e), that the amount of such credit taken for such overpayment of interest shall be reimbursed to the Unemployment Insurance Fund from the Special Employment Security Administration Fund. The Special Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the State Budget Act (Chapter 143C of the General Statutes) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Special Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Special Employment Security Administration Fund shall be deposited in said fund. The moneys in the Special Employment Security Administration Fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this section.

(c1) Repealed by Session Laws 2004-124, s. 13.7B(b), effective July 20, 2004.

(d) The other provisions of this section and G.S. 96-6, to the contrary notwithstanding, the Commission is authorized to requisition and receive from its account in the unemployment trust fund in the treasury of the United States of America, in the manner permitted by federal law, such moneys standing to its credit in such fund, as are permitted by federal law to be used for expense of administering this Chapter and to expend such moneys for such purpose, without regard to a determination of necessity by a federal agency. The State Treasurer shall be treasurer and custodian of the amounts of money so requisitioned. Such moneys shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as are provided by law for other special funds in the State treasury.

(e) Reed Bill Fund Authorization. — Subject to a specific appropriation by the General Assembly of North Carolina to the Employment Security Commission out of funds credited to and held in this State's account in the Unemployment Trust Fund by the Secretary of the Treasury of the United States pursuant to and in accordance with section 903 of the Social Security Act, the Commission is authorized to utilize such funds for the administration of the Employment Security Law, including personal services, operating and other expenses incurred in the administration of said law, as well as for the purchase or rental, either or both, of offices, lands, buildings or parts of buildings, fixtures, furnishings, equipment, supplies and the construction of buildings or parts of buildings, suitable for use in this State by the Employment Security Commission, and for the payment of expenses incurred for the construction, maintenance, improvements or repair of, or alterations to, such real or personal property. Provided, that any such funds appropriated by the General Assembly shall not exceed the amount in the Unemployment Trust Fund which may be obligated for expenditure for such purposes; and provided that said funds shall not be obligated for expenditure, as herein provided, after the close of the two-year period which begins on the effective date of the appropriation.

(f) Employment Security Commission Reserve Fund. — There is created in the State treasury a special trust fund, separate and apart from all other public moneys or funds of this State, to be known as the Employment Security Commission Reserve Fund, hereinafter "Reserve Fund". Part of the proceeds from the tax on contributions imposed in G.S. 96-9(b)(3)j shall be credited to the Reserve Fund, as specified in that statute. The moneys in the Reserve Fund may be used by the Commission for loans to the Unemployment Insurance Fund, as security for loans from the federal Unemployment Insurance Trust Fund, and to pay any interest required on advances under Title XII of the Social Security Act, and shall be continuously available to the Commission for expenditure in accordance with the provisions of this section. The State Treasurer shall be ex officio the treasurer and custodian and shall invest said moneys in accordance with existing law as well as rules and regulations promulgated pursuant thereto. Furthermore, the State Treasurer shall disburse the moneys in accordance with the directions of the Commission and in accordance with such regulations as the Commission may prescribe.

Administrative costs for the collection of the tax and interest payable to the Reserve Fund shall be borne by the Special Employment Security Administration Fund.

The interest earned from investment of the Reserve Fund moneys shall be deposited in a fund hereby established in the State Treasurer's Office, to be known as the "Worker Training Trust Fund". These moneys shall be used to:

(1) Fund programs, specifically for the benefit of unemployed workers or workers who have received notice of long-term layoff or permanent unemployment, which will enhance the employability of workers, including, but not limited to, adult basic education, adult high school or equivalency programs, occupational skills training programs, assessment, job counseling and placement programs;

(2) Continue operation of local Employment Security Commission offices throughout the State; or

(3) Provide refunds to employers.

The use of funds from the Worker Training Trust Fund, for the purposes set out in the above paragraph, shall be pursuant to appropriations in the Current Operations Appropriations Act. Funds appropriated from the Worker Training Trust Fund that are unexpended and unencumbered at the end of the fiscal year for which they are appropriated shall revert to the State treasury to the credit of the Worker Training Trust Fund in accordance with G.S. 143C-1-2.

(g) Notwithstanding subsection (f) of this section, the State Treasurer may invest not more than a total of twenty-five million dollars ($25,000,000) of funds in the Employment Security Commission Reserve Fund established under subsection (f) of this section in securities issued by the North Carolina Technological Development Authority, Inc., the proceeds for which are directed to support investment in venture capital funds. The State Treasurer shall report to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division on October 1 and March 1 of each fiscal year on investments made pursuant to this subsection. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, ss. 12, 13; 1947, c. 326, s. 5; c. 598, s. 1; 1949, c. 424, s. 2; 1951, c. 332, s. 18; 1953, c. 401, ss. 1, 5; 1977, c. 727, ss. 11-13; 1981, c. 160, s. 2; 1987, c. 17, ss. 1, 2; 1991, c. 689, s. 142; 1991, Ex. Sess., c. 6, s. 1; 1995 (Reg. Sess., 1996), c. 608, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 26.6; 2004-124, s. 13.7B(b); 2005-276, s. 6.37(h); 2006-203, s. 22.)

Editor's Note. —
The section is set out in the supplement to correct an error in the main volume.

ARTICLE 2.

Unemployment Insurance Division.

§ 96-8. Definitions.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in Shaw v. U.S. Airways, Inc., — N.C. App. —, 652 S.E.2d 22, 2007 N.C. App. LEXIS 2320 (2007).

§ 96-9. Contributions.

(a) Payment. —

(1) Except as provided in subsection (d) hereof, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Chapter, with respect to wages for employment (as defined in G.S. 96-8(6)). Such contributions shall become due and be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ. Contributions shall become due on and shall be paid on or before the last day of the month following the close of the calendar quarter in which such wages are paid and such contributions shall be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the Commission shall be advised by its duly authorized officers or agents that the collection of any contribution under any provision of this Chapter will be jeopardized by delay, the Commission may, whether or not the time otherwise prescribed by law for making returns and paying such tax has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by G.S. 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.

(2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

(3) Benefits paid employees of this State shall be financed and administered in accordance with the provisions and conditions of G.S. 96-9(d) required for nonprofit organizations; except as provided by suitable regulations which may be adopted by the Commission. The Department of Administration shall make an election with respect to financing all such benefits.

(4) Political subdivisions of this State may finance benefits paid to employees either by coming under the experience rating program provided in G.S. 96-9(b) or by coming into the program on a reimbursement basis in accordance with the provisions and conditions of G.S. 96-9(f). Any election made shall be binding upon the political subdivision so electing for a period of four years.

(4a) Indian tribes may finance benefits paid to employees either by coming under the experience rating program provided in G.S. 96-9(b) or by coming into the program on a reimbursement basis in accordance with the provisions and conditions of G.S. 96-9(i). Any election made is binding on the tribe so electing for a period of three years.

(5) An employer is not required to pay contributions on wages the employer pays to an individual in a calendar year in excess of the

taxable wage base for that calendar year. The taxable wage base is the greater of (i) the federally required taxable wage base or (ii) the product resulting from multiplying the average yearly insured wage by fifty percent (50%), rounded to the nearest multiple of one hundred dollars ($100.00). The average yearly insured wage is the average weekly insured wage on the applicable computation date multiplied by 52. The following wages are included in determining whether the amount of wages paid to an individual in a single calendar year exceeds the taxable wage base:

a. Wages paid to an individual in this State by an employer that made contributions in another state upon the wages paid to the individual because the work was performed in the other state.

b. Wages paid by a successor employer to an individual that meets both of the following conditions: (i) the individual was an employee of the predecessor and was taken over as an employee by the successor as a part of the organization acquired and (ii) the predecessor employer has paid contributions on the wages paid to the individual while in the predecessor's employ during the year of acquisition and the account of the predecessor is transferred to the successor in accordance with G.S. 96-9(c)(4)a.

(6) If the amount of the contributions shown to be due after all credits is less than five dollars ($5.00), no payment need be made. If an employer has paid contributions, penalties, and/or interest in excess of the amount due, this shall be considered an overpayment and refunded provided no other debts are owed to the Commission by the employer. Overpayments of less than five dollars ($5.00) shall be refunded only upon receipt by the Chairman of a written demand for such refund from the employer. Nothing herein shall be construed to change or extend the limitation set forth in G.S. 96-10(e), (f), and (i).

(7) Effective with the quarter ending September 30, 1999, every employer with 100 or more employees, and every person or organization that, as agent, reports wages on a total of 100 or more employees on behalf of one or more subject employers, shall file that portion of the "Employer's Quarterly Tax and Wage Report" that contains the name, social security number, and gross wages of each individual in employment on magnetic tapes or diskettes in a format prescribed by the Commission.

For failure of an employer to comply with this subdivision, there shall be added to the amount required to be shown as tax in the reports a penalty of twenty-five dollars ($25.00). For failure of an agent to comply with this subdivision, the Commission may deny the agent the right to report wages and file reports for the employer for whom the agent filed an improper report for a period of one year following the calendar quarter in which that agent filed the improper report. The Commission may reduce or waive a penalty for good cause shown.

(8) An employer of domestic service employees as defined by the Internal Revenue Code may be given permission by the Chair of the Commission to file reports once a year on or before the last day of the month following the close of the calendar year in which the wages are paid. Permission to file a report annually may be revoked if the employer is found liable to the Commission for quarterly contributions under subdivision (6) of this subsection.

(9) Employers who are granted permission under subdivision (8) of this subsection to file annual reports may be given permission to file reports by telephone. Employers who report by telephone must

contact either the Field Tax Auditor who is assigned to the employer's account or the Unemployment Insurance Division in Raleigh and report the required information to that Auditor or to the Division by the date the report is due under subdivision (8) of this subsection.

(10) Employers electing to do so may pay their quarterly tax contributions by electronic funds transfer. When an electronic funds transfer cannot be completed due to insufficient funds or the nonexistence of an account of the transferor, the Commission shall assess a penalty equal to ten percent (10%) of the amount of the transfer, subject to a minimum of one dollar ($1.00) and a maximum of one thousand dollars ($1,000). The Commission may waive this penalty for good cause shown. As used in this section, the term "electronic funds transfer" means a transfer of funds initiated by using an electronic terminal, a telephone, a computer, or magnetic tape to instruct or authorize a financial institution or its agent to credit or debit an account.

(11) The Commission may establish policies to allow taxes to be payable under certain conditions by credit card. A condition of payment by credit card is receipt by the Commission of the full amount of taxes, penalties, and interest due. The Commission shall require an employer who pays by credit card to include an amount equal to any fee charged the Commission for the use of the card. A payment of taxes that is made by credit card and is not honored by the card issuer does not relieve the employer of the obligation to pay the taxes.

(b) Rate of Contributions. —

(1) Beginning Rate. — The standard beginning rate of contributions for an employer is a percentage of wages paid by the employer during a calendar year for employment occurring during that year. For any calendar year that the training and reemployment contribution in G.S. 96-6.1 applies, the rate is determined in accordance with the following table:

Percentage	Date After Which Employment Occurs
2.25%	December 31, 1986
1.8	December 31, 1993
1.2	December 31, 1995
1.0	December 31, 1999

For any calendar year that the training and reemployment contribution in G.S. 96-6.1 does not apply, the rate is determined in accordance with the following table:

Percentage	Date After Which Employment Occurs
2.25%	December 31, 1986
1.8	December 31, 1993
1.2	December 31, 1995

(2) Experience Rating. —

a. Waiting Period for Rate Reduction. — No employer's contribution rate shall be reduced below the standard rate for any calendar year until its account has been chargeable with benefits for at least 12 calendar months ending July 31 immediately preceding the computation date. An employer's account has been chargeable with benefits for at least 12 calendar months if the employer has reported wages paid in four completed calendar quarters pursuant to G.S. 96-9(a).

b. Credit Ratio. — The Commission shall, for each year, compute a credit reserve ratio for each employer whose account has a credit balance. An employer's credit reserve ratio shall be the quotient obtained by dividing the credit balance of the employer's account as of July 31 of each year by the total taxable payroll of the employer for the 36 calendar-month period ending June 30 preceding the computation date. Credit balance as used in this section means the total of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits to the account of the employer less the total benefits charged to the account of the employer for all past periods.

c. Debit Ratio. — The Commission shall for each year compute a debit ratio for each employer whose account shows that the total of all its contributions paid and credited for all past periods in accordance with G.S. 96-9(c)(1) together with all other lawful credits is less than the total benefits charged to its account for all past periods. An employer's debit ratio shall be the quotient obtained by dividing the debit balance of the employer's account as of July 31 of each year by the total taxable payroll of the employer for the 36 calendar-month period ending June 30 preceding the computation date. The amount arrived at by subtracting the total amount of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits of the employer from the total amount of all benefits charged to the account of the employer for such periods is the employer's debit balance.

d. Other Provisions. — No employer's contribution rate shall be reduced below the standard rate for any calendar year unless its liability extends over a period of all or part of two consecutive calendar years and, as of August 1 of the second year, its credit reserve ratio meets the requirements of that schedule used in computing rates for the following calendar year, unless the employer's liability was established under G.S. 96-8(5)b and its predecessor's account was transferred as provided by G.S. 96-9(c)(4)a.

Whenever contributions are erroneously paid into one account which should have been paid into another account or which should have been paid into a new account, that erroneous payment can be adjusted only by refunding the erroneously paid amounts to the paying entity. No pro rata adjustment to an existing account may be made, nor can a new account be created by transferring any portion of the erroneously paid amount, notwithstanding that the entities involved may be owned, operated, or controlled by the same person or organization. No adjustment of a contribution rate can be made reducing the rate below the standard rate for any period in which the account was not in actual existence and in which it was not actually chargeable for benefits. Whenever payments are found to have been made to the wrong account, refunds can be made to the entity making the wrongful payment for a period not exceeding five years from the last day of the calendar year in which it is determined that wrongful payments were made. Notwithstanding payment into the wrong account, if an entity is determined to have met the requirements to be a covered employer, whether or not the entity has had paid on the account of its employees any sum into another account, the Commission shall collect contributions at the standard rate or the assigned rate, whichever is higher, for the five years preceding the determination of erroneous payments, which five years shall run from the last day of the calendar year in which the determination of liability for contributions or additional contributions is made. This requirement applies regardless of whether the employer acted in good faith.

(3)a through c. Repealed by Session Laws 1977, c. 727, s. 39.

d. Rate schedule A, B, C, D, E, F, G, H, or I appearing on the line opposite the fund ratio in the following Fund Ratio Schedules table shall be applicable in determining and assigning each eligible employer's contribution rate for the calendar year immediately following the computation date. The fund ratio is the total amount available for benefits in the Unemployment Insurance Fund on the computation date divided by the total amount of the taxable payroll of all subject employers for the 12-month period ending June 30 preceding the computation date.

FUND RATIO SCHEDULES

When the Fund Ratio Is: As Much As	But Less Than	Applicable Schedule
——	2.0%	A
2.0%	3.0%	B
3.0%	4.0%	C
4.0%	5.0%	D
5.0%	6.0%	E
6.0%	7.0%	F
7.0%	8.0%	G
8.0%	9.0%	H
9.0% and in excess thereof		I

d1. Repealed by Session Laws 1994, Extra Session, c. 10, s. 3.

d2. Repealed by Session Laws 1995, c. 4, s. 3, effective January 1, 1998.

d3. The standard contribution rate set by subdivision (b)(1) of this section applies to an employer unless the employer's account has a credit balance. Beginning January 1, 1999, for any calendar year that the training and reemployment contribution in G.S. 96-6.1 does not apply, the contribution rate of an employer whose account has a credit balance is determined in accordance with the rate set in the following Experience Rating Formula table for the applicable rate schedule. The contribution rate of an employer whose contribution rate is determined by this Experience Rating Formula table shall be reduced by fifty percent (50%) for any year in which the balance in the Unemployment Insurance Fund on computation date equals or exceeds one and ninety-five hundredths percent (1.95%) of the gross taxable wages reported to the Commission in the previous calendar year, and the fund ratio determined on that date is less than five percent (5%) and shall be reduced by sixty percent (60%) for any year in which the balance in the Unemployment Insurance Fund on computation date equals or exceeds one and ninety-five hundredths percent (1.95%) of the gross taxable wages as reported to the Commission in the previous calendar year, and the fund ratio determined on that date is five percent (5%) or more.

EXPERIENCE RATING FORMULA

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
0.0%	0.2%	2.70%	2.70%	2.70%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%
0.2%	0.4%	2.70%	2.70%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%
0.4%	0.6%	2.70%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%
0.6%	0.8%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%
0.8%	1.0%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%
1.0%	1.2%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%
1.2%	1.4%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%
1.4%	1.6%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%
1.6%	1.8%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%
1.8%	2.0%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%
2.0%	2.2%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%
2.2%	2.4%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%
2.4%	2.6%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%
2.6%	2.8%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%
2.8%	3.0%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%
3.0%	3.2%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%
3.2%	3.4%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%
3.4%	3.6%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%
3.6%	3.8%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%	0.05%
3.8%	4.0%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%	0.05%	0.04%
4.0% & OVER		0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

d4. Expired.

d5. The standard contribution rate set by subdivision (b)(1) of this section applies to an employer unless the employer's account has a credit balance. Beginning January 1, 1999, for any calendar year that the training and reemployment contribution in G.S. 96-6.1 applies, the contribution rate of an employer whose account has a credit balance is determined in accordance with the rate set in the following Experience Rating Formula table for the applicable rate schedule. The contribution rate of an employer whose contribution rate is determined by this Experience Rating Formula table shall be reduced by fifty percent (50%) for any year in which the balance in the Unemployment Insurance Fund on computation date equals or exceeds one and ninety-five hundredths percent (1.95%) of the gross taxable wages reported to the Commission in the previous calendar year, and the fund ratio determined on that date is less than five percent (5%) and shall be reduced by sixty percent (60%) for any year in which the balance in the Unemployment Insurance Fund on computation date equals or exceeds one and ninety-five hundredths percent (1.95%) of the gross taxable wages reported to the Commission in the previous calendar year, and the fund ratio determined on that date is five percent (5%) or more.

EXPERIENCE RATING FORMULA

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
0.0%	0.2%	2.16%	2.16%	2.16%	2.16%	2.00%	1.84%	1.68%	1.52%	1.36%
0.2%	0.4%	2.16%	2.16%	2.16%	2.00%	1.84%	1.68%	1.52%	1.36%	1.20%
0.4%	0.6%	2.16%	2.16%	2.00%	1.84%	1.68%	1.52%	1.36%	1.20%	1.04%
0.6%	0.8%	2.16%	2.00%	1.84%	1.68%	1.52%	1.36%	1.20%	1.04%	0.88%
0.8%	1.0%	2.00%	1.84%	1.68%	1.52%	1.36%	1.20%	1.04%	0.88%	0.72%
1.0%	1.2%	1.84%	1.68%	1.52%	1.36%	1.20%	1.04%	0.88%	0.72%	0.64%
1.2%	1.4%	1.68%	1.52%	1.36%	1.20%	1.04%	0.88%	0.72%	0.64%	0.56%
1.4%	1.6%	1.52%	1.36%	1.20%	1.04%	0.88%	0.72%	0.64%	0.56%	0.48%
1.6%	1.8%	1.36%	1.20%	1.04%	0.88%	0.72%	0.64%	0.56%	0.48%	0.40%
1.8%	2.0%	1.20%	1.04%	0.88%	0.72%	0.64%	0.56%	0.48%	0.40%	0.32%
2.0%	2.2%	1.04%	0.88%	0.72%	0.64%	0.56%	0.48%	0.40%	0.32%	0.24%
2.2%	2.4%	0.88%	0.72%	0.64%	0.56%	0.48%	0.40%	0.32%	0.24%	0.16%
2.4%	2.6%	0.72%	0.64%	0.56%	0.48%	0.40%	0.32%	0.24%	0.16%	0.12%
2.6%	2.8%	0.64%	0.56%	0.48%	0.40%	0.32%	0.24%	0.16%	0.12%	0.08%
2.8%	3.0%	0.56%	0.48%	0.40%	0.32%	0.24%	0.16%	0.12%	0.08%	0.07%
3.0%	3.2%	0.48%	0.40%	0.32%	0.24%	0.16%	0.12%	0.08%	0.07%	0.06%
3.2%	3.4%	0.40%	0.32%	0.24%	0.16%	0.12%	0.08%	0.07%	0.06%	0.06%
3.4%	3.6%	0.32%	0.24%	0.16%	0.12%	0.08%	0.07%	0.06%	0.06%	0.05%
3.6%	3.8%	0.24%	0.15%	0.12%	0.08%	0.07%	0.06%	0.06%	0.05%	0.04%
3.8%	4.0%	0.16%	0.12%	0.08%	0.07%	0.06%	0.06%	0.05%	0.04%	0.03%
4.0% & OVER		0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

e. For any calendar year that the training and reemployment contribution in G.S. 96-6.1 applies, each employer whose account as of any computation date occurring after August 1, 1964, shows a debit balance shall be assigned the rate of contributions appearing on the line opposite its debit ratio as set forth in the following Rate Schedule for Overdrawn Accounts:

RATE SCHEDULE FOR OVERDRAWN ACCOUNTS BEGINNING WITH THE CALENDAR YEAR 1978

When the Debit Ratio Is:		
As Much As	But Less Than	Assigned Rate
0.0%	0.3%	2.3%
0.3	0.6	2.5
0.6	0.9	2.6
0.9	1.2	2.8
1.2	1.5	3.0
1.5	1.8	3.1
1.8	2.1	3.3

When the Debit Ratio Is: As Much As	But Less Than	Assigned Rate
2.1	2.4	3.4
2.4	2.7	3.6
2.7	3.0	3.8
3.0	3.3	3.9
3.3	3.6	4.1
3.6	3.9	4.2
3.9	4.2	4.4
4.2	4.5	4.6
4.5	4.8	4.8
4.8	5.1	5.0
5.1	5.4	5.2
5.4 and over		5.4

For any calendar year that the training and reemployment contribution in G.S. 96-6.1 does not apply, each employer whose account as of any computation date occurring after August 1, 1964, shows a debit balance shall be assigned the rate of contributions appearing on the line opposite its debit ratio as set forth in the following Rate Schedule for Overdrawn Accounts:

RATE SCHEDULE FOR OVERDRAWN ACCOUNTS BEGINNING WITH THE CALENDAR YEAR 1978

When the Debit Ratio Is: As Much As	But Less Than	Assigned Rate
0.0%	0.3%	2.9%
0.3	0.6	3.1
0.6	0.9	3.3
0.9	1.2	3.5
1.2	1.5	3.7
1.5	1.8	3.9
1.8	2.1	4.1
2.1	2.4	4.3
2.4	2.7	4.5
2.7	3.0	4.7
3.0	3.3	4.9
3.3	3.6	5.1
3.6	3.9	5.3
3.9	4.2	5.5
4.2 and over		5.7

The Rate Schedule for Overdrawn Accounts Beginning with the Calendar Year 1966 in force in any particular calendar year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

f. The computation date for all contribution rates shall be August 1 of the calendar year preceding the calendar year with respect to which such rates are effective.

g. Any employer may at any time make a voluntary contribution, additional to the contributions required under this Chapter, to the fund to be credited to its account, and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as this term is used in G.S. 96-8(8). Any voluntary contributions so made by an employer within 30 days after the date of mailing by the Commission pursuant to G.S. 96-9(c)(3) of notification of contribution rate contained in cumulative account statement and computation of rate, shall be credited to its account as of the previous July 31. If, however, the voluntary contribution is made after July 31 of any year it shall not be considered a part of the balance of the unemployment insurance fund for the purposes of G.S. 96-9(b)(3) until the following July 31. The Commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of the voluntary contribution by the employer.

h. If, within the calendar month in which the computation date occurs, the Commission finds that any employing unit has failed to file any report required in connection therewith or has filed a report which the Commission finds incorrect or insufficient, the Commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report, as the case may be, within 15 days after the mailing of such notice, the Commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.

i. Repealed by Session Laws 1987, c. 17, s. 5.

j. A tax is imposed upon contributions at the rate of twenty percent (20%) of the amount of contributions due. The tax is due and payable at the time and in the same manner as the contributions. The tax does not apply in a calendar year if, as of August 1 of the preceding year, either of the following conditions was met; (i) the amount in the Reserve Fund equals or exceeds one hundred sixty-three million three hundred forty-nine thousand dollars ($163,349,000), which is one percent (1%) of taxable wages for calendar year 1984; or (ii) the balance in the Unemployment Insurance Fund established by G.S. 96-6(a) is five hundred million ($500,000,000) or less. The collection of this tax, the assessment of interest and penalties on unpaid taxes, the filing of judgment liens, and the enforcement of the liens for unpaid taxes is governed by the provisions of G.S. 96-10 where applicable. Taxes collected under this subpart shall be credited to the Employment Security Commission Reserve Fund, and refunds of the taxes shall be paid from the same Fund. The clear proceeds of any civil penalties collected under this subpart shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Any interest collected on unpaid taxes shall be credited to the Special Employment Security Administration Fund, and any interest refunded on taxes imposed by this subpart shall be paid from the same Fund.

(c)(1) Except as provided in subsection (d) of this section, the Commission shall maintain a separate account for each employer and shall credit his account with all voluntary contributions made by him and all other contributions which he has paid or is paid on his behalf, provided the Commission shall credit the account of each employer in an amount equal to eighty percent (80%) of all voluntary contributions paid with respect to periods prior to January 1, 1984, and of all other contributions paid with respect to periods between July 1, 1965, and December 31, 1983. On the computation date, beginning first with August 1, 1948, the ratio of the credit balance in each individual account to the total of all the credit balances in all employer accounts shall be computed as of such computation date, and an amount equal to the interest credited to this State's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar quarters shall be credited prior to the next computation date on a pro rata basis to all employers' accounts having a credit balance on the computation date. Such amount shall be prorated to the individual accounts in the same ratio that the credit balance in each individual account bears to the total of the credit balances in all such accounts. In computing the amount to be credited to the account of an employer as a result of interest earned by funds on deposit in the unemployment trust fund in the treasury of the United States to the account of this State, any voluntary contributions made by an employer after July 31 of any year shall not be considered a part of the account balance of the employer until the next computation date occurring after such voluntary contribution was made. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended. Nothing in this Act shall be construed to grant any employer or individual in his service prior claims or rights to the amount paid by him into the fund either on his own behalf or on behalf of such individuals.

(2) Charging of benefit payments. —

a. Benefits paid shall be allocated to the account of each base period employer in the proportion that the base period wages paid to an eligible individual in any calendar quarter by each such employer bears to the total wages paid by all base period employers during the base period, except as hereinafter provided in paragraphs b, c, and d of this subdivision, G.S. 96-9(d)(2)c, and 96-12.01G. The amount so allocated shall be multiplied by one hundred twenty percent (120%) and charged to that employer's account. Benefits paid shall be charged to employers' accounts upon the basis of benefits paid to claimants whose benefit years have expired.

b. Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this paragraph and based on wages paid prior to the date of (i) the leaving of work by the claimant without good cause attributable to the employer; (ii) the discharge of claimant for misconduct in connection with his work; (iii) the discharge of the claimant for substantial fault as that term may be defined in G.S. 96-14; (iv) the discharge of the claimant solely for a bona fide inability to do the work for which he was hired but only where the claimant's period of employment was 100 days or less; (v) separations made disqualifying under G.S. 96-14(2b) and (6a); (vi) separation due to leaving for disability or health condition; or (vii) separation of claimant solely as the result of an undue family hardship shall not be charged to the account of an employer by whom the claimant was employed at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding any separation of the individual from work as are or may be required by the regulations of the Commission.

No benefit charges shall be made to the account of any employer who has furnished work to an individual who, because of the loss of employment with one or more other employers, becomes eligible for partial benefits while still being furnished work by such employer on substantially the same basis and substantially the same amount as had been made available to such individual during his base period whether the employments were simultaneous or successive; provided, that such employer makes a written request for noncharging of benefits in accordance with Commission regulations and procedures.

No benefit charges shall be made to the account of any employer for benefit years ending on or before June 30, 1992, where benefits were paid as a result of a discharge due directly to the reemployment of a veteran mandated by the Veteran's Reemployment Rights Law, 38 USCA § 2021, et seq.

No benefit charges shall be made to the account of any employer where benefits are paid as a result of a decision by an Adjudicator, Appeals Referee or the Commission if such decision to pay benefits is ultimately reversed; nor shall any such benefits paid be deemed to constitute an overpayment under G.S. 96-18(g)(2), the provisions thereof notwithstanding. Provided, an overpayment of benefits paid shall be established in order to provide for the waiting period required by G.S. 96-13(c).

c. Any benefits paid to any claimant who is attending a vocational school or training program as provided in G.S. 96-13(a)(3) shall not be charged to the account of the base period employer(s).

d. Any benefits paid to any claimant under the following conditions shall not be charged to the account of the base period employer(s):
    1. The benefits are paid for unemployment due directly to a major natural disaster, and
    2. The President has declared the disaster pursuant to the Disaster Relief Act of 1970, 42 USCA 4401, et seq., and
    3. The benefits are paid to claimants who would have been eligible for disaster unemployment assistance under this Act, if they had not received unemployment insurance benefits with respect to that unemployment.

e.1. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to the experience rating account of any employer.

2. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(3) As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each employer's account and shall furnish him with a statement of all charges and

credits thereto. At the same time the Commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files an application for review or redetermination prior to May 1 following the effective date of such rates. The Commission may redetermine on its own motion within the same period of time.

(4) Transfer of account. —

a. 1. Mandatory. — When an employer, as defined in G.S. 96-8(5)b., in any manner acquires all of the organization, trade, or business of another employing unit, the account of the predecessor shall be transferred as of the date of the acquisition to the successor employer for use in the determination of the successor's rate of contributions. This mandatory transfer does not apply when there is no common ownership between the predecessor and the successor and the successor acquired the assets of the predecessor in a sale in bankruptcy. In this circumstance, the successor's rate of contributions is determined without regard to the predecessor's rate of contributions.

2. Consent. — When an employer, as defined in G.S. 96-8(5)b., in any manner acquires a distinct and severable portion of the organization, trade, or business of another employing unit, the part of the account of the predecessor that relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition to the successor employer for use in the determination of the successor's rate of contributions, provided application for transfer is made within 60 days after the Commission notifies the successor of the right to request such transfer, otherwise the effective date of the transfer shall be the first day of the calendar quarter in which such application is filed, and that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade or business. On or after January 1, 2006, whenever part of an organization, trade, or business is transferred between entities subject to substantially common ownership, management, or control, the tax account shall be transferred in accordance with regulations. However, employing units transferring entities with any common ownership, management, or control are not entitled to separate and distinct employer status under this Chapter. Provided, however, that the transfer of an account for the purpose of computation of rates shall be deemed to have been made prior to the computation date falling within the calendar year within which the effective date of such transfer occurs and the account shall thereafter be used in the computation of the rate of the successor employer for succeeding years, subject, however, to the provisions of paragraph b of this subdivision. No request for a transfer of the account will be accepted and no transfer of the account will be made if the request for the transfer of the account is not received within two years of the date of acquisition or notification by the Commission of the right to request such transfer, whichever occurs later. How-

ever, in no event will a request for a transfer be allowed if an account has been terminated because an employer ceases to be an employer pursuant to G.S. 96-9(c)(5) and G.S. 96-11(d) regardless of the date of notification.

a1. A new employing unit shall not be assigned a discrete employer number when there is an acquisition or change in the form or organization of an existing business enterprise, or severable portion thereof, and there is a continuity of control of the business enterprise. That new employing unit shall continue to be the same employer for the purposes of this Chapter as before the acquisition or change in form. As used in this sub-subdivision:

1. "Control of the business enterprise" may occur by means of ownership of the organization conducting the business enterprise, ownership of assets necessary to conduct the business enterprise, security arrangements or lease arrangements covering assets necessary to conduct the business enterprise, or a contract when the ownership, stated arrangements, or contract provide for or allow direction of the internal affairs or conduct of the business enterprise.
2. A "continuity of control" will exist if one or more persons, entities, or other organizations controlling the business enterprise remain in control of the business enterprise after an acquisition or change in form. Evidence of continuity of control shall include, but not be limited to, changes of an individual proprietorship to a corporation, partnership, limited liability company, association, or estate; a partnership to an individual proprietorship, corporation, limited liability company, association, estate, or the addition, deletion, or change of partners; a limited liability company to an individual proprietorship, partnership, corporation, association, estate, or to another limited liability company; a corporation to an individual proprietorship partnership, limited liability company, association, estate, or to another corporation or from any form to another form.

This sub-subdivision shall not modify the provisions of G.S. 96-10(d) — Collections of Contributions Upon Transfer or Cessation of Business.

b. Notwithstanding any other provisions of this section, if the successor employer was an employer subject to this Chapter prior to the date of acquisition of the business, the successor's rate of contribution for the period from that date to the end of the then current contribution year shall be the same as the successor's rate in effect on the date of the acquisition. If the successor was not an employer prior to the date of the acquisition of the business, the successor shall be assigned a standard beginning rate of contribution set forth in G.S. 96-9(b)(1) for the remainder of the year in which the successor acquired the business of the predecessor; however, if the successor makes application for the transfer of the account within 60 days after notification by the Commission of the right to do so and the account is transferred, or meets the requirements for mandatory transfer, the successor shall be assigned for the remainder of the year the rate applicable to the predecessor employer or employers on the date of acquisition of the business, as long as there was only one predecessor or, if more than one, the predecessors had identical rates. In the event the rates of the predecessor were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers on the date of acquisition of the business.

Irrespective of any other provisions of this Chapter, when an account is transferred in its entirety by an employer to a successor, the transferring employer shall thereafter pay the standard beginning rate of contributions set forth in G.S. 96-9(b)(1) and shall continue to pay at that rate until the transferring employer qualifies for a reduction, reacquires the account transferred or acquires the experience rating account of another employer, or is subject to an increase in rate under the conditions prescribed in G.S. 96-9(b)(2) and (3).

c. In those cases where the organization, trade, or business of a deceased person, or insolvent debtor is taken over and operated by an administrator, administratrix, executor, executrix, receiver, or trustee in bankruptcy, such employing units shall automatically succeed to the account and rate of contribution of such deceased person, or insolvent debtor without the necessity of the filing of a formal application for the transfer of such account.

(5) In the event any employer subject to this Chapter ceases to be such an employer, his account shall be closed and the same shall not be used in any future computation of such employer's rate nor shall any period prior to the effective date of the termination of such employer during which benefits were chargeable be considered in the application of G.S. 96-9(b)(2) of this Chapter.

(6) If the Commission finds that an employer's business is closed solely because of the entrance of one or more of the owners, officers, partners, or the majority stockholder into the Armed Forces of the United States, or of any of its allies, or of the United Nations, such employer's experience rating account shall not be terminated; and, if the business is resumed within two years after the discharge or release from active duty in the Armed Forces of such person or persons, the employer's account shall be deemed to have been chargeable with benefits throughout more than 13 consecutive calendar months ending July 31 immediately preceding the computation date. This subdivision shall apply only to employers who are liable for contributions under the experience rating system of financing unemployment benefits. This subdivision shall not be construed to apply to employers who are liable for payments in lieu of contributions or to employers using the reimbursable method of financing benefit payments.

(d) Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this paragraph. For the purposes of this paragraph, a nonprofit organization is an organization (or group of organizations) described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.

(1)a. Any nonprofit organization which becomes subject to this Chapter on or after January 1, 1972, shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this paragraph to pay the Commission for the Unemployment Insurance Fund an amount equal to the amount of regular benefits and of one half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment which begin within a benefit year established during the effective period of such election.

b. Any nonprofit organization which is or becomes subject to this Chapter on or after January 1, 1972, may elect to become liable

G.S. 96-9(d)(1)d, (d)(2)d, (i)(1)d, and (i)(2)d are set out twice. See note.

for payments in lieu of contributions for a period of not less than four calendar years beginning with the date on which subjectivity begins by filing a written notice of its election with the Commission not later than 30 days immediately following the date of written notification of the determination of such subjectivity. Provided if notification is not by registered mail, the election may be made on or after January 1, 1972, within six months following the date of the written notification of the determination of such subjectivity. If such election is not made as set forth herein, no election can be made until after four calendar years have elapsed under the contributions method of payment.

c. Any nonprofit organization which makes an election in accordance with subparagraph b of this paragraph will continue after such four calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election not later than 30 days prior to the next January 1, effective on such January 1. Provided, however, no employer granted or in reimbursement status will be allowed refund of any previous balances used in a transfer to reimbursement status.

d. **(Effective until January 1, 2010)** Any nonprofit organization which has been paying contributions under this Chapter for a period of at least four consecutive calendar years subsequent to January 1, 1972, may elect to change to a reimbursement basis by filing with the Commission not later than 30 days prior to the next January 1 a written notice of election to become liable for payments in lieu of contributions, effective on such January 1. Such election shall not be terminable for a period of four calendar years. In the event of such an election, the account of such employer shall be closed and shall not be used in any future computation of such employer's contribution rate in any manner whatsoever. Provided, however, any nonprofit employer formerly paying contributions who elects and qualifies to change to a reimbursement basis may be relieved of the requirement to pay one percent (1%) of taxable wages as required by G.S. 96-9(d)(2)a to the following extent and upon the following conditions:

1. Any nonprofit employer which has, for the year the election will be effective, an experience rating of 1.7 or less, will have transferred from its experience rating account an amount equal to one percent (1%) of its payroll as reported for each of the four calendar quarters which constitute the election year;
2. Any nonprofit employer which has, for the year the election will be effective, an experience rating of less than 2.7 but more than 1.7, will have transferred from its experience rating account an amount equal to one-half of one percent (.5%) of its payroll as reported for each of the four calendar quarters which constitute the election year. Such employers shall make advance payments to the Commission quarterly, computed at one-half of one percent (.5%) of the taxable wages reported as provided in G.S. 96-9(d)(2)a;
3. Any nonprofit employer which has, for the year the election will become effective, an experience rating of 2.7 or more, upon electing to change to a reimbursement basis, will meet

G.S. 96-9(d)(1)d, (d)(2)d, (i)(1)d, and (i)(2)d are set out twice. See note.

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all the requirements of G.S. 96-9(d)(2)a, including making advance payments computed at one percent (1%) of taxable wages.

d. **(Effective January 1, 2010)** Any nonprofit organization which has been paying contributions under this Chapter for a period of at least four consecutive calendar years subsequent to January 1, 1972, may elect to change to a reimbursement basis by filing with the Commission not later than 30 days prior to the next January 1 a written notice of election to become liable for payments in lieu of contributions, effective on such January 1. Such election shall not be terminable for a period of four calendar years. In the event of such an election, the account of such employer shall be closed and shall not be used in any future computation of such employer's contribution rate in any manner whatsoever.

d1. **(Effective January 1, 2010)** Any nonprofit organization which makes an election in accordance with subparagraph b. of this paragraph must secure such election by making a payment in lieu of contributions as provided in subdivision (2) of this subsection, posting a surety bond from an insurance company duly licensed to conduct business in this State, or obtaining an irrevocable letter of credit with the Commission to insure the payments in lieu of contributions as provided in subdivision (2) of this subsection. Any surety bond posted under this paragraph shall be in force for a period of not less than two calendar years and shall be renewed with the approval of the Commission. The Commission may adopt rules to implement the provisions of this subparagraph.

e. The Commission, in accordance with such regulations as it may adopt, shall notify each nonprofit organization of any determination which it may make of its status as an employer and of the effective date of any election which it makes and of any termination of such election. Such determinations shall be subject to reconsideration, appeal and review.

(2) Payments in lieu of contributions shall be made in accordance with the provisions of this subparagraph and shall be processed as provided herein.

a. Quarterly contributions and wage reports and advance payments shall be submitted to the Commission quarterly under the same conditions and requirements of G.S. 96-9 and 96-10, except that the amount of advance payments shall be computed as one percent (1%) of taxable wages and entered on such reports; provided that such advance payments shall become effective only with respect to the first four thousand two hundred dollars ($4,200) in wages paid in a calendar year until January 1, 1978. On and after that date advance payments shall be effective with respect to the federally required wage base provided that after December 31, 1983, the wage base shall be the same as that provided for in G.S. 96-9(a)(5). Collection of such advance payments shall be made as provided for the collection of contributions in G.S. 96-10.

Beginning January 1, 1978, any employer making quarterly reports of employment to the Commission and if such employer is a newly electing reimbursement employer he shall pay contributions of one percent (1%) of taxable wages entered on such reports.

G.S. 96-9(d)(1)d, (d)(2)d, (i)(1)d, and (i)(2)d are set out twice. See note.

Any employer paying by reimbursement having been, prior to July 1, under the reimbursement method of payment for the preceding calendar year, shall continue to file quarterly reports but shall make no payments with those reports.

b. The Commission shall establish a separate account for each such employer and such account shall be credited, and maintained as provided in G.S. 96-9(c)(1), except that advance payments shall be credited in full and voluntary contributions are not applicable.

c. Benefits paid shall be allocated to the employer's account in accordance with G.S. 96-9(c)(2)a but charged to such account without the application of any multiplier, and no benefits shall be noncharged except amounts equal to fifty percent (50%) of extended benefits paid and amounts equal to one hundred percent (100%) of benefits paid through error.

d. **(Effective until January 1, 2010)** As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each such employer's account and shall furnish him with a statement of all charges and credits thereto.

As of the second computation date (August 1) following the effective date of liability and as of each computation date thereafter, any credit balance remaining in the employer's account (after all applicable postings) in excess of whichever is the greater (a) benefits charged to such account during the 12 months ending on such computation date, or (b) one percent (1%) of taxable wages for the 12 months ending on June 30 preceding such computation date shall be refunded. Any such refund shall be made prior to February 1 following such computation date.

Should the balance in such account not equal that requiring a refund, the employer shall upon notice and demand for payment mailed to his last known address pay into his account an amount that will bring such balance to the minimum required for a refund. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment. Any such amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Upon a change in election as to the method of payment from reimbursement to contributions, or upon termination of coverage and after all applicable benefits paid based on wages paid prior to such change in election or termination of coverage have been charged, any credit balance in such account shall be refunded to the employer.

Should there be a debit balance in such account, the employer shall, upon notice and demand for payment, mailed to his last-known address, pay into his account an amount equal to such debit balance. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment.

Any such amount unpaid on the date due shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Beginning January 1, 1978, each employer paying by reimbursement shall have his account computed on computation date (August 1) and if there is a deficit shall be billed for an amount necessary to bring his account to one percent (1%) of his taxable

G.S. 96-9(d)(1)d, (d)(2)d, (i)(1)d, and (i)(2)d are set out twice. See note.

payroll. Any amount of his account in excess of that required to equal one percent (1%) of his payroll shall be refunded. Amounts due from any employer to bring his account to a one percent (1%) balance shall be billed as soon as practical and payment will be due within 25 days from the date of mailing of the statement of amount due. Amounts due from any nonprofit organization to bring its account to a one percent (1%) balance shall be billed as soon as practical, and payment will be due within 60 days from the date of mailing of the statement of the amount due.

d. **(Effective January 1, 2010)** As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each such employer's account and shall furnish him with a statement of all charges and credits thereto.

Should the balance in such account not equal that requiring a refund, the employer shall upon notice and demand for payment mailed to his last known address pay into his account an amount that will bring such balance to the minimum required for are fund. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment. Any such amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Should there be a debit balance in such account, the employer shall, upon notice and demand for payment, mailed to his last-known address, pay into his account an amount equal to such debit balance. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment.

Any such amount unpaid on the date due shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Beginning January 1, 1978, each employer paying by reimbursement shall have his account computed on computation date (August 1) and if there is a deficit shall be billed for an amount necessary to bring his account to one percent (1%) of his taxable payroll. Any amount of his account in excess of that required to equal one percent (1%) of his payroll shall be refunded. Amounts due from any employer to bring his account to a one percent (1%) balance shall be billed as soon as practical and payment will be due within 25 days from the date of mailing of the statement of amount due. Amounts due from any nonprofit organization to bring its account to a one percent (1%) balance shall be billed as soon as practical, and payment will be due within 60 days from the date of mailing of the statement of the amount due.

e. The Commission may make necessary rules and regulations with respect to coverage of a group of nonprofit organizations and with respect to the reimbursement of benefits payments by such group of nonprofit organizations.

(3)a. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to a nonprofit organization which makes payments to the State Unemployment Insurance Fund in lieu of contributions.

b. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(e) In order that the Commission shall be kept informed at all times on the circumstances and conditions of unemployment within the State and as to whether the stability of the fund is being impaired under the operation and effect of the system provided in subsection (c) of this section, the actuarial study now in progress shall be continued and such other investigations and studies of a similar nature as the Commission may deem necessary shall be made.

(f)(1) On and after January 1, 1978, all benefits charged to a State or local governmental employing unit shall be paid to the Commission within 25 days from the date a list of benefit charges is mailed to the State or local governmental employing agency and the appropriate account(s) shall be credited with such payment(s).

(2) In lieu of paying for benefits by reimbursement as provided in subdivision (1) hereof, any State or local governmental employing unit may elect pursuant to rules and regulations established by the Commission:

a. To pay contributions on an experience rating basis as provided in G.S. 96-9(a), (b), and (c); or,

b. To pay to the Commission, within 25 days from the date a list of benefit charges is mailed to such employing unit, a sum equal to the amount which its account would be charged if it were a tax paying employer under G.S. 96-9(c)(2).

(3) State or local governmental employing units paying for benefits as provided in subdivision (1) herein may establish pool accounts; provided, that such pool accounts are established and maintained according to the rules and regulations of the Commission.

(4) Any governmental entity paying by reimbursement as provided in subdivision (1) hereof shall not have any benefits paid against its account noncharged or forgiven except as provided in G.S. 96-9(d)(2)c.

(g) Nothing contained in subsections (d), (f), and (i) of this section prevents the Commission from providing any reimbursing employer with informational bills or lists of charges on a basis more frequent than yearly, if in its sole discretion, the Commission considers such action to be in the best interest of the Commission and the affected employer(s).

(h)(1) Any nonprofit organization which has been paying contributions on a reimbursement basis for at least three consecutive calendar years during none of which years the benefit charges exceeded four tenths of one percent (.4%) of its taxable payroll may, before November 1 of the fourth or subsequent calendar year, elect to pay contributions by special reimbursement on the basis provided for in subdivision (2) below but only upon the following conditions:

a. Benefit charges in the year of election are less than four tenths of one percent (.4%) of taxable payroll.

b. The election shall apply to no less than the four calendar years following the year of election unless terminated by the Commission under subdivision (3) below.

c. All reimbursements during the year of election and the three preceding years were paid when due.

d. The election of special reimbursement shall not entitle the electing nonprofit organization to any refund of any portion of its account balance.

e. No later than January 1 of the first year to which its election applies, the electing nonprofit organization shall furnish the Commission a letter of credit in an amount equal to one hundred fifty percent (150%) of the account balance required under subdivision (2) below.

f. The Commission shall by regulation prescribe the form of the letter of credit and the criteria for the financial institution issuing such letter of credit along with the form of election under this section.

(2) Any qualified nonprofit organization that meets the conditions of subdivision (1) above shall, upon the approval of its election by the Commission, pay contributions by special reimbursement as follows:

a. The organization's account shall have a required minimum balance that shall be computed on August 1 of each calendar year for the following calendar year and shall be equal to the greater of:

1. One-half the largest amount of claims charged to it during any of the three calendar years preceding the computation date; or,

2. One-tenth of one percent (0.1%) of the highest total taxable payroll during any of the three calendar years preceding the computation date.

b. On the first day of each quarter of any calendar year, the Commission shall bill the employer for an amount necessary to bring its account to the required minimum balance, and the amount so billed is due no later than 25 days after the bill is mailed.

(3) If any electing organization shall fail to make any quarterly payment when due:

a. The Commission may draw the full amount of the letter of credit for application to the employer's account;

b. The organization's required minimum balance shall immediately and without notice become the greater of:

1. A sum equal to its current minimum balance plus the full amount of the current letter of credit; or

2. A sum equal to five tenths of one percent (.5%) of its total taxable payroll. Any amount necessary, after the application of any funds drawn from the letter of credit, to bring the employer's account to such balance shall be payable upon demand.

c. If, after demand, the organization shall fail to pay any sums required under paragraph b. above, the Commission may revoke the organization's election for special reimbursement and any difference between the employer's account balance and one percent (1%) of its total taxable payroll shall become immediately due and payable.

d. The Commission may, in addition, exercise any of the powers granted to it in G.S. 96-10 to collect any amount due.

e. Pursuant to such regulations as the Commission may adopt, the Commission shall afford any organization affected by this paragraph a hearing to determine if any increase in the organization's minimum required balance should be reduced, in whole or in part, or if any revocation of a special reimbursement election should be rescinded. If the Commission, in its sole discretion, is satisfied that the conditions giving rise to the increase or revocation have been corrected, it may reduce such increase or rescind such revocation provided that it may require as a condition of such reduction or recision a new letter of credit up to three times the amount normally required.

G.S. 96-9(d)(1)d, (d)(2)d, (i)(1)d, and (i)(2)d are set out twice. See note.

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f. When used in the subsection, "total taxable payroll" means the highest total taxable payroll during the three most recent, completed calendar years.

(i) Indian Tribes. — Benefits paid to employees of Indian tribe employing units shall be financed in accordance with the provisions of this subsection. For the purposes of this subsection, an "Indian tribe employing unit" is an Indian tribe, a subdivision or subsidiary of an Indian tribe, or a business enterprise wholly owned by an Indian tribe.

(1) Election. —

a. An Indian tribe employing unit shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this subsection to pay the Commission for the Unemployment Insurance Fund an amount equal to the amount of benefits paid that is attributable to service in the employ of the unit, to individuals for weeks of unemployment that begin within a benefit year established during the effective period of the election.

b. An Indian tribe employing unit may elect to become liable for payments in lieu of contributions for a period of not less than three calendar years by filing a written notice of its election with the Commission at least 30 days before the January 1 effective date of the election.

c. An Indian tribe employing unit that makes an election in accordance with this subsection will continue after the end of the three calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election at least 30 days before the January 1 effective date of the termination.

d. **(Effective until January 1, 2010)** The account of an Indian tribe employing unit that has been paying contributions under this Chapter for a period of at least three consecutive calendar years and that elects to change to a reimbursement basis shall be closed and shall not be used in any future computation of the unit's contribution rate in any manner except that the unit may be relieved of the requirement to pay one percent (1%) of taxable wages as required by subdivision (2) of this subsection to the following extent and upon the following conditions:

1. An Indian tribe employing unit that has, for the year the election will be effective, an experience rating of 1.7 or less will have transferred from its experience rating account an amount equal to one percent (1%) of its payroll as reported for each of the four calendar quarters that constitute the election year.

2. An Indian tribe employing unit that has, for the year the election will be effective, an experience rating of less than 2.7 but more than 1.7 will have transferred from its experience rating account an amount equal to one-half of one percent (.5%) of its payroll as reported for each of the four calendar quarters that constitute the election year. These employing units shall make advance payments to the Commission quarterly, computed at one-half of one percent (.5%) of the taxable wages reported as provided in subdivision (2) of this subsection.

3. An Indian tribe employing unit that has, for the year the election will become effective, an experience rating of 2.7 or

G.S. 96-9(d)(1)d, (d)(2)d, (i)(1)d, and (i)(2)d are set out twice. See note.

more, upon electing to change to a reimbursement basis, will meet all the requirements of subdivision (2) of this subsection, including making advance payments computed at one percent (1%) of taxable wages.

d. **(Effective January 1, 2010)** The account of an Indian tribe employing unit that has been paying contributions under this Chapter for a period of at least three consecutive calendar years and that elects to change to a reimbursement basis shall be closed and shall not be used in any future computation of the unit's contribution rate in any manner.

e. The Commission, in accordance with regulations it adopts, shall notify each Indian tribe employing unit of any determination of the effective date of any election it makes and of any termination of the election. These determinations shall be subject to reconsideration, appeal, and review.

(2) Procedure. — Indian tribe employing units' payments by reimbursement in lieu of contributions shall be made and processed as provided in this subdivision.

a. Quarterly contributions and wage reports and advance payments shall be submitted to the Commission quarterly under the same conditions and requirements of G.S. 96-9 and G.S. 96-10, except that the amount of advance payments shall be computed as one percent (1%) of taxable wages and entered on the reports, and except that the wage base shall be the same as that provided for in G.S. 96-9(a)(5). Collection of these advance payments shall be made as provided for the collection of contributions in G.S. 96-10.

Any Indian tribe employing unit paying by reimbursement having been, prior to July 1, under the reimbursement method of payment for the preceding calendar year, shall continue to file quarterly reports but shall make no payments with those reports.

b. The Commission shall establish a separate account for each Indian tribe employing unit paying by reimbursement. The account shall be credited and maintained as provided in G.S. 96-9(c)(1), except that advance payments shall be credited in full, and voluntary contributions are not applicable.

c. Benefits paid shall be allocated to the employer's account in accordance with G.S. 96-9(c)(2)a. but charged to the account without the application of any multiplier, and no benefits shall be noncharged except amounts of benefits paid through error.

d. **(Effective until January 1, 2010)** As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each Indian tribe employing unit's account and shall furnish the unit with a statement of all charges and credits to the account.

As of August 1 of each year, there shall be refunded any credit balance remaining in the Indian tribe employing unit's account (after all applicable postings) in excess of one percent (1%) of taxable wages for the 12 months ending on June 30 preceding the computation date. The refund must be made before February 1 following the computation date.

If the balance in the account does not equal one percent (1%) of taxable wages, the Indian tribe employing unit must, upon notice and demand for payment mailed to its last known address, pay

G.S. 96-9(d)(1)d, (d)(2)d, (i)(1)d, and (i)(2)d are set out twice. See note.

into the account an amount that will bring the balance to one percent (1%) of taxable wages. This amount becomes due on or before the 25th day after the notice and demand for payment is mailed. Any amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Upon a change in election as to the method of payment from reimbursement to contributions, or upon termination of coverage and after all applicable benefits paid based on wages paid before the change in election or termination of coverage have been charged, any credit balance in the account shall be refunded to the Indian tribe employing unit.

If there is a debit balance in the account, the Indian tribe employing unit must, upon notice and demand for payment mailed to its last known address, pay into the account an amount necessary to bring the account to one percent (1%) of taxable wages. This amount becomes due on or before the 25th day after the notice and demand for payment is mailed. Any amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

d. **(Effective January 1, 2010)** As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each Indian tribe employing unit's account and shall furnish the unit with a statement of all charges and credits to the account.

If the balance in the account does not equal one percent (1%) of taxable wages, the Indian tribe employing unit must, upon notice and demand for payment mailed to its last known address, pay into the account an amount that will bring the balance to one percent (1%) of taxable wages. This amount becomes due on or before the 25th day after the notice and demand for payment is mailed. Any amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

If there is a debit balance in the account, the Indian tribe employing unit must, upon notice and demand for payment mailed to its last known address, pay into the account an amount necessary to bring the account to one percent (1%) of taxable wages. This amount becomes due on or before the 25th day after the notice and demand for payment is mailed. Any amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

e. Notices to Indian tribe employing units of payment and reporting delinquency must include information that failure to make full payment within the time prescribed will cause the unit to become liable for contributions under subsection (a) of this section, will cause the unit to lose the option of making payment by reimbursement in lieu of contributions, and could cause the unit to lose coverage under this Chapter for services performed for the unit.

(3) Forfeiture of option. — If an Indian tribe employing unit fails to make payments, including interest and penalties, required under this subsection within 90 days after receipt of the bill, the unit loses the option to make payments by reimbursement in lieu of contributions for the following calendar year unless payment in full is made before

contribution rates for the following calendar year are computed. An Indian tribe that has lost the option to make payments by reimbursement in lieu of contributions for a calendar year regains that option for the following calendar year if it makes all contributions timely during the year for which the option was lost, and no payments, penalties, or interest remain outstanding.

(4) Forfeiture of coverage. — If an Indian tribe employing unit fails to make payments, including interest and penalties, required under this subsection after all collection activities considered necessary by the Commission have been exhausted, services performed for that employing unit are no longer treated as "employment" for the purpose of coverage under this Chapter. An Indian tribe employing unit that has lost coverage regains coverage under this Chapter for services performed for the employing unit if the Commission determines that all contributions, payments in lieu of contributions, penalties, and interest have been paid.

The Commission shall notify the Internal Revenue Service and the United States Department of Labor of any termination or reinstatement of coverage pursuant to this subdivision.

(5) Extended benefits. — Extended benefits paid that are attributable to service in the employ of an Indian tribe employing unit and not reimbursed by the federal government shall be financed in their entirety by the Indian tribe employing unit. (Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17; c. 881, s. 3; 1949, c. 424, ss. 9-13; c. 969; 1951, c. 322, s. 2; c. 332, ss. 4-7; 1953, c. 401, ss. 12-14; 1955, c. 385, ss. 5, 6; 1957, c. 1059, ss. 5-11; 1959, c. 362, ss. 7, 8; 1965, c. 795, ss. 6-10; 1969, c. 575, ss. 7, 8; 1971, c. 673, ss. 14-20; 1973, c. 172, ss. 2, 3; c. 740, s. 1; 1977, c. 727, ss. 37-49; 1979, c. 660, ss. 13-15; 1981, c. 160, ss. 13-15; c. 534; 1983, c. 585, ss. 1-11; 1985, c. 552, ss. 5-7, 13; 1987, c. 17, ss. 3-7; c. 197; 1987 (Reg. Sess., 1988), c. 999, ss. 2, 3; 1989, c. 583, ss. 4, 6; c. 770, s. 20; 1991, c. 276, s. 1; c. 421, s. 1; c. 458, ss. 2, 3; 1991, Ex. Sess., c. 6, s. 2; 1993, c. 85, s. 1; c. 424, s. 1; 1994, Ex. Sess., c. 10, ss. 1-3; 1995, c. 4, ss. 1-3; c. 463, ss. 1-3; 1996, 1st Ex. Sess., c. 1; 1997-398, s. 4; 1999-196, s. 3; 1999-321, ss. 1, 3-6; 1999-340, ss. 1-3; 1999-421, s. 1; 2000-140, s. 87; 2001-184, ss. 4, 5, 6; 2001-207, s. 1; 2001-251, ss. 2, 5; 2001-414, s. 40; 2001-424, ss. 30.5(f), 30.5(g), 30.5(h), 30.5(i), 30.5(j); 2001-513, s. 7; 2003-67, s. 1; 2003-220, ss. 2, 4; 2003-405, s. 1; 2004-124, s. 13.7B(a); 2004-170, s. 3(a); 2005-276, s. 6.37(j); 2005-410, ss. 2, 3, 5; 2006-251, s. 1; 2008-157, ss. 1, 2.)

Subdivisions (d)(1)d, d(2)d, (i)(1)d, and (i)(2)d, Set Out Twice. — The first versions of (d)(1)d, (d)(2)d, (i)(1)d and (i)(2)d, are effective until January 1, 2010. The second versions of subsections (d)(1)d, (d)(2)d, (i)(1)d and (i)(2)d, are effective January 1, 2010.

Effect of Amendments. —

Session Laws 2008-157, ss. 1 and 2, effective January 1, 2010, deleted the proviso at the end of subdivision (d)(1)d and deleted subdivisions (d)(1)d.1 through (d)(1)d.3 regarding taxation and reimbursement of nonprofit employer unemployment contributions; added subdivision (d)(1)d1; deleted the second and fourth paragraphs in subdivision (d)(2)d regarding computation dates for unemployment contributions; deleted the language beginning with "except that the unit..." and ending with "...upon the following conditions" at the end of subdivision (i)(1)d and deleted subdivisions (i)(1)d.1 through (i)(1)d.3 regarding taxation and reimbursement of unemployment contributions made by Indian tribes; and deleted the second and fourth paragraphs in subdivision (i)(2)d regarding computation dates for unemployment contributions.

§ 96-12. Benefits.

CASE NOTES

Unemployment Compensation Insurance Benefits Not Reduced by Amount of Pension Benefits Received. — Superior court did not err in affirming the decision of the Employment Security Commission (ESC) that an employee's benefits would not be reduced by the amount of pension benefits received under the Employment Security Act, G.S.. 96-12(f) and G.S. 96-14(9), because the employee did not "receive" his lump sum that he had rolled over from the employer directly into an Individual Retirement Account; deference was given to the Federal Employment and Training Administration's treatment of lump sum rollover distributions with regard to reductions in unemployment compensation insurance benefits, and the Administration stated that if a rollover from a qualified trust into an eligible retirement plan was not subject to federal income tax, it was not received for purposes of the Federal Unemployment Tax Act, 26 U.S.C.S. § 3304(a)(15). Carolina Power & Light Co. v. Employment Sec. Comm'n, — N.C. App. —, 665 S.E.2d 141, 2008 N.C. App. LEXIS 1526 (2008).

§ 96-14. Disqualification for benefits.

CASE NOTES

I. General Consideration.
III. Misconduct.

I. GENERAL CONSIDERATION.

Construction. —

Superior court did not err in affirming the decision of the Employment Security Commission (ESC) that an employee left work with good cause attributable to the employer because the employee met his burden of showing that his acceptance of a voluntary early retirement package was valid and not indicative of an unwillingness to work and that such acceptance was a result of the employer's actions; case law was favorable toward applicants for unemployment benefits under the Employment Security Act, G.S. 96-1 et seq., and the ESC's unchallenged findings of fact were liberally in favor of the employee. Carolina Power & Light Co. v. Employment Sec. Comm'n, — N.C. App. —, 665 S.E.2d 141, 2008 N.C. App. LEXIS 1526 (2008).

Unemployment Compensation Insurance Benefits Not Reduced by Amount of Pension Benefits Received. — Superior court did not err in affirming the decision of the Employment Security Commission (ESC) that an employee's benefits would not be reduced by the amount of pension benefits received under the Employment Security Act, G.S. 96-12(f) and G.S. 96-14(9), because the employee did not "receive" his lump sum that he had rolled over from the employer directly into an Individual Retirement Account; deference was given to the Federal Employment and Training Administration's treatment of lump sum rollover distributions with regard to reductions in unemployment compensation insurance benefits, and the Administration stated that if a rollover from a qualified trust into an eligible retirement plan was not subject to federal income tax, it was not received for purposes of the Federal Unemployment Tax Act, 26 U.S.C.S. § 3304(a)(15). Carolina Power & Light Co. v. Employment Sec. Comm'n, — N.C. App. —, 665 S.E.2d 141, 2008 N.C. App. LEXIS 1526 (2008).

III. MISCONDUCT.

Removal of Computer Hard Drive Sufficient Misconduct. — Employment Security Commission properly found that work-related misconduct was the basis of an employee's termination and properly denied unemployment benefits because the employee removed the hard drive from the employee's work computer and asserted a personal copyright interest in the employer's catalogs and web site without seeking and receiving permission, evidencing a deliberate disregard of standards of behavior which the employer had the right to expect of an employee. Binney v. Banner Therapy Prods., 362 N.C. 310, 661 S.E.2d 717, 2008 N.C. LEXIS 487 (2008).

Misconduct Not Shown. —

Commission erred in concluding that the former employee's conduct in returning 15 minutes late to the former employee's work area meant that the former employee was at substantial fault for tardiness that justified the former employee's discharge and denial of unemployment benefits for nine weeks; the commission found as a fact that the former employee's tardiness was due to the fact that the employee became ill and had to go to the bathroom as a result, and the former employee could not be at substantial fault for a matter over which the former employee did not have reasonable control, that of becoming ill. Applewhite v. Alliance One Int'l, Inc., — N.C. App. —, 654 S.E.2d 764, 2008 N.C. App. LEXIS 98 (Jan. 15, 2008).

§ 96-15. Claims for benefits.

CASE NOTES

Conclusiveness of Findings of Fact on Appeal. —

Employment Security Commission properly found that work-related misconduct was the basis of an employee's termination and properly denied unemployment benefits because the employee removed the hard drive from the employee's work computer and asserted a personal copyright interest in the employer's catalogs and web site without seeking and receiving permission, evidencing a deliberate disregard of standards of behavior which the employer had the right to expect of an employee. Binney v. Banner Therapy Prods., 362 N.C. 310, 661 S.E.2d 717, 2008 N.C. LEXIS 487 (2008).

Chapter 97.

Workers' Compensation Act.

ARTICLE 1.

Workers' Compensation Act.

§ 97-2. Definitions.

CASE NOTES

I. In General.
II. Employment, Employees, and Employers.
  A. In General.
III. Average Weekly Wages.
  A. In General.
  B. Illustrative Cases.
IV. Compensable Injuries, Generally.
V. Accident.
VI. Arising Out of and in the Course of Employment.
  B. Arising Out of.
XIII. Aggravation of Existing Condition or Infirmity.
XVI. Illustrative Cases.
  A. Falls.
XVII. Disability.
XVIII. Burden of Proof and Evidence.
XIX. Compensation.

I. IN GENERAL.

Reasonable Rehabilitative Service. — North Carolina Industrial Commission's conclusion that a workers' compensation claimant's life care plan was a "reasonable rehabilitative service" under G.S. 97-2(19) and G.S. 97-25 was supported by a doctor's opinion that the life care plan was medically necessary for the claimant. Scarboro v. Emery Worldwide Freight Corp., — N.C. App. —, 665 S.E.2d 781, 2008 N.C. App. LEXIS 1616 (2008).

Applied in Davis v. Harrah's Cherokee Casino, 362 N.C. 133, 655 S.E.2d 392, 2008 N.C. LEXIS 30 (2008); Williams v. Law Cos. Group, Inc., — N.C. App. —, 654 S.E.2d 725, 2008 N.C. App. LEXIS 75 (2008).

Cited in Cross v. Capital Transaction Group, Inc., — N.C. App. —, 661 S.E.2d 778, 2008 N.C. App. LEXIS 1150 (June 17, 2008).

II. EMPLOYMENT, EMPLOYEES, AND EMPLOYERS.

A. In General.

Employment Not Shown. — Employee was not entitled to workers' compensation benefits because he fraudulently misrepresented that he had not sustained prior back injuries, the employer relied on that representation, and the employer's reliance was a substantial factor in the hiring; because there was actual fraud in obtaining employment, the contract of hire under G.S. 97-2(2) was void ab initio. The employer established that there was a causal connection between the false representation and the injury. Freeman v. J.L. Rothrock, — N.C. App. —, 657 S.E.2d 389, 2008 N.C. App. LEXIS 430 (2008).

III. AVERAGE WEEKLY WAGES.

A. In General.

"Exceptional Reasons." — "Exceptional reasons" method of calculating an injured employee's average weekly wage, under G.S. 97-2(5), could only be utilized subsequent to a finding that the methods stated previously in the statute were either inapplicable, or were applicable but would fail to produce results fair and just to both parties. Conyers v. New Hanover County Sch., — N.C. App. —, 654 S.E.2d 745, 2008 N.C. App. LEXIS 66 (2008).

Employer's Contributions to 401(K) and Pension Plans Not Included. — For purposes of a workers' compensation claim, an employee was not entitled under G.S. 97-2(5) to include his employer's contributions to his 401(k) and pensions plans in a calculation of his average weekly earnings as the statute did not define earnings and the contributions constituted fringe benefits, which the statute did not specifically include. Shaw v. U.S. Airways, Inc., — N.C. —, 665 S.E.2d 449, 2008 N.C. LEXIS 684 (2008).

B. Illustrative Cases.

School District Employees. — When calculating the average weekly wage of an injured school district employee, who worked and was paid ten months of the year, for workers' compensation purposes, pursuant to G.S. 97-2(5), the calculation method which divided the employee's wages for the 52 weeks preceding the employee's injury by 52 was not proper because the result was not fair and just; the employer was unduly burdened and the employee received a windfall, contrary to statutory intent, because such calculation caused the employee's annual wages to be considered to be higher than those wages actually were, since the weekly amount arrived at was paid to the employee for all 52 weeks of the year, rather than the 40 weeks the employee had typically worked. Conyers v. New Hanover County Sch., — N.C. App. —, 654 S.E.2d 745, 2008 N.C. App. LEXIS 66 (2008).

When calculating the average weekly wage of an injured school district employee, who worked and was paid ten months of the year, for workers' compensation purposes, pursuant to G.S. 97-2(5), the calculation method which divided the employee's wages for the 52 weeks preceding the employee's injury by the number of weeks the employee actually worked during that period was fair and just because the result of that calculation most nearly approximated the amount the employee would have earned were it not for the employee's injury. Conyers v. New Hanover County Sch., — N.C. App. —, 654 S.E.2d 745, 2008 N.C. App. LEXIS 66 (2008).

When calculating the average weekly wage of an injured school district employee, who worked and was paid ten months of the year, for workers' compensation purposes, pursuant to G.S. 97-2(5), the first calculation method provided in the statute could not be used because the employee worked for less than 52 weeks in the year preceding the employee's injury. Conyers v. New Hanover County Sch., — N.C. App. —, 654 S.E.2d 745, 2008 N.C. App. LEXIS 66 (2008).

IV. COMPENSABLE INJURIES, GENERALLY.

Finding of Injury Required. —

Expert testimony that an employee's motor vehicle accident "more than likely" caused the leak in her right breast implant was sufficient to establish that the injury to her right breast implant was compensable under G.S. 97-2, but testimony that the left breast implant had not been ruptured in the accident, and the expert's uncertainty as to whether the rippling in the left breast implant had been caused by the accident or was due to the original left breast implant being underfilled was not sufficient to establish that the injury to the left breast implant was compensable. Consequently, the decision of the Full Commission of the North Caroline Industrial Commission correctly determined that the employee sustained compensable injuries with respect to her right breast implant, but erred in concluding that she sustained compensable injuries to her bilateral breast implants. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 652 S.E.2d 3, 2007 N.C. App. LEXIS 2319 (2007).

Breast Implants as Compensable Prosthetic Device. — Breast implants satisfy the statutory requirement as a compensable prosthetic device that functions as part of the body under G.S 97-2(6). Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 652 S.E.2d 3, 2007 N.C. App. LEXIS 2319 (2007).

Expert Testimony. —

Competent evidence supported the conclusion of the Full Commission of the North Carolina Industrial Commission that an employee was entitled to workers' compensation benefits for her headaches because the employee, who was involved in a work-related motor vehicle accident, sustained an impact to her head in the accident, and her treating physician testified that, from the very beginning, the employee had stated that she experienced daily headaches since the time of the accident. Expert testimony also supported the compensability of injuries to the employee's right hand and wrist, and her right knee. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 652 S.E.2d 3, 2007 N.C. App. LEXIS 2319 (2007).

Competent evidence in the form of testimony from treating physicians supported the awards to an employee for injuries, including the (1) replacement of one of the employee's breast implants which was damaged in an auto accident, but not the replacement of the other implant which apparently was not damaged in the accident; (2) treatment of the employee's headaches after the accident, (3) treatment of the employee for carpal tunnel syndrome and arthrosis in the employee's right wrist and thumb after the accident, and (4) treatment for and surgeries to the employee's right knee in which a pre-existing condition was aggravated because of the accident. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 657 S.E.2d 34, 2008 N.C. App. LEXIS 213 (2008).

V. ACCIDENT.

An injury must involve more than the carrying on of the usual and customary duties in the usual way, etc.

Because an employee's trapezius strain was caused by his shoulder injury and his shoulder injury occurred while performing his normal work routine under normal working conditions, the shoulder injury was not compensable under the Workers' Compensation Act; it was not the result of an injury by accident as defined in G.S. 97-2(6). Raper v. Mansfield Sys., — N.C. App. —, 657 S.E.2d 899, 2008 N.C. App. LEXIS 540 (Mar. 18, 2008).

Back Injury Resulting from Traumatic Incident at Unknown Time. — Plaintiff employee's disabling back injury was shown to be a result of traumatic injury and was compensable under G.S. 97-2(6), despite some uncertainty as to the exact date the injury occurred. Gregory v. W.A. Brown & Sons, — N.C. App. —, 664 S.E.2d 589, 2008 N.C. App. LEXIS 1543 (2008).

Evidence Insufficient to Find Back Injury. —

Denial of workers' compensation benefits was upheld because the employee failed to prove any of the employee's alleged occupational diseases or injuries resulted from the employee's employment; among other things, an expert acknowledged that the employee did not have any documented cause for employee's cervical condition and that the expert's opinion of causation was mere speculation. Lanier v. Eddie Romanelle's, — N.C. App. —, 664 S.E.2d 609, 2008 N.C. App. LEXIS 1552 (2008).

VI. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

B. Arising Out of.

Hazards or Risks Incidental to Employment as Contributing Cause to Accident and Resulting Injuries. — The North Carolina Industrial Commission neither (1) erred in relying on Allred v. Allred-Gardner, Inc., 253 N.C. 554 (1960), in finding that an employee's injuries arose out of and in the course of his employment, nor (2) misapplied the increased risk analysis, when it determined that the risk of driving a truck aggravated, accelerated, or combined with plaintiff employee's pre-existing condition (syncopal episode or blackout) to produce his injuries, and thus, that the injuries arose out of and in the course of his employment, because they resulted from his work-related accident. Facts were consistent with an interpretation of Allred that no showing was needed that plaintiff's injury was made more severe or caused solely by driving a truck, and since the employee was returning to work after making a delivery for his employer when the accident occurred, an increased risk analysis was not relevant. Billings v. Gen. Parts, Inc., — N.C. App. —, 654 S.E.2d 254, 2007 N.C. App. LEXIS 2560 (2007).

XIII. AGGRAVATION OF EXISTING CONDITION OR INFIRMITY.

Aggravation of Carpal Tunnel Syndrome. — Employee's carpal tunnel syndrome was a compensable injury, even though there was no direct evidence of initial causation because a doctor confirmed another doctor's diagnosis, which was based on test results and was not reliant on facts not in evidence or the maxim post hoc ergo propter hoc. The employee's carpal tunnel syndrome was compensable even if it was preexisting; it was aggravated by a work injury. Raper v. Mansfield Sys., — N.C. App. —, 657 S.E.2d 899, 2008 N.C. App. LEXIS 540 (Mar. 18, 2008).

XVI. ILLUSTRATIVE CASES.

A. Falls.

Injury Held Compensible. — Employee was entitled to receive disability benefits because the evidence showed that the employee's capacity to earn was causally related to the employee's physical restrictions resulting from a hip injury, and that the employee had made a reasonable effort to obtain employment. Even if the employee had been terminated due to an economic downturn, it did not preclude a finding that the employee was disabled and eligible for benefits. Graham v. Masonry Reinforcing Corp. of Am., — N.C. App. —, 656 S.E.2d 676, 2008 N.C. App. LEXIS 276 (2008).

XVII. DISABILITY.

Loss of Earning Power Is Criterion. —

Termination of the employee's temporary total disability benefits from the date the employee could no longer show that the employee was disabled was proper. Pursuant to G.S. 97-2(9), "disability" did not mean physical impairment but, instead, meant loss of earning capacity and the evidence showed that the employee's earning capacity became the same about nine months after the employee's work-related accident as it was before that accident. Cross v. Falk Integrated Techs., Inc., — N.C. App. —, 661 S.E.2d 249, 2008 N.C. App. LEXIS 867 (2008).

Date of Disability. — Date of a deceased employee's disability from an occupational disease was found by the North Carolina Industrial Commission to have been the date that the employee became incapable of earning the wages that the employee was receiving at the time of the injury. Kelly v. Duke Univ., — N.C. App. —, 661 S.E.2d 745, 2008 N.C. App. LEXIS 1073 (2008).

Findings Required to Support Conclusion of Disability. —

Remand was required when the Industrial Commission failed to make findings under G.S. 97-2(9) as to whether an employee claiming disability under the North Carolina Workers' Compensation Act had demonstrated either that (1) he made a reasonable effort to obtain employment but was unsuccessful, or (2) any effort to obtain employment would have been futile because of preexisting conditions. Raper v. Mansfield Sys., — N.C. App. —, 657 S.E.2d 899, 2008 N.C. App. LEXIS 540 (Mar. 18, 2008).

Evidence of Disability Held Sufficient. — Employee was properly awarded temporary total disability benefits for bilateral carpal tunnel syndrome (CTS) because, inter alia, the evidence tended to show that any current effort by the employee to obtain sedentary light-duty employment would have been futile based on the employee's medical problems, limited education, limited work experience, and limited training. Johnson v. City of Winston-Salem, — N.C. App. —, 656 S.E.2d 608, 2008 N.C. App. LEXIS 209 (2008).

Injured employee satisfied the employee's initial burden of proving disability as a result of the employee's work-related injuries because the employee's treating physicians placed restrictions on the employee's return to work and the employee was able to perform only light duty assignments when she attempted to return to work; however, the employer and its insurer failed to carry their burden of proving that the employee was capable of obtaining suitable employment. The employer and its insurer, therefore, failed to rebut the ongoing presumption of disability. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 657 S.E.2d 34, 2008 N.C. App. LEXIS 213 (2008).

XVIII. BURDEN OF PROOF AND EVIDENCE.

Award Where Cause of Injury Not Explained. — Full Commission of the North Carolina Industrial Commission correctly ruled with respect to the replacement of a claimant's right breast implant, which was established to have been damaged as a result of a motor vehicle accident while working, but erred in concluding that the claimant sustained compensable injuries to her left breast implant as well as the medical testimony indicated inconclusively that the rippling in the claimant's left breast was caused by the accident, therefore, the claimant was only entitled to compensation for replacement of the right breast implant. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, — S.E.2d —, 2007 N.C. App. LEXIS 2112 (Oct. 2, 2007).

Employer Failed to Rebut Employee's Evidence of Total Disability. — Because an injured employee presented sufficient evidence of total disability, and the employer failed to rebut this evidence, the Industrial Commission did not err in concluding that the employee was temporarily totally disabled to the extent that the Commission awarded the employee benefits. Roset-Eredia v. F.W. Dellinger, Inc., — N.C. App. —, 660 S.E.2d 592, 2008 N.C. App. LEXIS 1019 (2008).

Claimant Not Entitled to Presumption of Ongoing Disability. — Doctor's diagnosis, which was based on test results and was not reliant on facts not in evidence or the maxim post hoc ergo propter hoc, was competent evidence of a compensable injury. Raper v. Mansfield Sys., — N.C. App. —, 657 S.E.2d 899, 2008 N.C. App. LEXIS 540 (Mar. 18, 2008).

XIX. COMPENSATION.

Determination of Compensation for Former Employee Diagnosed with Asbestosis. — North Carolina Industrial Commission properly ordered an employer to pay for prescription expenses as part of the compensation awarded to an employee disabled as a result of asbestos exposure because the employee's treating physician testified that there was no federally approved medication specifically designed to treat asbestosis and that the employee was being treated with medication approved to treat the symptoms of obstructive lung disease and to improve overall lung functioning; based on that testimony, there was competent evidence in the record to support the Commission's finding that plaintiff's prescription medications provided some relief to plaintiff by improving his overall lung functioning, thus, it was proper for the Commission to have ordered the employer to pay for the medications. Bolick v. Freight Sys., — N.C. App. —, 654 S.E.2d 793, 2008 N.C. App. LEXIS 81 (2008).

Employer-Funded Contributions to Claimant's Retirement Accounts. — Employee benefits, including employer-funded contributions to a claimant's retirement accounts, must be considered on a case-by-case basis to determine whether they can be converted into a cash equivalent; if so, such benefits may be considered as part of the worker's average weekly wage. Shaw v. U.S. Airways, Inc., — N.C. App. —, 652 S.E.2d 22, 2007 N.C. App. LEXIS 2320 (2007).

Universal Maritime test is an appropriate first step in determining whether an employee benefit can meet the standard set out in Morrison-Knudsen, 461 U.S. at 630, 76 L. Ed. 2d at 199, 103 S. Ct. at 2049 and adopted in Kirk v. N.C. Dep't of Corr., 121 N.C. App. 129, 465 S.E.2d 301 (1995), namely: Did the employee earn an unconditional entitlement to a tangible benefit, even though the benefit might not be received until sometime in the future? If so, then Morrison-Knudsen's and Kirk's concern about the speculative nature of a benefit will have been addressed and, in determining whether the present value of the benefit is readily converted into a cash equivalent, the

North Carolina Industrial Commission should apply the reasoning in Morrison-Knudsen to see whether the proposed valuation measures the employee's benefit or his compensation. Shaw v. U.S. Airways, Inc., — N.C. App. —, 652 S.E.2d 22, 2007 N.C. App. LEXIS 2320 (2007).

Workers' compensation claimant was not entitled to reimbursement of the cost of heating her home pool under G.S. 97-25 because such compensation was not considered "medical compensation" under G.S. 97-2(19) because the claimant did not show that she was entitled to pool maintenance reimbursement rather than reimbursement for treatment at a center that provided pool therapy; further, although pool therapy was a compensable medical treatment, the record did not support a minimum of five days per week of pool therapy as there was no finding that a doctor had prescribed a minimum of five sessions a week. Winders v. Edgecombe County Home Health Care, — N.C. App. —, 653 S.E.2d 575, 2007 N.C. App. LEXIS 2559 (2007).

Compensation for Lawn Services Prohibited. — North Carolina Industrial Commission's factual findings supported its conclusion that although a workers' compensation claimant should refrain from mowing the claimant's lawn due to the claimant's medical condition, the lawn care services were ordinary life expenses that were not included in medical compensation under G.S. 97-2(19) and G.S. 97-25; providing the claimant with the resources to comply with a restrictive covenant as to yard upkeep on the claimant's property was not "other treatment." Scarboro v. Emery Worldwide Freight Corp., — N.C. App. —, 665 S.E.2d 781, 2008 N.C. App. LEXIS 1616 (2008).

§ 97-9. Employer to secure payment of compensation.

CASE NOTES

Act Provides Exclusive Remedy. —

Parent company was protected by the exclusivity provision of the North Carolina Workers' Compensation Act with respect to an employee's injuries where it managed the employer's business, including the employer's safety program, and its status as owner of the employer did not change the fact that it managed the employer within the meaning of the pertinent statutes. Hamby v. Profile Prods., L.L.C., 361 N.C. 630, 652 S.E.2d 231, 2007 N.C. LEXIS 1105 (2007).

§ 97-10.1. Other rights and remedies against employer excluded.

CASE NOTES

Employee's Rights and Remedies Hereunder Are Exclusive. —

Because the North Carolina Workers' Compensation Act provided a student-employee's exclusive remedy for the student's alleged injury that arose out of and in the course and scope of employment with the student's university employer, the Industrial Commission properly dismissed the student's tort claim, with prejudice. Christopher v. N.C. State Univ., — N.C. App. —, 661 S.E.2d 36, 2008 N.C. App. LEXIS 996 (2008).

Cited in Hamby v. Profile Prods., L.L.C., 361 N.C. 630, 652 S.E.2d 231, 2007 N.C. LEXIS 1105 (2007); Cross v. Capital Transaction Group, Inc., — N.C. App. —, 661 S.E.2d 778, 2008 N.C. App. LEXIS 1150 (June 17, 2008).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

CASE NOTES

I. In General.
IV. Disbursement of Proceeds.

I. IN GENERAL.

Public Policy. — Trial court did not err by concluding that pursuant to G.S. 97-10.2(e) a steamroller driver's employer was not entitled to recover on its workers' compensation lien from a judgment awarded to the driver following a collision. G.S. 97-10.2(e) evidenced a strong public policy of prohibiting a negligent employer from recouping any workers' compensation benefits paid to an injured employee, and the General Assembly intended for G.S. 97-10.2(e) to apply even in cases where the issue of last clear chance had been submitted to the jury and the jury had answered this question in the affirmative. Outlaw v. Johnson, — N.C. App. —, 660 S.E.2d 550, 2008 N.C. App. LEXIS 907 (2008).

Cited in Cross v. Falk Integrated Techs., Inc., — N.C. App. —, 661 S.E.2d 249, 2008 N.C. App. LEXIS 867 (2008).

IV. DISBURSEMENT OF PROCEEDS.

Employer's Lien Against Settlement. — In a workers' compensation case, because the settlement between the claimant's uninsured motorist insurance carrier and herself did not comply with G.S. 97-10.2 in that the employer never gave written consent to the settlement, the full commission of the North Carolina Industrial Commission erred in concluding that the employer's only remedy was to apply to a trial court for a credit for amounts paid from the uninsured motorist carrier to the claimant. Instead, the employer was entitled to a lien on all corresponding uninsured motorist benefits received by the claimant, less the portion expended for the cost of replacing the claimant's left breast implant, which was determined not to have been a compensable injury. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, — S.E.2d —, 2007 N.C. App. LEXIS 2112 (Oct. 2, 2007).

As to whether a trial court abused its discretion by finding, in the alternative, that if respondents did have a lien against the settlement proceeds under G.S. 97-10.2(h), such lien should be struck pursuant to G.S. 97-10.2(j), a remand was necessary because there was no indication in the record to show that the trial court considered several mandated statutory factors. Parker v. C.C. Mangum Co. (In re Estate of Bullock), — N.C. App. —, 655 S.E.2d 869, 2008 N.C. App. LEXIS 218 (Feb. 5, 2008).

Right for decedent's estate to bring an action against the third-party tortfeasors, was conferred by G.S. 28A-18-2; however, the relative rights between decedent's estate and respondent employer and its insurer were governed by G.S. 97-10.2. Parker v. C.C. Mangum Co. (In re Estate of Bullock), — N.C. App. —, 655 S.E.2d 869, 2008 N.C. App. LEXIS 218 (Feb. 5, 2008).

Unless and until an employee who was injured in a hit-and-run automobile accident applied to a superior court for a determination of the subrogation amount on a settlement the employee received from an uninsured motorist carrier, the employer and the employer's insurer were entitled to a lien on all corresponding uninsured motorist benefits received by the employee, less the portion expended for the cost of replacing an implant for the employee for which the carrier paid. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 657 S.E.2d 34, 2008 N.C. App. LEXIS 213 (2008).

Subrogation of Lien Interest. — Trial court erred in concluding that respondents did not have a lien against the wrongful death benefits recovered by decedent's estate because, although the General Assembly expressly subrogated the rights of an employer's insurance carrier to that of an employer, there was no language in G.S. 97-10.2 subrograting the rights of an employer to that of the beneficiaries of the workers' compensation award. Parker v. C.C. Mangum Co. (In re Estate of Bullock), — N.C. App. —, 655 S.E.2d 869, 2008 N.C. App. LEXIS 218 (Feb. 5, 2008).

§ 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

CASE NOTES

I. In General.

I. IN GENERAL.

Evidence of Intoxication. — North Carolina Industrial Commission's finding of fact under G.S. 97-12 that the worker's fall was caused by his intoxication was supported by competent evidence of record where there was witness testimony that he smelled of alcohol and had a blood alcohol level of 0.22 percent at the time he fell off the roof. Gratz v. Hill, — N.C. App. —, 658 S.E.2d 523, 2008 N.C. App. LEXIS 607 (Apr. 1, 2008).

Cited in Hassell v. Onslow County Bd. of Educ., 362 N.C. 299, 661 S.E.2d 709, 2008 N.C. LEXIS 498 (2008).

§ 97-17. Settlements allowed in accordance with Article.

CASE NOTES

No Determination of Whether Agreement Was Fair and Just. — Where an employee suffered a back injury and entered into a compromise settlement agreement with an insurance carrier, the North Carolina Industrial Commission erred by not setting aside the agreement because, inter alia, the Commission failed to undertake a full investigation to determine if the agreement was fair and just since the employee may have been entitled to total disability benefits instead of a scheduled injury or partial disability benefits. Kyle v. Holston Group, — N.C. App. —, 656 S.E.2d 667, 2008 N.C. App. LEXIS 282 (2008).

§ 97-18. Prompt payment of compensation required; installments; payment without prejudice; notice to Commission; penalties.

CASE NOTES

Sanctions Were Proper. — Industrial Commission properly granted indemnity payments to plaintiff, because G.S. 97-42 gave the Commission discretion to deny a credit to defendants for an overpayment of benefits, and the sanction imposed under G.S. 97-18 was reasonable based on defendants' failure to comply with the statute, as defendants admitted and accepted plaintiff's right to compensation and failed to notify the Commission. Bennett v. Sheraton Grand, 186 N.C. App. 250, 650 S.E.2d 660, 2007 N.C. App. LEXIS 2083 (2007).

§ 97-18.1. Termination or suspension of compensation benefits.

CASE NOTES

When Employer Authorized to Cease Payments to Employee. — Having received a Form 28U from the injured employee, the employer could cease making payments only on the basis of G.S. 97-18.1, 97-83, and 97-84. Roberts v. Dixie News, Inc., — N.C. App. —, 658 S.E.2d 684, 2008 N.C. App. LEXIS 654 (2008).

§ 97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

CASE NOTES

Assertion of Lien Barred Against Workers' Compensation Benefits. — G.S. 97-21 barred the assignee's assertion of a lien on the claimant's workers' compensation benefits because the agreement between the parties was a loan and, thus, the assignee was a creditor who could not attach a lien to such benefits; in finding the transaction to be a loan it was the nature of the transaction, not the name assigned to the transaction, that was relevant. Cross v. Capital Transaction Group, Inc., — N.C. App. —, 661 S.E.2d 778, 2008 N.C. App. LEXIS 1150 (June 17, 2008).

§ 97-22. Notice of accident to employer.

CASE NOTES

Commission Must Make Findings On Issue of Whether Failure to Give Timely Notice Excused. — Full Commission of the North Carolina Industrial Commission erred in failing to properly address whether a claimant timely reported her claim for workers' compensation benefits, pursuant to G.S. 97-22, and whether the case was barred for her failure to do so, despite her employer being notified of the motor vehicle accident the claimant was involved in within minutes of the accident. It was undisputed that the claimant did not provide written notice of the accident until she filed her workers' compensation claim, over one year after her accident, however, the full commission never addressed the issue of whether the claimant met her burden of establishing a reasonable excuse for not giving written notice within 30 days of the accident that caused her injury. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, — S.E.2d —, 2007 N.C. App. LEXIS 2112 (Oct. 2, 2007).

Sufficiency of the Industrial Commission's Findings of Fact. —

It was undisputed that an employee did not provide written notice of her accident until she filed her workers' compensation claim, over a year later. Although her employer conceded it had actual notice of the accident on the day it happened, the Full Commission of the North Carolina Industrial Commission erred by not making findings of fact as to whether the employee satisfied her burden of providing a reasonable excuse for her failure to timely provide written notice of her accident within 30 days of its occurrence, and whether the employer was prejudiced by the employee's failure to immediately file a written notice, as G.S. 97-22 required, and was directed to do so on remand. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 652 S.E.2d 3, 2007 N.C. App. LEXIS 2319 (2007).

Case was remanded because the North Carolina Industrial Commission was to determine whether reasonable excuse existed for an employee's delay in providing written notice to the employee's employer under G.S. 97-22 and whether the employer was prejudiced by the lack of notice where the employee was injured in an automobile accident and telephoned the employee's supervisor within 30 minutes after the accident and reported the accident, but did not provide written notice of the accident until the employee filed a workers' compensation claim over a year later. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 657 S.E.2d 34, 2008 N.C. App. LEXIS 213 (2008).

Applied in Gregory v. W.A. Brown & Sons, — N.C. App. —, 664 S.E.2d 589, 2008 N.C. App. LEXIS 1543 (2008).

§ 97-24. Right to compensation barred after two years; destruction of records.

CASE NOTES

The requirement that a claim be filed within, etc.

Two-year limitation in G.S. 97-24 was a condition precedent to a workers' compensation claimant's right to compensation that could be waived by an employer's conduct; the employer waived the G.S. 97-24 limitation as the workers' compensation claimant filled out forms with the employer's human resources officer, who lost them, to the claimant's detriment. Gore v. Myrtle/Mueller, 362 N.C. 27, 653 S.E.2d 400, 2007 N.C. LEXIS 1231 (2007).

§ 97-25. Medical treatment and supplies.

CASE NOTES

I. In General.
II. What Treatment Must Be Provided.
III. Refusal to Accept Treatment.

I. IN GENERAL.

Evidence Insufficient to Support Award of Medical Benefits. — Because there was no evidence a claimant had leg injuries or pain due to a work-related accident, and given a doctor's statement that any such pain was not causally related to the accident, the North Carolina Industrial Commission's finding that the claimant sustained injuries to her legs due to the accident, and thus was entitled to temporary total disability benefits, including past and future medical expenses, was without evidentiary support. Williams v. Law Cos. Group, Inc., — N.C. App. —, 654 S.E.2d 725, 2008 N.C. App. LEXIS 75 (2008).

Cited in Graham v. Masonry Reinforcing Corp. of Am., — N.C. App. —, 656 S.E.2d 676, 2008 N.C. App. LEXIS 276 (2008); Cross v. Falk Integrated Techs., Inc., — N.C. App. —, 661 S.E.2d 249, 2008 N.C. App. LEXIS 867 (2008).

II. WHAT TREATMENT MUST BE PROVIDED.

Life Care Plan Costs. — North Carolina Industrial Commission's conclusion that a workers' compensation claimant's life care plan was a "reasonable rehabilitative service" under G.S. 97-2(19) and G.S. 97-25 was supported by a doctor's opinion that the life care plan was medically necessary for the claimant. Scarboro v. Emery Worldwide Freight Corp., — N.C. App. —, 665 S.E.2d 781, 2008 N.C. App. LEXIS 1616 (2008).

Aggravation of Work-Related Injury. — Employee was awarded workers' compensation benefits for all of his medical treatment and his ongoing disability because the employee's original injury at work and resultant surgery led to scar tissue and made him more prone to degenerative changes, which in turn necessitated a second surgery after he fell at his home following his return to work. Davis v. Harrah's Cherokee Casino, 362 N.C. 133, 655 S.E.2d 392, 2008 N.C. LEXIS 30 (2008).

Workers' compensation claimant was not entitled to reimbursement of the cost of heating her home pool under G.S. 97-25 because such compensation was not considered "medical compensation" under G.S. 97-2(19) because the claimant did not show that she was entitled to pool maintenance reimbursement rather than reimbursement for treatment at a center that provided pool therapy; further, although pool therapy was a compensable medical treatment, the record did not support a minimum of five days per week of pool therapy as there was no finding that a doctor had prescribed a minimum of five sessions a week. Winders v. Edgecombe County Home Health Care, — N.C. App. —, 653 S.E.2d 575, 2007 N.C. App. LEXIS 2559 (2007).

Compensation for Lawn Services Prohibited. — North Carolina Industrial Commission's factual findings supported its conclusion that although a workers' compensation claimant should refrain from mowing the claimant's lawn due to the claimant's medical condition, the lawn care services were an ordinary life expense that were not included in medical compensation under G.S. 97-2(19) and G.S. 97-25; providing the claimant with the resources to comply with a restrictive covenant as to yard upkeep on the claimant's property was not "other treatment." Scarboro v. Emery Worldwide Freight Corp., — N.C. App. —, 665 S.E.2d 781, 2008 N.C. App. LEXIS 1616 (2008).

III. REFUSAL TO ACCEPT TREATMENT.

Reasonableness of a refusal to accept treatment, etc.

Argument of defendants, an employer and its workers' compensation carrier, that an injured employee's refusal to cooperate with vocational rehabilitation precluded an award of disability benefits under N.C. Gen. Stat. § 97-25, was rejected on appeal based on the Industrial Commission's finding that the claimant visited a sheltered workshop and that his decision to leave based on the overhwhelming noise and number of developmentally disabled individuals at the shelter was reasonable. Hunter v. Apac/Barrus Constr. Co., — N.C. App. —, 656 S.E.2d 652, 2008 N.C. App. LEXIS 274 (2008).

§ 97-25.1. Limitation of duration of medical compensation.

CASE NOTES

Applied in Gregory v. W.A. Brown & Sons, — N.C. App. —, 664 S.E.2d 589, 2008 N.C. App. LEXIS 1543 (2008).

§ 97-25.3. Preauthorization.

CASE NOTES

Preauthorization Allowed But Not Required by Statute. — Commission did not err in awarding additional medical compensation to a claimant based on a change of condition under G.S. 97-47 on the grounds that she failed to obtain preauthorization before obtaining significant medical treatment; although G.S. 97-25.3 allowed preauthorization, it did not require it and there was no showing that defendants actually required preauthorization. Moreover, defendants could not have imposed a preauthorization requirement as they denied liability for the claimant's treatment on the grounds that there was no causal connection between that compensable injury and the medical treatment at issue. Perry v. CKE Rests., Inc., — N.C. App. —, 654 S.E.2d 33, 2007 N.C. App. LEXIS 2532 (2007).

§ 97-29. Compensation rates for total incapacity.

CASE NOTES

I. In General.
II. Permanent and Total Disability.

I. IN GENERAL.

Construction with § 97-31. —
Deceased employee's estate, which recovered death benefits, did not have a vested right in additional compensation resulting from the employee's loss of vision under G.S. 97-31 because the employee was not entitled to recover once under G.S. 97-29 and then again under G.S. 97-31. Kelly v. Duke Univ., — N.C. App. —, 661 S.E.2d 745, 2008 N.C. App. LEXIS 1073 (2008).

Failure of Commission to Determine Fairness of Agreement. —
Where an employee suffered a back injury and entered into a compromise settlement agreement with an insurance carrier, the North Carolina Industrial Commission erred by not setting aside the agreement because, inter alia, the Commission failed to undertake a full investigation to determine if the agreement was fair and just since the employee may have been entitled to total disability benefits instead of a scheduled injury or partial disability benefits. Kyle v. Holston Group, — N.C. App. —, 656 S.E.2d 667, 2008 N.C. App. LEXIS 282 (2008).

Evidence Insufficient to Support Temporary Total Disability Rating. — Because there was no evidence a claimant had leg injuries or pain due to a work-related accident, and given a doctor's statement that any such pain was not causally related to the accident, the North Carolina Industrial Commission's finding that the claimant sustained injuries to her legs due to the accident, and thus was entitled to temporary total disability benefits, was without evidentiary support. Williams v. Law Cos. Group, Inc., — N.C. App. —, 654 S.E.2d 725, 2008 N.C. App. LEXIS 75 (2008).

Trial Return to Work. — Employee may attempt a trial return to work for a period not to exceed nine months and, during a trial return to work period, the employee shall be paid any compensation that may be owed for partial disability pursuant to G.S. 97-30. If the trial return to work was unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter for other reasons. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, — S.E.2d —, 2007 N.C. App. LEXIS 2112 (Oct. 2, 2007).

Applied in Davis v. Harrah's Cherokee Casino, 362 N.C. 133, 655 S.E.2d 392, 2008 N.C. LEXIS 30 (2008).

Cited in Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 657 S.E.2d 34, 2008 N.C. App. LEXIS 213 (2008); Cross v. Falk Integrated Techs., Inc., — N.C. App. —, 661 S.E.2d 249, 2008 N.C. App. LEXIS 867 (2008); Cross v. Capital Transaction Group, Inc., — N.C. App. —, 661 S.E.2d 778, 2008 N.C. App. LEXIS 1150 (June 17, 2008); Polk v. Nationwide Recyclers, Inc., — N.C. App. —, 664 S.E.2d 619, 2008 N.C. App. LEXIS 1521 (2008); Scarboro v. Emery Worldwide Freight Corp., — N.C. App. —, 665 S.E.2d 781, 2008 N.C. App. LEXIS 1616 (2008).

II. PERMANENT AND TOTAL DISABILITY.

When Apportionment Not Permitted. —
In a workers' compensation case wherein the employee was awarded compensation after being found permanently and totally disabled, the North Carolina Industrial Commission properly determined that the employee's impairment could not be apportioned between occupational and non-occupational causes and that

the employee was entitled to continued compensation as competent evidence in the record supported the Commission's finding that the employee's disability could not reasonably be apportioned between the work-related asbestosis and the other non-work-related lung disease and, in turn, the Commission's findings of fact supported its conclusion that the employer was liable to compensate the employee for the entire disability. Bolick v. Freight Sys., — N.C. App. —, 654 S.E.2d 793, 2008 N.C. App. LEXIS 81 (2008).

Evidence of Total Disability Held Sufficient. —

Employee was properly awarded temporary total disability benefits for bilateral carpal tunnel syndrome (CTS) because, inter alia, (1) there was sufficient evidence that the employee's CTS was a compensable occupational disease, (2) the evidence tended to show that any current effort by the employee to obtain sedentary light-duty employment would have been futile based on the employee's medical problems, limited education, limited work experience, and limited training, and (3) there was insufficient evidence for apportionment. Johnson v. City of Winston-Salem, — N.C. App. —, 656 S.E.2d 608, 2008 N.C. App. LEXIS 209 (2008).

§ 97-30. Partial incapacity.

CASE NOTES

Return to Work — Generally. —

Employee may attempt a trial return to work for a period not to exceed nine months and, during a trial return to work period, the employee shall be paid any compensation that may be owed for partial disability pursuant to G.S. 97-30. If the trial return to work was unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter for other reasons. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, — S.E.2d —, 2007 N.C. App. LEXIS 2112 (Oct. 2, 2007).

Failure of Commission to Determine Fairness of Agreement. — Where an employee suffered a back injury and entered into a compromise settlement agreement with an insurance carrier, the North Carolina Industrial Commission erred by not setting aside the agreement because, inter alia, the Commission failed to undertake a full investigation to determine if the agreement was fair and just since the employee may have been entitled to total disability benefits instead of a scheduled injury or partial disability benefits. Kyle v. Holston Group, — N.C. App. —, 656 S.E.2d 667, 2008 N.C. App. LEXIS 282 (2008).

Cited in Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 657 S.E.2d 34, 2008 N.C. App. LEXIS 213 (2008); Kelly v. Duke Univ., — N.C. App. —, 661 S.E.2d 745, 2008 N.C. App. LEXIS 1073 (2008); Cross v. Falk Integrated Techs., Inc., — N.C. App. —, 661 S.E.2d 249, 2008 N.C. App. LEXIS 867 (2008).

§ 97-31. Schedule of injuries; rate and period of compensation.

CASE NOTES

I. In General.
III. Hands.
IX. Important Organs.

I. IN GENERAL.

Section Construed with § 97-29. —

Deceased employee's estate, which recovered death benefits, did not have a vested right in additional compensation resulting from the employee's loss of vision under G.S. 97-31 because the employee was not entitled to recover once under G.S. 97-29 and then again under G.S. 97-31. Kelly v. Duke Univ., — N.C. App. —, 661 S.E.2d 745, 2008 N.C. App. LEXIS 1073 (2008).

Failure of Commission to Determine Fairness of Agreement. —

Where an employee suffered a back injury and entered into a compromise settlement agreement with an insurance carrier, the North Carolina Industrial Commission erred by not setting aside the agreement because, inter alia, the Commission failed to undertake a full investigation to determine if the agreement was fair and just since the employee may have been entitled to total disability benefits instead of a scheduled injury or partial disability benefits. Kyle v. Holston Group, — N.C. App. —, 656 S.E.2d 667, 2008 N.C. App. LEXIS 282 (2008).

Employee Eligible for Benefits Under Section. — North Carolina Industrial Commission did not err in finding that a former employee was eligible for benefits only under the Workers' Compensation Act, G.S. 97-31, because the employee failed to show that the Commission misapplied the law or that the Commission's findings of fact were not based on competent evidence; the employee's post-injury employment was not modified so as to constitute make work because the company was aware of her restrictions when the company hired her. Polk v. Nationwide Recyclers, Inc., — N.C. App. —, 664 S.E.2d 619, 2008 N.C. App. LEXIS 1521 (2008).

Cited in Cross v. Capital Transaction Group, Inc., — N.C. App. —, 661 S.E.2d 778, 2008 N.C. App. LEXIS 1150 (June 17, 2008); Cross v. Falk Integrated Techs., Inc., — N.C. App. —, 661 S.E.2d 249, 2008 N.C. App. LEXIS 867 (2008).

III. HANDS.

Carpal Tunnel Syndrome. — In a case in which an employee was properly awarded temporary total disability benefits for bilateral carpal tunnel syndrome (CTS), it was correctly determined that the employee had not reached maximum medical improvement because the employee's medical treatment for CTS may not have been complete, the employee required further medical evaluation at a minimum, and the condition had not stabilized. Johnson v. City of Winston-Salem, — N.C. App. —, 656 S.E.2d 608, 2008 N.C. App. LEXIS 209 (2008).

IX. IMPORTANT ORGANS.

Head Injury. — Employee was entitled to benefits for a two percent permanent disability rating to the employee's head that occurred as a result of a work-related auto accident. The Industrial Commission's made no finding to support its conclusion to deny the employee compensation for a permanent brain injury and the imposition of a two percent permanent partial disability rating relative to the employee's post-concussion syndrome by the employee's doctor meant the employee was entitled to compensation for that injury pursuant to G.S. 97-31(24). Cross v. Falk Integrated Techs., Inc., — N.C. App. —, 661 S.E.2d 249, 2008 N.C. App. LEXIS 867 (2008).

§ 97-32.1. Trial return to work.

CASE NOTES

Presumption of Continuing Disability. —

Employer and its insurance carrier contended that the Full Commission of the North Carolina Industrial Commission erred in concluding that an employee, who was injured in a work-related accident, carried her burden of proving disability; however, they failed to rebut the ongoing presumption of disability because the employee had regularly contacted the employer seeking light-duty work, but the employer rarely offered her work that she was physically capable of performing based on her restrictions. Although an accounts manager for the employer testified that the employee had been offered light-duty assignments, his testimony was found not to be credible because he did not know the dates or nature of the job offers, and he admitted that the employer did not keep records of the offers; consequently, the employer and insurance carrier failed to carry their burden of proving that the employee was capable of obtaining suitable employment. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 652 S.E.2d 3, 2007 N.C. App. LEXIS 2319 (2007).

Right to Continuing Compensation. —

Employee may attempt a trial return to work for a period not to exceed nine months and, during a trial return to work period, the employee shall be paid any compensation that may be owed for partial disability pursuant to G.S. 97-30. If the trial return to work was unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter for other reasons. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, — S.E.2d —, 2007 N.C. App. LEXIS 2112 (Oct. 2, 2007).

Although an injured employee returned to work on a few occasions during the time period at issue, such intermittent and infrequent work days did not constitute a successful trial return to work. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 657 S.E.2d 34, 2008 N.C. App. LEXIS 213 (2008).

§ 97-38. Where death results proximately from compensable injury or occupational disease; dependents; burial expenses; compensation to aliens; election by partial dependents.

CASE NOTES

I. In General.

I. IN GENERAL.

When Disability or Death Resulting from Disease Is Compensable. — Competent evidence supported the North Carolina Industrial Commission's finding that an employee's death was proximately caused by the employee's compensable occupational disease of diabetes because, although a doctor indicated that it was possible that the deceased employee died of complications from the employee's upper respiratory infection, the doctor testified that it was "more likely than not" that the deceased employee's diabetes caused the employees death. Kelly v. Duke Univ., — N.C. App. —, 661 S.E.2d 745, 2008 N.C. App. LEXIS 1073 (2008).

Statute of Limitations. — Statute of limitations for death benefits under G.S. 97-38 began to run on the date of a deceased employee's disability from an occupational disease, which the North Carolina Industrial Commission found was the date that the employee became incapable of earning the wages that the employee was receiving at the time of the injury. Kelly v. Duke Univ., — N.C. App. —, 661 S.E.2d 745, 2008 N.C. App. LEXIS 1073 (2008).

§ 97-40. Commutation and payment of compensation in absence of dependents; "next of kin" defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.

CASE NOTES

Applied in Kelly v. Duke Univ., — N.C. App. —, 661 S.E.2d 745, 2008 N.C. App. LEXIS 1073 (2008).

§ 97-42. Deduction of payments.

CASE NOTES

An employer's entitlement to a credit, etc.

Employer and insurance carrier were entitled to a credit for benefits paid to the employee as a result of the employee's work-related motor vehicle accident for benefits paid after the date that the employee could no longer show that the employee was disabled. The Industrial Commission had the authority pursuant to G.S. 97-42 to grant such a credit from the time that the employee was no longer able to demonstrate that the accident caused impaired earning capacity, which was about nine months after the accident occurred. Cross v. Falk Integrated Techs., Inc., — N.C. App. —, 661 S.E.2d 249, 2008 N.C. App. LEXIS 867 (2008).

Credit Properly Denied. — Industrial Commission properly granted indemnity payments to plaintiff, because G.S. 97-42 gave the Commission discretion to deny a credit to defendants for an overpayment of benefits, and the sanction imposed under G.S. 97-18 was reasonable based on defendants' failure to comply with the statute, as defendants admitted and accepted plaintiff's right to compensation and failed to notify the Commission. Bennett v. Sheraton Grand, 186 N.C. App. 250, 650 S.E.2d 660, 2007 N.C. App. LEXIS 2083 (2007).

§ 97-47. Change of condition; modification of award.

CASE NOTES

I. In General.
II. Change of Condition.

I. IN GENERAL.

Applied in Stachowski v. Sysco Food Servs. of Balt., Inc., 402 Md. 506, 937 A.2d 195, 2007 Md. LEXIS 733 (2007).

Cited in Bennett v. Sheraton Grand, 186 N.C. App. 250, 650 S.E.2d 660, 2007 N.C. App. LEXIS 2083 (2007); Starr v. Gaston County Bd. of Educ., — N.C. App. —, 663 S.E.2d 322, 2008 N.C. App. LEXIS 1311 (2008).

II. CHANGE OF CONDITION.

Modification of Award Upheld. — Commission did not err in awarding additional medical compensation to a claimant based on a change of condition under G.S. 97-47 on the grounds that she failed to obtain preauthorization before obtaining significant medical treatment; although G.S. 97-25.3 allowed preauthorization, it did not require it and there was no showing that defendants actually required preauthorization. Moreover, defendants could not have imposed a preauthorization requirement as they denied liability for the claimant's treatment on the grounds that there was no causal connection between that compensable injury and the medical treatment at issue. Perry v. CKE Rests., Inc., — N.C. App. —, 654 S.E.2d 33, 2007 N.C. App. LEXIS 2532 (2007).

§ 97-53. (See editor's note on condition precedent) Occupational diseases enumerated; when due to exposure to chemicals.

CASE NOTES

II. Subdivision (13).
III. Particular Diseases.
IV. Hearing Loss.

II. SUBDIVISION (13).

Causation Not Proven. — In an occupational disease case under G.S. 97-53(13), the North Carolina Industrial Commission did not err in denying an employee's claim for workers' compensation benefits because the employee failed to prove a causal relationship between the employee's employment and the Lyme disease. Kashino v. Carolina Veterinary Specialists Med. Servs., 186 N.C. App. 418, 650 S.E.2d 839, 2007 N.C. App. LEXIS 2205 (2007).

Although the employee's synovitis resulted from a tear to the employee's ligament, the tear was not caused by the employee's employment and, thus, was not compensable. Furthermore, the employee's elbow injury was not compensable because the employee presented no evidence that the employee was exposed to an increased risk of developing ulnar neuropathy in the employee's job to a far greater degree and in a wholly different manner than was the general public. Lanier v. Eddie Romanelle's, — N.C. App. —, 664 S.E.2d 609, 2008 N.C. App. LEXIS 1552 (2008).

Disease Caused by Vaccination Required as Condition of Employment. — Award of worker's compensation benefits was proper for an employee's occupational disease based on side effects suffered by the employee as the result of a vaccine that was required for employment under circumstances in which, inter alia, an expert testified that the vaccine was approved for research only, and 15 to 17 percent of those who received the booster experienced systemic side effects; the expert also testified that persons who took the vaccine because of their employment were at an increased risk for systemic side effects as opposed to the general public, which was competent evidence to support the finding that the employee was placed at an increased risk over persons in the general population for her symptoms by virtue of her employment. There was also competent evidence that the employee's ongoing symptoms were causally related to her employment. Fu v. UNC Chapel Hill, — N.C.

App. —, 655 S.E.2d 907, 2008 N.C. App. LEXIS 201 (Feb. 5, 2008).

III. PARTICULAR DISEASES.

Carpal Tunnel Syndrome. — Employee, who worked as a custodial maintenance worker for 15 years, was properly awarded temporary total disability benefits for bilateral carpal tunnel syndrome (CTS) because, inter alia, there was sufficient evidence that the employee's CTS was a compensable occupational disease since there was evidence that the employment exposed the employee to an increased risk of developing bilateral CTS as opposed to members of the general public not so exposed. Johnson v. City of Winston-Salem, — N.C. App. —, 656 S.E.2d 608, 2008 N.C. App. LEXIS 209 (2008).

General Anxiety Disorder. — Where an employee worked as a teacher and sought workers' compensation benefits, arguing that the employee's generalized anxiety disorder (GAD) was an occupational disease caused by a hostile and abusive classroom environment, the North Carolina Industrial Commission properly concluded that the employee's GAD was not an occupational disease because, although it was inappropriate to imply that the employee's fault played a role in determining compensability, the employee failed to prove either that the employee's work increased the risk of GAD or significantly contributed to it, and the Commission did not ignore the testimony of the employee's expert. Hassell v. Onslow County Bd. of Educ., 362 N.C. 299, 661 S.E.2d 709, 2008 N.C. LEXIS 498 (2008).

IV. HEARING LOSS.

Burden of Proof. — Employee's hearing loss in her left ear was not found to be an occupational disease under G.S. 97-53(28) because the employee failed to establish a causal link between her hearing loss and the alleged workplace exposure to noise; two doctors testified that, given the employee's greater loss of hearing in lower frequencies, her hearing loss was not likely due to noise exposure. Strezinski v. City of Greensboro, — N.C. App. —, 654 S.E.2d 263, 2007 N.C. App. LEXIS 2562 (2007).

§ 97-59. Employer to pay for treatment.

CASE NOTES

Failure to Make Findings of Fact and Conclusions of Law. — In a workers' compensation case wherein the employee was awarded compensation after being found permanently and totally disabled, the North Carolina Industrial Commission erred by failing to expressly rule on whether the employer was required to reimburse the employee for past out-of-pocket medical expenses; while it appeared from the emphasis in the Commission's opinion and award, which ordered the employer to pay medical expenses as well as from its decision not to hold the employer in civil contempt, that the Commission implicitly ruled that the employee did not timely submit his request for reimbursement of $1,965.13 in past out-of-pocket medical expenses, the better approach for the Commission was to expressly respond to the issues raised by the employee's appeal. Bolick v. Freight Sys., — N.C. App. —, 654 S.E.2d 793, 2008 N.C. App. LEXIS 81 (2008).

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Egen v. Excalibur Resort Prof'l, — N.C. App. —, 663 S.E.2d 914, 2008 N.C. App. LEXIS 1469 (Aug. 5, 2008).

Cited in Vaden v. Dombrowski, — N.C. App. —, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007).

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval; direct payment as award.

CASE NOTES

Cited in Gore v. Myrtle/Mueller, 362 N.C. 27, 653 S.E.2d 400, 2007 N.C. LEXIS 1231 (2007); Kyle v. Holston Group, — N.C. App. —, 656 S.E.2d 667, 2008 N.C. App. LEXIS 282 (2008).

§ 97-83. Commission is to make award after hearing.

CASE NOTES

Employer Permitted to Request Hearing Regarding Employee's Benefits. — Former employer was not barred from asking the North Carolina Commission to resolve the issue regarding the payments of a former employee's permanent partial disability benefits because the employer was permitted to request a hearing as to the employee's benefits under the Act pursuant to G.S. 97-83. Polk v. Nationwide Recyclers, Inc., — N.C. App. —, 664 S.E.2d 619, 2008 N.C. App. LEXIS 1521 (2008).

When Employer Authorized to Cease Payments to Employee. — Having received a Form 28U from the injured employee, the employer could cease making payments only on the basis of G.S. 97-18.1, 97-83, and 97-84. Roberts v. Dixie News, Inc., — N.C. App. —, 658 S.E.2d 684, 2008 N.C. App. LEXIS 654 (2008).

§ 97-84. Determination of disputes by Commission or deputy.

CASE NOTES

And Determines Credibility and Weight of Testimony. —

North Carolina Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence, and the Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary. Davis v. Harrah's Cherokee Casino, 362 N.C. 133, 655 S.E.2d 392, 2008 N.C. LEXIS 30 (2008).

When Employer Authorized to Cease Payments to Employee. — Having received a Form 28U from the injured employee, the employer could cease making payments only on the basis of G.S. 97-18.1, 97-83, and 97-84. Roberts v. Dixie News, Inc., — N.C. App. —, 658 S.E.2d 684, 2008 N.C. App. LEXIS 654 (2008).

Award Determination Upheld. —

Where an employee worked as a teacher and sought workers' compensation benefits, arguing that the employee's generalized anxiety disorder (GAD) was an occupational disease caused by a hostile and abusive classroom environment, the North Carolina Industrial Commission properly concluded that the employee's GAD was not an occupational disease because, although it was inappropriate to imply that the employee's fault played a role in determining compensability, the employee failed to prove either that the employee's work increased the risk of GAD or significantly contributed to it, and the Commission did not ignore the testimony of the employee's expert. Hassell v. Onslow County Bd. of Educ., 362 N.C. 299, 661 S.E.2d 709, 2008 N.C. LEXIS 498 (2008).

§ 97-85. Review of award.

CASE NOTES

The Commission is the fact-finding body, etc.

Employer's allegations that the claimant's counsel engaged in witness tampering was not properly before the court because G.S. 97-85 placed the ultimate fact-finding function with the Commission; thus, the Commission was under no obligation to consider a deputy commissioner's finding regarding the credibility of the claimant's medical experts. Matthews v. Wake Forest Univ., — N.C. App. —, 653 S.E.2d 557, 2007 N.C. App. LEXIS 2522 (2007).

Credibility Determinations. —

North Carolina Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence, and the Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary. Davis v. Harrah's Cherokee Casino, 362 N.C. 133, 655 S.E.2d 392, 2008 N.C. LEXIS 30 (2008).

Industrial Commission Did Not Err in Sending Notice of Opinion and Award Through Email. — North Carolina Industrial Commission did not err in notifying an employee's attorney through email of the deputy commissioner's opinion and award denying the employee's claim for additional benefits because G.S. 97-85 only required notice of the opinion and award, and there was no rule expressly prohibiting the use of email for notification purposes; although there is nothing in the Worker's Compensation Act, or in the Commission's Rules for Workers' Compensation cases, that allows the Commission to serve opinions and awards on parties or their counsel by way of email, there is no rule prohibiting transmission of an opinion and award by way of email. Egen v. Excalibur Resort Prof'l, — N.C. App. —, 663 S.E.2d 914, 2008 N.C. App. LEXIS 1469 (Aug. 5, 2008).

Failure of Commission to Make Findings and Conclusions. —

In a workers' compensation case wherein the employee was awarded compensation after being found permanently and totally disabled, the North Carolina Industrial Commission erred by failing to expressly rule on whether the employer was required to reimburse the employee for past out-of-pocket medical expenses; while it appeared from the emphasis in the Commission's opinion and award, which ordered the employer to pay medical expenses as well as from its decision not to hold the employer in civil contempt, that the Commission implicitly ruled that the employee did not timely submit his request for reimbursement of $1,965.13 in past out-of-pocket medical expenses, the better approach for the Commission was to expressly respond to the issues raised by the employee's appeal. Bolick v. Freight Sys., — N.C. App. —, 654 S.E.2d 793, 2008 N.C. App. LEXIS 81 (2008).

Excusable Neglect. —

North Carolina Industrial Commission erred in granting an employer's motion to dismiss an employee's appeal of the deputy commissioner's award denying his claim for additional benefits because the failure of the employee's attorney to file the appeal within the 15 day period required by G.S. 97-85 was excusable neglect due to the actions of the attorney's agent; based upon the lack of any Commission rules regarding the use of email to announce an award, which could have put the attorney on notice that an opinion and award could arrive by email, it was excusable neglect for the agent to conclude that the attorney had been sent a copy of the award via email and for her not to realize that the employee's right to appeal would depend upon her delivery of the email to the attorney. Egen v. Excalibur Resort Prof'l, — N.C. App. —, 663 S.E.2d 914, 2008 N.C. App. LEXIS 1469 (Aug. 5, 2008).

Competent evidence supported the Full Commission of the North Carolina Industrial Commission's findings of fact that an employee's hearing loss in her left ear was not an occupational disease under G.S. 97-53(28), because two doctors testified that, given the employee's greater loss of hearing in lower frequencies, her hearing loss was not likely due to noise exposure. Strezinski v. City of Greensboro, — N.C. App. —, 654 S.E.2d 263, 2007 N.C. App. LEXIS 2562 (2007).

Where an employee worked as a teacher and sought workers' compensation benefits, arguing that the employee's generalized anxiety disorder (GAD) was an occupational disease caused by a hostile and abusive classroom environment, the North Carolina Industrial Commission properly concluded that the employee's GAD was not an occupational disease because, although it was inappropriate to imply that the employee's fault played a role in determining compensability, the employee failed to prove either that the employee's work increased the risk of GAD or significantly contributed to it, and the Commission did not ignore the testimony of the employee's expert. Hassell v. Onslow County Bd. of Educ., 362 N.C. 299, 661 S.E.2d 709, 2008 N.C. LEXIS 498 (2008).

Commissioner Holding Over After Expiration of Term Made Award Nullity. — Panel of commissioners was evenly split and no majority existed because when the opinion and award was filed, a commissioner who concurred in the opinion was not an officer de jure pursuant as the commissioner's term had ended and a successor had been appointed. Therefore, because the commissioner's appointment was void before the opinion and award were entered, and because the commissioner's concurrence in the opinion and award was not the act of a qualified officer — neither de jure nor de facto — the concurrence was a nullity. Baxter v. Danny Nicholson, Inc., — N.C. App. —, 661 S.E.2d 892, 2008 N.C. App. LEXIS 1149 (June 17, 2008).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

CASE NOTES

I. In General.
II. Review, Generally.
III. Jurisdiction.
V. Scope of Review.
VI. Review of Particular Findings.

I. IN GENERAL.

Cited in Egen v. Excalibur Resort Prof'l, — N.C. App. —, 663 S.E.2d 914, 2008 N.C. App. LEXIS 1469 (Aug. 5, 2008).

II. REVIEW, GENERALLY.

Appeal Served as Supersedeas. — When a party appealed a decision of the Industrial Commission to the Court of Appeals of North Carolina, said appeal served as a supersedeas to maintain the status quo between the parties. Thus, an employee's argument that neither the order entered by the Deputy Commissioner nor the ensuing order by Chairman was a final, enforceable award allowing the employer to cease payments lacked merit. Roberts v. Dixie News, Inc., — N.C. App. —, 658 S.E.2d 684, 2008 N.C. App. LEXIS 654 (2008).

III. JURISDICTION.

Dismissal for Lack of Jurisdiction Where Notice of Appeal Untimely. — Employer's appeal regarding the denial of its costs and attorney fees was dismissed because the appellate court did not obtain jurisdiction over the appeal under G.S. 97-86 since the employer's notice of appeal was filed more than 30 days after the decision by the Full Commission of the North Carolina Industrial Commission. Strezinski v. City of Greensboro, — N.C. App. —, 654 S.E.2d 263, 2007 N.C. App. LEXIS 2562 (2007).

V. SCOPE OF REVIEW.

Commission Is Sole Judge of Weight and Credibility of Testimony. —
North Carolina Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence, and the Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary. Davis v. Harrah's Cherokee Casino, 362 N.C. 133, 655 S.E.2d 392, 2008 N.C. LEXIS 30 (2008).

VI. REVIEW OF PARTICULAR FINDINGS.

General Anxiety Disorder of Teacher. — Where an employee worked as a teacher and sought workers' compensation benefits, arguing that the employee's generalized anxiety disorder (GAD) was an occupational disease caused by a hostile and abusive classroom environment, the North Carolina Industrial Commission properly concluded that the employee's GAD was not an occupational disease because, although it was inappropriate to imply that the employee's fault played a role in determining compensability, the employee failed to prove either that the employee's work increased the risk of GAD or significantly contributed to it, and the Commission did not ignore the testimony of the employee's expert. Hassell v. Onslow County Bd. of Educ., 362 N.C. 299, 661 S.E.2d 709, 2008 N.C. LEXIS 498 (2008).

§ 97-86.1. Payment of award pending appeal in certain cases.

CASE NOTES

Order of Reimbursement Upheld. — In a third-party administrator's appeal of an opinion and award of the North Carolina Industrial Commission, an order requiring the third-party administrator to reimburse the employer's workers' compensation carrier for underpayments and compensation paid to a claimant was upheld as G.S. 97-86.1(d) provided the Commission with the authority to order the payment. The payment of compensation to the claimant, pursuant to Form 60, was not a final award of the Commission and was subject to amendment, including the ordered reimbursement that was made. Starr v. Gaston County Bd. of Educ., — N.C. App. —, 663 S.E.2d 322, 2008 N.C. App. LEXIS 1311 (2008).

§ 97-87. Judgments on awards.

CASE NOTES

Cited in Bennett v. Sheraton Grand, 186 N.C. App. 250, 650 S.E.2d 660, 2007 N.C. App. LEXIS 2083 (2007).

§ 97-88. Expenses of appeals brought by insurers.

CASE NOTES

Employee Failed to Move for Expenses and Fees. — Employee's request to the Court of Appeals of North Carolina for an award of fees pursuant to G.S. 97-88 was not properly raised as a cross-assignment of error, pursuant to N.C. R. App. P. 10(d), and as such, the employee failed to show any entitlement to an award; moreover, even assuming that the employee had properly moved for expenses and fees under G.S. 97-88, the appeals court declined to issue an order. Roset-Eredia v. F.W. Dellinger, Inc., — N.C. App. —, 660 S.E.2d 592, 2008 N.C. App. LEXIS 1019 (2008).

Expenses and Fees Incurred at Appellate Court Level. —

Sister, who was awarded death benefits and additional benefits upon the death of an employee, was entitled upon the exercise of the appellate court's discretion to an award of attorney's fees on remand because payments for death benefits were required to continue to be made to the sister, even though the appellate court did not affirm all the benefits that the North Carolina Industrial Commission awarded to the sister. Kelly v. Duke Univ., — N.C. App. —, 661 S.E.2d 745, 2008 N.C. App. LEXIS 1073 (2008).

Inadequate Findings. — When the Industrial Commission ordered the payment of attorney's fees pursuant to G.S. 97-88, that order was reversed because the Commission (1) did not find whether, as required by G.S. 97-88, the proceedings were brought by an insurer, (2) ordered "defendants" to pay the fees without specifying to which of three possible defendants the order applied, and (3) summarily granted a request to remove an insurance guaranty association, which could have been liable for attorney's fees, from the case caption without explaining why the request was granted or determining the association's attorney's fees liability. Swift v. Richardson Sports Ltd Partners, — N.C. App. —, 658 S.E.2d 674, 2008 N.C. App. LEXIS 78 (2008).

§ 97-88.1. Attorney's fees at original hearing.

CASE NOTES

Construction with Other Sections. —

When an employer appealed the Industrial Commission's order directing the payment of attorney's fees pursuant to G.S. 97-88, the employer did not waive the issue by failing to raise the issue in a prior appeal because the prior appeal concerned liability for attorney's fees pursuant to G.S. 97-88.1; thus, the applicability of G.S. 97-88 was not pertinent to the prior appeal. Swift v. Richardson Sports Ltd Partners, — N.C. App. —, 658 S.E.2d 674, 2008 N.C. App. LEXIS 78 (2008).

Discretion of Industrial Commission. —

Industrial Commission's decision not to award fees to an employee was not an abuse of discretion under N.C. R. App. P. 28(b)(6) where the full commission was not bound by a contrary decision of a deputy commissioner and the employee failed to show that his employer and its insurance carrier did not mount an unreasonable defense of his workers' compensation claim. Raper v. Mansfield Sys., — N.C. App. —, 657 S.E.2d 899, 2008 N.C. App. LEXIS 540 (Mar. 18, 2008).

§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation.

CASE NOTES

Cited in Swift v. Richardson Sports Ltd Partners, — N.C. App. —, 658 S.E.2d 674, 2008 N.C. App. LEXIS 78 (2008).

Chapter 101.

Names of Persons.

Sec.
101-6. Effect of change; only one change, except as provided.

§ 101-6. Effect of change; only one change, except as provided.

(a) When the order is made and the applicant's name changed, he is entitled to all the privileges and protection under his new name as he would have been under the old name. No person shall be allowed to change his name under this Chapter but once, except that he shall be permitted to resume his former name upon compliance with the requirements and procedure set forth in this Chapter for change of name, and except as provided in subsection (b) of this section.

(b) For good cause shown, and upon compliance with the requirements and procedure set forth in this Chapter for change of name, the name of a minor child may be changed not more than two times under this Chapter.

(c) A sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes is prohibited from obtaining a change of name under this Chapter. (1891, c. 145; Rev., ss. 2147, 2149; C.S., s. 2975; 1945, c. 37, s. 2; 1991, c. 333, s. 1; 2008-218, s. 9.)

Editor's Note. — Session Laws 2008-218, s. 10, is a severability clause.

Effect of Amendments. — Session Laws 2008-218, s. 9, effective December 1, 2008, and applicable to offenses committed on or after that date, added subsection (c).

Chapter 105.

Taxation.

SUBCHAPTER I. LEVY OF TAXES.

Article 1A.

Estate Taxes.

Sec.

105-32.2. Estate tax imposed in amount equal to federal state death tax credit.

Article 2.

Privilege Taxes.

105-41. Attorneys-at-law and other professionals.

Article 2A.

Tobacco Products Tax.

Part 3. Tax on Other Tobacco Products.

105-113.39. Discount; refund.

Article 2C.

Alcoholic Beverage License And Excise Taxes.

Part 4. Excise Taxes, Distribution of Tax Revenue.

105-113.81A. Distribution of part of wine taxes attributable to North Carolina wine.

105-113.82. Distribution of part of beer and wine taxes.

Article 2D.

Unauthorized Substances Taxes.

105-113.112. Confidentiality of information.

Article 3.

Franchise Tax.

105-114. Nature of taxes; definitions.

105-114.1. Limited liability companies.

105-122. Franchise or privilege tax on domestic and foreign corporations.

105-125. Exempt corporations.

Article 3A.

Tax Incentives For New And Expanding Businesses.

105-129.2A. Sunset; studies.

Article 3B.

Business And Energy Tax Credits.

105-129.16C. [Repealed.]

105-129.16E. (Effective for taxable years beginning on or after January 1, 2007, and expires for taxable years beginning on or after January 1, 2010) Credit for small business employee health benefits.

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105-330.5. (For effective date, see note) Listing and collecting procedures.
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105-449.52. (Effective January 1, 2009) Civil penalties applicable to motor carriers.

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105-522. (Effective October 1, 2009) City hold harmless for repealed local taxes.
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Article 46.

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105-538. Administration of taxes.

SUBCHAPTER I. LEVY OF TAXES.

ARTICLE 1A.

Estate Taxes.

§ 105-32.2. Estate tax imposed in amount equal to federal state death tax credit.

(a) Tax. — An estate tax is imposed on the estate of a decedent when a federal estate tax is imposed on the estate under section 2001 of the Code and any of the following apply:

(1) The decedent was a resident of this State at death.

(2) The decedent was not a resident of this State at death and owned any of the following:

a. Real property or tangible personal property that is located in this State.

b. Intangible personal property that has a tax situs in this State.

(b) Amount. — The amount of the estate tax imposed by this section is the amount of the state death tax credit that, as of December 31, 2001, would have been allowed under section 2011 of the Code against the federal taxable estate. The tax may not exceed the amount of federal estate tax due under the Code. The federal taxable estate and the amount of the federal estate tax due are determined without taking into account the deduction for state death taxes allowed under Section 2058 of the Code and the credits allowed under sections 2011 through 2015 of the Code.

If any property in the estate is located in a state other than North Carolina, the amount of tax payable depends on whether the decedent was a resident of this State at death. If the decedent was a resident of this State at death, the amount of tax due under this section is reduced by an amount computed by multiplying the credit by a fraction, the numerator of which is the gross value of the estate that has a tax situs in another state and the denominator of which is the value of the decedent's gross estate. If the decedent was not a resident of this State at death, the amount of tax due under this section is an amount computed by multiplying the credit by a fraction, the numerator of which is the gross value of real property that is located in North Carolina plus the gross value of any personal property that has a tax situs in North Carolina and the denominator of which is the value of the decedent's gross estate. For purposes of this section, the gross value of property is its gross value as finally determined in the federal estate tax proceedings. (1998-212, s. 29A.2(b); 2002-87, s. 9; 2002-126, ss. 30C.3(a), 30C.3(b); 2003-284, ss. 37A.4, 37A.5; 2003-416, s. 1; 2004-170, ss. 1, 4(a), (b); 2005-144, ss. 8.1, 8.2; 2006-162, s. 26; 2008-107, s. 28.17(a).)

Editor's Note. —

Session Laws 2008-107, s. 28.17, which amended this section, is applicable retroactively to the estates of decedents for which the statute of limitations for claiming a refund had not expired as of December 28, 2007. A personal representative of an estate for which the statute of limitations had not expired as of December 28, 2007, may file a claim for refund under G.S. 105-241.7.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.17(a), effective July 16, 2008, deleted "the lesser of the amount of the death tax paid the other state or" preceding "an amount computed" in the second sentence of the second paragraph of subsection (b). See Editor's note for applicability.

CASE NOTES

Cited in Pope v. Rollins (In re Estate of Pope), — N.C. App. —, 666 S.E.2d 140, 2008 N.C. App. LEXIS 1626 (2008).

Article 2.

Privilege Taxes.

§ 105-33. Taxes under this Article.

Editor's Note. —

Session Laws 2008-206, s. 3, provides: "Notwithstanding the July 1 due date in G.S. 105-33, a home inspector required under this act to obtain a State privilege license on July 1, 2008, for the taxable year beginning on July 1, 2008, has until October 1, 2008, to submit an application for licensure and pay the tax."

§ 105-41. Attorneys-at-law and other professionals.

(a) Every individual in this State who practices a profession or engages in a business and is included in the list below must obtain from the Secretary a statewide license for the privilege of practicing the profession or engaging in the business. A license required by this section is not transferable to another person. The tax for each license is fifty dollars ($50.00).

(1) An attorney-at-law.

(2) A physician, a veterinarian, a surgeon, an osteopath, a chiropractor, a chiropodist, a dentist, an ophthalmologist, an optician, an optometrist, or another person who practices a professional art of healing.
(3) A professional engineer, as defined in G.S. 89C-3.
(4) A registered land surveyor, as defined in G.S. 89C-3.
(5) An architect.
(6) A landscape architect.
(7) A photographer, a canvasser for any photographer, or an agent of a photographer in transmitting photographs to be copied, enlarged, or colored.
(8) A real estate broker or a real estate salesman, as defined in G.S. 93A-2. A real estate broker or a real estate salesman who is also a real estate appraiser is required to obtain only one license under this section to cover both activities.
(9) A real estate appraiser, as defined in G.S. 93E-1-4. A real estate appraiser who is also a real estate broker or a real estate salesman is required to obtain only one license under this section to cover both activities.
(10) A person who solicits or negotiates loans on real estate as agent for another for a commission, brokerage, or other compensation.
(11) A mortician or embalmer licensed under G.S. 90-210.25.
(12) A home inspector licensed under Article 9F of Chapter 143 of the General Statutes.

(b) The following persons are exempt from the tax:
(1) A person who is at least 75 years old.
(2) A person practicing the professional art of healing for a fee or reward, if the person is an adherent of an established church or religious organization and confines the healing practice to prayer or spiritual means.
(3) A blind person engaging in a trade or profession as a sole proprietor. A "blind person" means any person who is totally blind or whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or where the widest diameter of visual field subtends an angle no greater than 20 degrees. This exemption shall not extend to any sole proprietor who permits more than one person other than the proprietor to work regularly in connection with the trade or profession for remuneration or recompense of any kind, unless the other person in excess of one so remunerated is a blind person.

(c) Every person engaged in the public practice of accounting as a principal, or as a manager of the business of public accountant, shall pay for such license fifty dollars ($50.00), and in addition shall pay a license of twelve dollars and fifty cents ($12.50) for each person employed who is engaged in the capacity of supervising or handling the work of auditing, devising or installing systems of accounts.

(d) Repealed by Session Laws 1998-95, s. 7, effective July 1, 1999.

(e) Licenses issued under this section are issued as personal privilege licenses and shall not be issued in the name of a firm or corporation. A licensed photographer having a located place of business in this State is liable for a license tax on each agent or solicitor employed by the photographer for soliciting business. If any person engages in more than one of the activities for which a privilege tax is levied by this section, the person is liable for a privilege tax with respect to each activity engaged in.

(f) Repealed by Session Laws 1981, c. 17.

(g) Repealed by Session Laws 1998-95, s. 7, effective July 1, 1999.

(h) Counties and cities may not levy any license tax on the business or professions taxed under this section.

(i) Obtaining a license required by this Article does not of itself authorize the practice of a profession, business, or trade for which a State qualification license is required. (1939, c. 158, s. 109; 1941, c. 50, s. 3; 1943, c. 400, s. 2; 1949, c. 683; 1953, c. 1306; 1957, c. 1064; 1973, c. 476, s. 193; 1981, c. 17; c. 83, ss. 4, 5; 1989, c. 584, s. 7; 1991 (Reg. Sess., 1992), c. 974, s. 1; 1993, c. 419, s. 13.2; 1998-95, s. 7; 2002-158, s. 3; 2005-276, s. 23A.1(b); 2008-206, s. 1.)

Editor's Note. —

Session Laws 2008-206, s. 2, provides: "Notwithstanding G.S. 105-41(h), a city that imposed a license tax on a home inspector licensed under Article 9F of Chapter 143 of the General Statutes for fiscal year 2008-2009 may impose and collect that tax for fiscal year 2008-2009. A city may not levy a license tax on this business or profession for taxable years beginning on or after July 1, 2009."

Effect of Amendments. —

Session Laws 2008-206, s. 1, effective August 9, 2008, and applicable to taxable years beginning on or after July 1, 2008, added subdivision (a)(12).

ARTICLE 2A.

Tobacco Products Tax.

Part 3. Tax on Other Tobacco Products.

§ 105-113.39. Discount; refund.

(a) Discount. — A wholesale dealer or a retail dealer who is primarily liable under G.S. 105-113.35(b) for the excise taxes imposed by this Part, who files a timely report under G.S. 105-113.37, and who sends a timely payment may deduct from the amount due with the report a discount of two percent (2%). This discount covers expenses incurred in preparing the records and reports required by this Part and the expense of furnishing a bond.

(b) Refund. — A wholesale dealer or retail dealer who is primarily liable under G.S. 105-113.35(b) for the excise taxes imposed by this Part and is in possession of stale or otherwise unsalable tobacco products upon which the tax has been paid may return the tobacco products to the manufacturer and apply to the Secretary for refund of the tax. The application shall be in the form prescribed by the Secretary and shall be accompanied by an affidavit from the manufacturer listing the tobacco products returned to the manufacturer by the applicant. The Secretary shall refund the tax paid, less the discount allowed, on the listed products. (1969, c. 1075, s. 2; 1991, c. 689, s. 273; 2001-414, s. 4; 2003-284, s. 45A.1(c); 2004-84, s. 2(c); 2005-406, s. 2; 2008-207, s. 4.)

Effect of Amendments. —

Session Laws 2008-207, s. 4, effective October 1, 2008, and applicable to products returned on or after that date, in the second sentence of subsection (a), deleted "losses due to damage to tobacco products" following "this discount covers" and made a minor stylistic change; and in subsection (b), in the first sentence, substituted "G.S. 105-113.35(b)" for "G.S. 150-113.35(b)," in the second sentence, substituted "tobacco products" for "cigars" twice, and substituted "listing the tobacco products" for "stating the number of cigars," and in the third sentence, substituted "listed products" for "unsalable cigars."

Article 2C.

Alcoholic Beverage License And Excise Taxes.

Part 4. Excise Taxes, Distribution of Tax Revenue.

§ 105-113.81A. Distribution of part of wine taxes attributable to North Carolina wine.

(a) Industry Promotion. — The Secretary shall on a quarterly basis credit to the Department of Commerce two hundred thousand dollars ($200,000) from the net proceeds of the excise tax collected on unfortified wine. The Department of Commerce shall allocate the funds received under this subsection to the North Carolina Wine and Grape Growers Council to be used to promote the North Carolina grape and wine industry. Any funds credited to the Department of Commerce under this subsection that are not expended by June 30 of any fiscal year do not revert to the General Fund, but remain available to the Department for the uses set forth in this subsection.

(b) Research and Development. — The Secretary shall on a quarterly basis credit to the Department of Commerce twenty-five thousand dollars ($25,000) from the net proceeds of the excise tax collected on unfortified wine. The Department of Commerce shall allocate the funds received under this subsection to the North Carolina Wine and Grape Growers Council to be used to contract for research and development services to improve viticultural and enological practices in North Carolina. Any funds credited to the Department of Commerce under this subsection that are not expended by June 30 of any fiscal year do not revert to the General Fund, but remain available to the Department for the uses set forth in this subsection. (1987, c. 836, s. 1; 1987 (Reg. Sess., 1988), c. 1036, s. 12(a); 1991 (Reg. Sess., 1992), c. 900, s. 176(b); 1996, 2nd Ex. Sess., c. 18, ss. 25.2(a), 25.2(b); 1997-261, s. 109; 1997-443, s. 14.4; 1999-237, s. 13.7; 2001-475, s. 1; 2005-276, s. 11.4; 2005-380, s. 4(c); 2006-227, s. 14; 2006-264, s. 98.3(b); 2008-107, s. 13.6A(a).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 13.6A(a), effective October 1, 2008, designated the previously existing provisions as subsection (a); in subsection (a), added "Industry Promotion. —" at the beginning, deleted "and to contract for research and development services to improve viticultural and enological practices in North Carolina" at the end of the second sentenced, and substituted "this subsection" for "this section" throughout; and added subsection (b).

§ 105-113.82. Distribution of part of beer and wine taxes.

(a) Amount, Method. — The Secretary shall distribute annually the following percentages of the net amount of excise taxes collected on the sale of malt beverages and wine during the preceding 12-month period ending March 31 to the counties or cities in which the retail sale of these beverages is authorized in the entire county or city:

(1) Of the tax on malt beverages levied under G.S. 105-113.80(a), twenty-three and three-fourths percent (23¾%);

(2) Of the tax on unfortified wine levied under G.S. 105-113.80(b), sixty-two percent (62%); and

(3) Of the tax on fortified wine levied under G.S. 105-113.80(b), twenty-two percent (22%).

For purposes of this subsection, "net amount" means gross collections less refunds and amounts credited to the Department of Commerce under G.S. 105-113.81A. If malt beverages, unfortified wine, or fortified wine may be licensed to be sold at retail in both a county and a city located in the county, both the county and city shall receive a portion of the amount distributed, that portion to be determined on the basis of population. If one of these beverages may be licensed to be sold at retail in a city located in a county in which the sale of the beverage is otherwise prohibited, only the city shall receive a portion of the amount distributed, that portion to be determined on the basis of population. The amounts distributed under subdivisions (1), (2), and (3) shall be computed separately.

(b) Repealed by Session Laws 2000, c. 173, s. 3, effective August 2, 2000.

(c) Exception. — Notwithstanding subsection (a), in a county in which ABC stores have been established by petition, the revenue shall be distributed as though the entire county had approved the retail sale of a beverage whose retail sale is authorized in part of the county.

(d) Time. — The revenue shall be distributed to cities and counties within 60 days after March 31 of each year. The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution.

(e) Population Estimates. — To determine the population of a city or county for purposes of the distribution required by this section, the Secretary shall use the most recent annual estimate of population certified by the State Budget Officer.

(f) City Defined. — As used in this section, the term "city" means a city as defined in G.S. 153A-1(1) or an urban service district defined by the governing body of a consolidated city-county.

(g) Use of Funds. — Funds distributed to a county or city under this section may be used for any public purpose.

(h) Disqualification. — No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets is open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999. (1985, c. 114, s. 1; 1987, c. 836, s. 2; 1989 (Reg. Sess., 1990), c. 813, s. 5; 1991, c. 689, s. 28(b); 1993, c. 321, s. 26(g); c. 485, s. 2; 1995, c. 17, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 25.2(a); 1997-261, s. 109; 1999-458, s. 10; 2000-173, s. 3; 2002-120, s. 1; 2004-203, s. 5(d); 2005-435, s. 34(a); 2006-162, s. 1; 2007-527, s. 4.)

Editor's Note. — This section has been set out in the supplement to correct a publishing error in the main volume.

ARTICLE 2D.

Unauthorized Substances Taxes.

§ 105-113.107. Excise tax on unauthorized substances.

CASE NOTES

Failure to Pay Excise Tax. — When a North Carolina Department of Revenue agent uses a jeopardy assessment to collect the excise tax on controlled substances possessed by dealers pursuant to G.S. 105-113.107 of the North Carolina's Unauthorized Substances Tax Act, G.S. 105-113 et seq., the Department was required by former G.S. 105-241.1(a), (c), and (g) (repealed January 1, 2008) to provide the dealer with written notice no later than 30 days after the jeopardy assessment that the dealer may request a hearing on the jeopardy assessment following the procedure described in the notice. Thus, while the statute may not technically require that the Revenue Officer provide written notice to a dealer that he may halt the seizure of property by posting a bond, it does require that officer to provide written notice of the right to request a hearing either at the time of the assessment or, in the case of a jeopardy assessment, within 30 days after the seizure, and the officer thus must serve the taxpayer with the assessment, a warrant and written notice of procedures. Ervin v. Hammond, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 29659 (W.D.N.C. Mar. 31, 2008).

Magistrate judge's recommendation against the dismissal of certain claims asserted by a plaintiff pursuant to 42 U.S.C.S. § 1983 and 42 U.S.C.S. § 1985 for damages based on the conduct of defendant officials in allegedly entering his home without a warrant, seizing his property to satisfy the "drug dealer excise tax" imposed in G.S. 105-113.107 by North Carolina's Unauthorized Substances Tax Act, G.S. 105-113 et seq., and otherwise violating his constitutional rights was sustained in part because plaintiff's claims against certain of the officers in their individual capacities stated a claim under federal law for violation of such rights. Ervin v. Hammond, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 29659 (W.D.N.C. Mar. 31, 2008).

§ 105-113.112. Confidentiality of information.

Information obtained by the Department in the course of administering the tax imposed by this Article, including information on whether the Department has issued a revenue stamp to a person, is confidential tax information and is subject to the following restrictions on disclosure:

(1) G.S. 105-259 prohibits the disclosure of the information, except in the limited circumstances provided in that statute.

(2) The information may not be used as evidence, as defined in G.S. 15A-971, in a criminal prosecution for an offense other than an offense under this Article or under Article 9 of this Chapter. Under this prohibition, no officer, employee, or agent of the Department may testify about the information in a criminal prosecution for an offense other than an offense under this Article or under Article 9 of this Chapter. This subdivision implements the protections against double jeopardy and self-incrimination set out in Amendment V of the United States Constitution and the restrictions in it apply regardless of whether information may be disclosed under G.S. 105-259. This subdivision does not apply to information obtained from a source other than an employee, officer, or agent of the Department. This subdivision does not prohibit testimony by an officer, employee, or agent of the Department concerning an offense committed against that individual in the course of administering this Article. An officer, employee, or agent of the Department who provides evidence or testifies in violation of this subdivision is guilty of a Class 1 misdemeanor. (1989, c. 772, s. 1; 1993, c. 539, s. 702; 1994, Ex. Sess., c. 24, s. 14(c); 1997, c. 292, s. 1; 2005-435, s. 27; 2008-134, s. 68(a).)

Effect of Amendments. —
Session Laws 2008-134, s. 68(a), effective December 1, 2008, and applicable to offenses committed on or after that date, added the fifth sentence in subdivision (2).

Article 3.

Franchise Tax.

§ 105-114. Nature of taxes; definitions.

(a) Nature of Taxes. — The taxes levied in this Article upon persons and partnerships are for the privilege of engaging in business or doing the act named.

(a1) Scope. — The taxes levied in this Article upon corporations are privilege or excise taxes levied upon:

(1) Corporations organized under the laws of this State for the existence of the corporate rights and privileges granted by their charters, and the enjoyment, under the protection of the laws of this State, of the powers, rights, privileges and immunities derived from the State by the form of such existence; and

(2) Corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which these corporations receive from the government and laws of this State in doing business in this State.

(a2) Condition for Doing Business. — If the corporation is organized under the laws of this State, the payment of the taxes levied by this Article is a condition precedent to the right to continue in the corporate form of organization. If the corporation is not organized under the laws of this State, payment of these taxes is a condition precedent to the right to continue to engage in doing business in this State.

(a3) Tax Year. — The taxes levied in this Article are for the fiscal year of the State in which the taxes become due, except that the taxes levied in G.S. 105-122 are for the income year of the corporation in which the taxes become due.

(a4) No Double Taxation. — G.S. 105-122 does not apply to holding companies taxed under G.S. 105-120.2. G.S. 105-122 applies to a corporation taxed under another section of this Article only to the extent the taxes levied on the corporation in G.S. 105-122 exceed the taxes levied in other sections of this Article on the corporation or on a limited liability company whose assets must be included in the corporation's tax base under G.S. 105-114.1.

(b) Definitions. — The following definitions apply in this Article:

(1) City. — Defined in G.S. 105-228.90.

(1a) Code. — Defined in G.S. 105-228.90.

(2) **(Effective for taxable years beginning before January 1, 2009)** Corporation. — A domestic corporation, a foreign corporation, an electric membership corporation organized under Chapter 117 of the General Statutes or doing business in this State, or an association that is organized for pecuniary gain, has capital stock represented by shares, whether with or without par value, and has privileges not possessed by individuals or partnerships. The term includes a mutual or capital stock savings and loan association or building and loan association chartered under the laws of any state or of the United States. The term includes a limited liability company that elects to be taxed as a C Corporation under the Code, but does not otherwise include a limited liability company.

(2) **(Effective for taxable years beginning on or after January 1, 2009)** Corporation. — A domestic corporation, a foreign corporation, an electric membership corporation organized under Chapter 117 of the General Statutes or doing business in this State, or an association that is organized for pecuniary gain, has capital stock represented by shares, whether with or without par value, and has privileges not possessed by individuals or partnerships. The term includes a mutual or capital stock savings and loan association or building and loan association chartered under the laws of any state or of the United States. The term includes a limited liability company that elects to be

taxed as a corporation under the Code, but does not otherwise include a limited liability company.

(3) Doing business. — Each and every act, power, or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges granted by the laws of this State.

(4) Income year. — Defined in G.S. 105-130.2(4b).

(c) Recodified as G.S. 105-114.1 by Session Laws 2002-126, s. 30G.2.(b), effective January 1, 2003. (1939, c. 158, s. 201; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1965, c. 287, s. 16; 1967, c. 286; 1969, c. 541, s. 6; 1973, c. 1287, s. 3; 1983, c. 713, s. 66; 1985, c. 656, s. 7; 1985 (Reg. Sess., 1986), c. 853, s. 1; 1987, c. 778, s. 1; 1987 (Reg. Sess., 1988), c. 1015, s. 2; 1989, c. 36, s. 2; 1989 (Reg. Sess., 1990), c. 981, s. 2; 1991, c. 30, s. 2; c. 689, s. 250; 1991 (Reg. Sess., 1992), c. 922, s. 3; 1993, c. 12, s. 4; c. 354, s. 11; c. 485, s. 5; 1997-118, s. 4; 1998-98, ss. 60, 76; 1999-337, s. 20; 2000-173, s. 8; 2001-327, s. 2(b); 2002-126, s. 30G.2(b); 2005-435, s. 59.2(a); 2006-66, s. 24A.2(a); 2006-162, ss. 3(b), 22; 2008-107, s. 28.7(a).)

Subdivision (b)(2) Set Out Twice. — The first version of subdivision (b)(2) set out above is effective for taxable years beginning before January 1, 2009. The second version of subdivision (b)(2) set out above is effective for taxable years beginning on or after January 1, 2009.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.7(a), effective for taxable years beginning on or after January 1, 2009, substituted "corporation" for "C Corporation" in the last sentence of subdivision (b)(2).

§ 105-114.1. Limited liability companies.

(a) Definitions. — The following definitions apply in this section:

(1) Affiliated group. — Defined in section 1504 of the Code.

(2) Capital interest. — The right under a limited liability company's governing law to receive a percentage of the company's assets upon dissolution after payments to creditors.

(3) Entity. — A person that is not a human being.

(4) Governing law. — A limited liability company's governing law is determined under G.S. 57C-6-05 or G.S. 57C-7-01, as applicable.

(5) **(Effective for taxable years beginning before January 1, 2009)** Noncorporate limited liability company. — A limited liability company that does not elect to be taxed as a C Corporation under the Code.

(5) **(Effective for taxable years beginning on or after January 1, 2009)** Noncorporate limited liability company. — A limited liability company that does not elect to be taxed as a corporation under the Code.

(b) Controlled Companies. — If a corporation or an affiliated group of corporations owns more than fifty percent (50%) of the capital interests in a noncorporate limited liability company, the corporation or group of corporations must include in its three tax bases pursuant to G.S. 105-122 the same percentage of (i) the noncorporate limited liability company's capital stock, surplus, and undivided profits; (ii) fifty-five percent (55%) of the noncorporate limited liability company's appraised ad valorem tax value of property; and (iii) the noncorporate limited liability company's actual investment in tangible property in this State, as appropriate.

(c) Constructive Ownership. — Ownership of the capital interests in a noncorporate limited liability company is determined by reference to the constructive ownership rules for partnerships, estates, and trusts in section 318(a)(2)(A) and (B) of the Code with the following modifications:

(1) The term "capital interest" is substituted for "stock" each place it appears.
(2) A noncorporate limited liability company and any noncorporate entity other than a partnership, estate, or trust is treated as a partnership.
(3) The operating rule of section 318(a)(5) of the Code applies without regard to section 318(a)(5)(C).

(d) No Double Inclusion. — If a corporation is required to include a percentage of a noncorporate limited liability company's assets in its tax bases under this Article pursuant to subsection (b) of this section, its investment in the noncorporate limited liability company is not included in its computation of capital stock base under G.S. 105-122(b).

(e) Affiliated Group. — If the owner of the capital interests in a noncorporate limited liability company is an affiliated group of corporations, the percentage to be included pursuant to subsection (b) of this section by each group member that is doing business in this State is determined by multiplying the capital interests in the noncorporate limited liability company owned by the affiliated group by a fraction. The numerator of the fraction is the capital interests in the noncorporate limited liability company owned by the group member, and the denominator of the fraction is the capital interests in the noncorporate limited liability company owned by all group members that are doing business in this State.

(f) Exemption. — This section does not apply to assets owned by a noncorporate limited liability company if the total book value of the noncorporate limited liability company's assets never exceeded one hundred fifty thousand dollars ($150,000) during its taxable year.

(g) Timing. — Ownership of the capital interests in a noncorporate limited liability company is determined as of the last day of its taxable year. The adjustments pursuant to subsections (b) and (d) of this section must be made to the owner's next following return filed under this Article. If a noncorporate limited liability company and a corporation or an affiliated group of corporations have engaged in a pattern of transferring assets between them with the result that each did not own the capital interests on the last day of its taxable year, the ownership of the capital interests in the noncorporate limited liability company must be determined as of the last day of the corporation or group of corporations' taxable year.

(h) Penalty. — A taxpayer who, because of fraud with intent to evade tax, underpays the tax under this Article on assets attributable to it under this section is guilty of a Class H felony in accordance with G.S. 105-236(7). (2002-126, s. 30G.2(b); 2004-74, ss. 1, 2; 2004-170, s. 8.1; 2006-66, s. 24A.2(b); 2008-107, s. 28.7(b).)

Subdivision (a)(5) Set Out Twice. — The first version of subdivision (a)(5) set out above is effective for taxable years beginning before January 1, 2009. The second version of subdivision (a)(5) set out above is effective for taxable years beginning on or after January 1, 2009.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.7(b), effective for taxable years beginning on or after January 1, 2009, substituted "corporation" for "C Corporation" in subdivision (a)(5).

§ 105-122. Franchise or privilege tax on domestic and foreign corporations.

(a) **(Effective for taxable years beginning before January 1, 2009)** Every corporation, domestic and foreign, incorporated, or, by an act, domesticated under the laws of this State or doing business in this State, except as otherwise provided in this Article, shall, on or before the fifteenth day of the third month following the end of its income year, annually make and deliver to the Secretary in the form prescribed by the Secretary a full, accurate, and complete report and statement signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary, containing the facts and information required by the Secretary as shown by the books and records of the corporation at the close of the income year.

There shall be annexed to the return required by this subsection the affirmation of the officer signing the return.

(a) **(Effective for taxable years beginning on or after January 1, 2009)** An annual franchise or privilege tax is imposed on a corporation doing business in this State. The tax is determined on the basis of the books and records of the corporation as of the close of its income year. A corporation subject to the tax must file a return under affirmation with the Secretary at the place and in the manner prescribed by the Secretary. The return must be signed by the president, vice-president, treasurer, or chief financial officer of the corporation. The return is due on or before the fifteenth day of the fourth month following the end of the corporation's income year.

(b) Determination of Capital Base. — A corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus, and undivided profits. No reservation or allocation from surplus or undivided profits is allowed except as provided below:

(1) Definite and accrued legal liabilities.

(2) Taxes accrued, dividends declared, and reserves for depreciation of tangible assets as permitted for income tax purposes.

(3) When including deferred tax liabilities, a corporation may reduce the amount included in its base by netting against that amount deferred tax assets. The reduction may not decrease deferred tax liabilities below zero (0).

(4) Reserves for the cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or streams, lakes, or rivers, upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 certifying that the Environmental Management Commission or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to such devices, plants or equipment, that such device, plant or equipment is being effectively operated in

accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions.

(5) Reserves for the cost of purchasing and installing equipment or constructing facilities for the purpose of recycling or resource recovering of or from solid waste or for the purpose of reducing the volume of hazardous waste generated shall be treated as deductible for the purposes of this section upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources certifying that the Department of Environment and Natural Resources has found as a fact that the equipment or facility has actually been purchased, installed or constructed, that it is in conformance with all rules and regulations of the Department of Environment and Natural Resources, and the recycling or resource recovering is the primary purpose of the facility or equipment.

(6) Reserves for the cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

(7) The cost of treasury stock.

(8) In the case of an international banking facility, the capital base shall be reduced by the excess of the amount as of the end of the taxable year of all assets of an international banking facility which are employed outside the United States over liabilities of the international banking facility owed to foreign persons. For purposes of such reduction, foreign persons shall have the same meaning as defined in G.S. 105-130.5(b)(13)d.

Every corporation doing business in this State which is a parent, subsidiary, or affiliate of another corporation shall add to its capital stock, surplus, and undivided profits all indebtedness owed to a parent, subsidiary, or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. If any part of the capital of the creditor corporation is capital borrowed from a source other than a parent, subsidiary, or affiliate, the debtor corporation, which is required under this subsection to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the creditor corporation, may deduct from the debt included a proportionate part determined on the basis of the ratio of the borrowed capital of the creditor corporation to the total assets of the creditor corporation. If the creditor corporation is also taxable under the provisions of this section, the creditor corporation is allowed to deduct from the total of its capital, surplus, and undivided profits the amount of any debt owed to it by a parent, subsidiary or affiliated corporation to the extent that the debt has been included in the tax base of the parent, subsidiary, or affiliated debtor corporation reporting for taxation under the provisions of this section.

The following definitions apply in this subsection:

(1) Affiliate. — The same meaning as specified in G.S. 105-130.6.

(2) Indebtedness. — All loans, credits, goods, supplies, or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation, other than indebtedness endorsed, guaranteed, or otherwise supported by one of these corporations.

(3) Parent. — The same meaning as specified in G.S. 105-130.6.

(4) Subsidiary. — The same meaning as specified in G.S. 105-130.6.

(c) Repealed by Session Laws 2007-491, s. 2, effective January 1, 2008.

(c1) Apportionment. — A corporation that is doing business in this State and in one or more other states must apportion its capital stock, surplus, and undivided profits to this State. A corporation must use the apportionment method set out in subdivision (1) of this subsection unless the Department has authorized it to use a different method under subdivision (2) of this subsection. The portion of a corporation's capital stock, surplus, and undivided profits determined by applying the appropriate apportionment method is considered the amount of capital stock, surplus, and undivided profits the corporation uses in its business in this State.

(1) Statutory. — A corporation that is subject to income tax under Article 4 of this Chapter must apportion its capital stock, surplus, and undivided profits by using the fraction it applies in apportioning its income under that Article. A corporation that is not subject to income tax under Article 4 of this Chapter must apportion its capital stock, surplus, and undivided profits by using the fraction it would be required to apply in apportioning its income if it were subject to that Article. The apportionment method set out in this subdivision is considered the statutory method of apportionment and is presumed to be the best method of determining the amount of a corporation's capital stock, surplus, and undivided profits attributable to the corporation's business in this State.

(2) Alternative. — A corporation that believes the statutory apportionment method set out in subdivision (1) of this subsection subjects a greater portion of its capital stock, surplus, and undivided profits to tax under this section than is attributable to its business in this State may make a written request to the Secretary for permission to use an alternative method. The request must set out the reasons for the corporation's belief and propose an alternative method. The corporation has the burden of establishing by clear, cogent, and convincing proof that the statutory apportionment method subjects a greater portion of the corporation's capital stock, surplus, and undivided profits to tax under this section than is attributable to its business in this State and that the proposed alternative method is a better method of determining the amount of the corporation's capital stock, surplus, and undivided profits attributable to the corporation's business in this State.

The Secretary must issue a written decision on a corporation's request for an alternative apportionment method. If the decision grants the request, it must describe the alternative method the corporation is authorized to use and state the tax years to which the alternative method applies. A decision may apply to no more than three tax years. A corporation may renew a request to use an alternative apportionment method by following the procedure in this subdivision. A decision of the Secretary on a request for an alternative apportionment method is final and is not subject to administrative or judicial review. A corporation authorized to use an alternative method may apportion its capital stock, surplus, and undivided profits in accordance with the alternative method or the statutory method.

(d) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection (c) of this section, which amount shall not be less than fifty-five percent (55%) of the appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State of each corporation nor less than its total actual investment in tangible property in this State, every corporation taxed under this section shall annually pay to the Secretary of Revenue, at the time the report and statement are due, a franchise or privilege tax at the rate of one dollar and fifty cents ($1.50) per one thousand dollars ($1,000) of the total amount of capital stock, surplus and undivided profits as provided in this section. The tax imposed in this section shall not be less than thirty-five dollars ($35.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each corporation in this State. Appraised value of tangible property including real estate is the ad valorem valuation for the calendar year next preceding the due date of the franchise tax return. The term "total actual investment in tangible property" as used in this section means the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon. In computing "total actual investment in tangible personal property" there shall also be deducted reserves for the entire cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or into streams, lakes, or rivers, upon condition that the corporation claiming this deduction shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 certifying that said Department or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that the device, plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to the devices, plants or equipment, that the device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program and that the primary purpose is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas is treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

(d1) Credits. — A corporation is allowed a credit against the tax imposed by this section for a taxable year equal to one-half of the amount of tax payable during the taxable year under Article 5E of this Chapter. The credit allowed by this subsection may not exceed the amount of tax imposed by this section for the taxable year, reduced by the sum of all other credits allowed against that tax, except tax payments made by or on behalf of the taxpayer.

(e) Any corporation which changes its income year, and files a "short period" income tax return pursuant to G.S. 105-130.15 shall file a franchise tax return in accordance with the provisions of this section in the manner and as of the date specified in subsection (a) of this section. Such corporation shall be entitled to deduct from the total franchise tax computed (on an annual basis) on such return the amount of franchise tax previously paid which is applicable to the period subsequent to the beginning of the new income year.

(f) The report, statement and tax required by this section shall be in addition to all other reports required or taxes levied and assessed in this State.

(g) Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section.

(h) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1211, s. 5. (1939, c. 158, s. 210; 1941, c. 50, s. 4; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1947, c. 501, s. 3; 1951, c. 643, s. 3; 1953, c. 1302, s. 3; 1955, c. 1100, s. 2½; c. 1350, s. 17; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1967, c. 286; c. 892, ss. 10, 11; c. 1110, s. 2; 1973, c. 476, s. 193; c. 695, s. 17; c. 1262, s. 23; c. 1287, s. 3; 1975, c. 764, s. 2; 1977, c. 771, s. 4; 1981, c. 704, s. 18; c. 855, s. 3; 1981 (Reg. Sess., 1982), c. 1211, s. 5; 1985, c. 656, s. 40; 1985 (Reg. Sess., 1986), c. 826, s. 6; c. 854, s. 1; 1987 (Reg. Sess., 1988), c. 882, s. 4.3; 1989, c. 148, s. 1; c. 727, ss. 218(39), 219(27); 1991, c. 30, s. 5; 1993, c. 532, s. 11; 1995 (Reg. Sess., 1996), c. 560, s. 1; 1997-443, s. 11A.119(a); 1998-22, ss. 8, 9; 1998-98, ss. 72, 77; 1998-217, s. 43; 1999-337, s. 21; 2001-427, s. 12(a); 2003-416, s. 5(j); 2006-95, s. 1.1; 2006-162, s. 2; 2007-491, ss. 2, 10, 11; 2008-134, ss. 3(a), (b).)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective for taxable years beginning before January 1, 2009. The second version of subsection (a) set out above is effective for taxable years beginning on or after January 1, 2009.

Editor's Note. —

Session Laws 2007-491, s. 10, which rewrote subsection (a), was repealed by Session Laws 2008-134, s. 3(a), effective January 1, 2008.

Effect of Amendments. —

Session Laws 2008-134, s. 3(b), effective for taxable years beginning on or after January 1, 2009, rewrote subsection (a).

§ 105-125. Exempt corporations.

(a) Exemptions. — The following corporations are exempt from the taxes levied by this Article. Upon request of the Secretary, an exempt corporation must establish its claim for exemption in writing:

(1) A charitable, religious, fraternal, benevolent, scientific, or educational corporation not operated for profit.

(2) An insurance company subject to tax under Article 8B of this Chapter.

(3) A mutual ditch or irrigation association, a mutual or cooperative telephone association or company, a mutual canning association, a cooperative breeding association, or a similar corporation of a purely local character deriving receipts solely from assessments, dues, or fees collected from members for the sole purpose of meeting expenses.

(4) A cooperative marketing association that operates solely for the purpose of marketing the products of members or other farmers and returns to the members and farmers the proceeds of sales, less the association's necessary operating expenses, including interest and dividends on capital stock, on the basis of the quantity of product furnished by them. The association's operations may include activities directly related to these marketing activities.

(5) A production credit association organized under the federal Farm Credit Act of 1933.

(6) A club organized and operated exclusively for pleasure, recreation, or other nonprofit purposes, a civic league operated exclusively for the promotion of social welfare, a business league, or a board of trade.

(7) A chamber of commerce or merchants' association not organized for profit, no part of the net earnings of which inures to the benefit of a private stockholder, an individual, or another corporation.

(8) An organization, such as a condominium association, a homeowners' association, or a cooperative housing corporation not organized for profit, the membership of which is limited to the owners or occupants of residential units in the condominium, housing development, or cooperative housing corporation. To qualify for the exemption, the organization must be operated exclusively for the management, operation, preservation, maintenance, or landscaping of the residential units owned by the organization or its members or of the common areas and facilities that are contiguous to the residential units and owned by the organization or by its members. To qualify for the exemption, no part of the net earnings of the organization may inure, other than through the performance of related services for the members of the organization, to the benefit of any person.

(9) Except as otherwise provided by law, an organization exempt from federal income tax under the Code.

Provided, that an entity that qualifies as a real estate mortgage investment conduit, as defined in section 860D of the Code, is exempt from all of the taxes levied in this Article. Upon request by the Secretary of Revenue, a real estate mortgage investment conduit must establish in writing its qualification for this exemption.

(b) **(Effective for taxable years beginning before January 1, 2009)** Certain Investment Companies. — A corporation doing business in North Carolina that qualifies as a "regulated investment company" under section 851 of the Code or as a "real estate investment trust" under section 856 of the Code and elects for federal income tax purposes to be treated as a "regulated investment company" or as a "real estate investment trust," may, in determining its basis for franchise tax, deduct the aggregate market value of its investments in the stocks, bonds, debentures, or other securities or evidences of debt of other corporations, partnerships, individuals, municipalities, governmental agencies, or governments.

(b) **(Effective for taxable years beginning on or after January 1, 2009)** Certain Investment Companies. — A corporation doing business in North Carolina that meets one or more of the following conditions may, in determining its basis for franchise tax, deduct the aggregate market value of its investments in the stocks, bonds, debentures, or other securities or evidences of debt of other corporations, partnerships, individuals, municipalities, governmental agencies, or governments:

(1) A regulated investment company. — A regulated investment company is an entity that qualifies as a regulated investment company under section 851 of the Code.

(2) A REIT, unless the REIT is a captive REIT. — The terms "REIT" and "captive REIT" have the same meanings as defined in G.S. 105-130.12. (1939, c. 158, s. 213; 1951, c. 937, s. 3; 1955, c. 1313, s. 1; 1957, c. 1340, s. 3; 1963, c. 601, s. 3; c. 1169, s. 1; 1967, c. 1110, s. 2; 1971, c. 820, s. 3; c. 833, s. 1; 1973, c. 476, s. 193; c. 1053, s. 2; c. 1287, s. 3; 1975, c. 591, s. 1; 1983, c. 28, s. 2; c. 713, s. 67; 1985 (Reg. Sess., 1986), c. 826, s. 4; 1991, c. 30, s. 6; 1993, c. 485, s. 4; c. 494, s. 1; 2008-107, s. 28.7(c).)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective for taxable years beginning before January 1, 2009. The second version of subsection (b) set out above is effective for taxable years beginning on or after January 1, 2009.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.7(c), effective for taxable years beginning on or after January 1, 2009, rewrote subsection (b).

ARTICLE 3A.

Tax Incentives For New And Expanding Businesses.

(See note for repeal of this Article.)

§ 105-129.2. (See note for repeal) Definitions.

Editor's Note. —

Session Laws 2008-134, s. 78, provides: "An employee of the State may provide tax information about tax credits claimed under former Article 3A or current Article 3J of Chapter 105 of the General Statutes to the University of North Carolina at Chapel Hill (University) to enable the University to compile statistical information to fulfill a contractual obligation between the University and the North Carolina General Assembly, on behalf of the Joint Select Committee on Economic Development Incentives established by the President Pro Tempore of the Senate and the Speaker of the House of Representatives on March 2, 2007. In lieu of extracting the needed information from these tax returns, the State may provide a copy of the returns to the University so the University can extract the information. The disclosure allowed by this section is an exception to G.S. 105-259. A person to whom a disclosure is made under this section is subject to the same confidentiality requirements as an employee of the State who has access to tax information."

§ 105-129.2A. Sunset; studies.

(a) Sunset. — This Article is repealed for business activities that occur in taxable years beginning on or after January 1, 2007.

(a1) Sunset for Interstate Air Couriers. — Notwithstanding subsection (a) of this section, in the case of an interstate air courier that enters into a real estate lease on or before January 1, 2006, with an airport authority that provides for the lease of at least 100 acres of real property with a lease term in excess of 15 years, this Article is repealed effective for business activities that occur on or after January 1, 2010.

(a2) Sunset for Eligible Major Industries. — Notwithstanding subsection (a) of this section, in the case of a taxpayer that qualifies as an eligible major industry on or before January 1, 2008, this Article is repealed effective for business activities that occur on or after January 1, 2010.

(a3) Sunset for Certain Taxpayers Located in Development Zones. — Notwithstanding subsection (a) of this section, in the case of a taxpayer that satisfies all of the conditions of this subsection, this Article is repealed effective for business activities that occur on or after January 1, 2010.

(1) Before January 1, 2006, the taxpayer signs a letter of commitment with the Department of Commerce describing a proposed new or expanding project and specifying the amount to be invested in real property and machinery and equipment, the number of new jobs to be created, and a proposed timetable for making the investment and creating the jobs.

(2) Before January 1, 2006, the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase, lease, or construct and place in service in an eligible business at a location within a development zone within a three-year period at least ten million dollars ($10,000,000) of real property and machinery and equipment and that the taxpayer will create at least 300 new jobs at the location within a three-year period beginning when the property is first placed in service in an eligible business.

(3) Before January 1, 2006, the taxpayer places at least four million dollars ($4,000,000) of real property and machinery and equipment in service at the location and creates at least 20 new jobs at the location.

(a4) Sunset for Taxpayers That Sign a Letter of Commitment. — Notwithstanding subsection (a) of this section, in the case of a taxpayer that signs a letter of commitment with the Department of Commerce on or before December 31, 2006, stating the taxpayer's intent to create new jobs or make new investments with respect to machinery and equipment, central office or aircraft facility property, or substantial investments in other real property at a specific site in this State, this Article is repealed effective for business activities that occur on or after January 1, 2008. If a taxpayer elects to take any credit under the provisions of this subsection for activities occurring in the 2007 taxable year, the taxpayer may not take any credit under Article 3J of this Chapter with respect to the same establishment for activities occurring in the 2007 taxable year.

(b) Equity Study. — The Department of Commerce shall study the effect of the tax incentives provided in this Article on tax equity. This study shall include the following:

(1) Reexamining the formula in G.S. 105-129.3(b) used to define enterprise tiers, to include consideration of alternative measures for more equitable treatment of counties in similar economic circumstances.

(2) Considering whether the assignment of tiers and the applicable thresholds are equitable for smaller counties, for example those under 50,000 in population.

(3) Compiling any available data on whether expanding North Carolina businesses receive fewer benefits than out-of-State businesses that locate to North Carolina.

(c) Impact Study. — The Department of Commerce shall study the effectiveness of the tax incentives provided in this Article. This study shall include:

(1) Study of the distribution of tax incentives across new and expanding industries.

(2) Examination of data on economic recruitment for the period from 1994 through the most recent year for which data are available by county, by industry type, by size of investment, and by number of jobs, and other relevant information to determine the pattern of business locations and expansions before and after the enactment of the William S. Lee Act incentives.

(3) Measuring the direct costs and benefits of the tax incentives.

(4) Compiling available information on the current use of incentives by other states and whether that use is increasing or declining.

(d) Report. — The Department of Commerce shall report the results of these studies and its recommendations to the General Assembly biennially with the first report due by April 1, 2001, and the last report due by June 1, 2007. (1997-277, s. 4; 1999-360, s. 18.1; 2000-173, ss. 1(b), 1(c); 2001-476, s. 2(a); 2002-146, s. 2; 2003-435, 2nd Ex. Sess., s. 3.2; 2005-241, ss. 1(a), 1(b); 2006-168, s. 2.1; 2006-252, s. 1.3; 2007-515, ss. 4, 5; 2008-134, s. 69.)

Effect of Amendments. — Session Laws 2008-134, s. 69, effective July 28, 2008, substituted "Article 3J" for "Article 3I" in the last sentence of subsection (a4).

ARTICLE 3B.

Business And Energy Tax Credits.

§ 105-129.16C: Repealed effective for taxable years beginning on or after January 1, 2006.

Editor's Note. — This section was repealed pursuant to the terms of the sunset provision in former subsection (d), effective for taxable years beginning on or after January 1, 2006.

§ 105-129.16E. (Effective for taxable years beginning on or after January 1, 2007, and expires for taxable years beginning on or after January 1, 2010) Credit for small business employee health benefits.

(a) Credit. — A small business that provides health benefits for all of its eligible employees during the taxable year is allowed a credit to offset its costs in providing health benefits for its eligible employees. For the purposes of this subsection, a taxpayer provides health benefits if it pays at least fifty percent (50%) of the premiums for health care coverage that equals or exceeds the minimum provisions of the basic health care plan of coverage recommended by the Small Employer Carrier Committee pursuant to G.S. 58-50-125 or if its employees have qualifying existing coverage.

The credit is equal to a dollar amount per eligible employee whose total wages or salary received from the business does not exceed forty thousand dollars ($40,000) on an annual basis. The dollar amount is two hundred fifty dollars ($250.00), not to exceed the taxpayer's costs of providing health benefits for the employee during the taxable year.

(b) Allocation. — If the taxpayer is an individual who is a nonresident or a part-year resident, the taxpayer must reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. If the taxpayer is not an individual and is required to apportion its multistate business income to this State, the taxpayer must reduce the amount of the credit by multiplying it by the apportionment fraction used to apportion its apportionable income to this State.

(c) Definitions. — The following definitions apply in this section:

(1) Eligible employee. — Defined in G.S. 58-50-110.

(2) Qualifying existing coverage. — Defined in G.S. 58-50-130(a)(4a).

(3) Small business. — A taxpayer that employs no more than 25 eligible employees throughout the taxable year.

(d) Sunset. — This section expires for taxable years beginning on or after January 1, 2010. (2006-66, s. 24.4(a); 2007-527, s. 5; 2008-107, s. 28.9A(a).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.9A(a), effective July 16, 2008, substituted "January 1, 2010" for "January 1, 2009" in subsection (d).

§ 105-129.16G. (Effective for taxable years beginning on or after January 1, 2008, and expires for taxable years beginning on or after January 1, 2012) Work Opportunity Tax Credit.

(a) Credit. — A taxpayer who is allowed a federal tax credit under Part IV, Subpart F of the Code for the taxable year is allowed a credit against the tax imposed by this Part. The credit is equal to six percent (6%) of the amount of credit allowed under the Code for wages paid during the taxable year for positions located in this State. A position is located in this State if more than fifty percent (50%) of the employee's duties are performed in the State.

(b) Sunset. — This section expires for taxable years beginning on or after January 1, 2012. (2007-323, s. 31.21(a); 2008-134, s. 2(a).)

Section Set Out Twice. — The section above is effective for taxable years beginning on or after January 1, 2008. For the section as in effect for taxable years beginning before January 1, 2008, see the main volume.

Effect of Amendments. — Session Laws 2008-134, s. 2(a), effective July 28, 2008, designated the previously existing provisions as subsection (a), inserted "Credit. —" at the beginning, added "for wages paid during the taxable year for positions located in this State" at the end of the second sentence, and added the third sentence; and added subsection (b).

§ 105-129.16H. Credit for donating funds to a nonprofit organization or unit of State or local government to enable the nonprofit or government unit to acquire renewable energy property.

(a) Credit. — A taxpayer who donates money to a tax-exempt nonprofit organization or a unit of State or local government for the purpose of providing funds for the organization or government unit to construct, purchase, or lease renewable energy property is allowed a credit under this section if the donation is used for its intended purpose. A tax-exempt nonprofit organization is an organization that is exempt from tax under section 501(c)(3) of the Code.

The amount of the credit allowed in this section is the taxpayer's share of the credit the nonprofit organization or the unit of State or local government could claim under G.S. 105-129.16A if the nonprofit organization or government unit were subject to tax. The taxpayer's share of the credit is calculated by dividing the taxpayer's donation by the cost of the renewable energy property constructed, purchased, or leased by the nonprofit organization or government unit and placed in service during the taxable year and then multiplying this percentage by the amount of the credit the nonprofit organization or government unit could claim if it were subject to tax. A taxpayer must take the credit allowed by this section for the taxable year in which the property is placed in service. The installment requirements in G.S. 105-129.16A for nonresidential property do not apply to the credit allowed in this section.

(b) Records. — A nonprofit organization or a unit of State or local government must keep a record of all donations it receives for the purpose of providing funds for the organization to construct, purchase, or lease renewable energy property and of the amount of the donations used for this purpose. If a nonprofit organization or government unit places renewable energy property in service that is purchased in whole or in part from donations made for this purpose, the nonprofit organization or government unit must give each taxpayer who made a donation a statement setting out the amount of the credit for which the taxpayer qualifies under this section. The statement must describe the renewable energy property placed in service and state the cost of the property, the amount of the credit the nonprofit organization or government unit could claim under G.S. 105-129.16A if it were subject to tax, and the taxpayer's share of the credit allowed in this section. If the donations made for the renewable energy property exceed the cost of the property, the nonprofit organization or government unit must prorate each taxpayer's share of the credit. The sum of the credits allowed under this section to taxpayers who make donations to a nonprofit organization or a government unit may not exceed the amount of the credit the nonprofit organization or government unit could claim under G.S. 105-129.16A if it were subject to tax.

(c) No Double Benefit. — A taxpayer who claims a credit under this section based on a donation to a nonprofit organization or a unit of State or local government is not allowed to deduct this donation as a charitable contribution. (2007-397, s. 13(a); 2008-107, s. 28.25(a); 2008-134, s. 70.)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.25(a), effective for taxable years beginning on or after January 1, 2008, inserted "or unit of State or local government" and "or unit" throughout the section; and in the first sentence of subsection (a), substituted "donation is used" for "nonprofit organization uses the donation."

Session Laws 2008-134, s. 70, effective July 28, 2008, substituted "for the taxable year" for "in the year" in the third sentence of the second paragraph of subsection (a).

Article 3E.

Low-Income Housing Tax Credits.

(See note for repeal of this Article.)

§ 105-129.45. Sunset.

This Article is repealed effective January 1, 2015. The repeal applies to developments to which federal credits are allocated on or after January 1, 2015. (2002-87, s. 1; 2004-110, s. 4.1; 2008-107, s. 28.3(a).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.3(a), effective July 16, 2008, substituted "January 1, 2015" for "January 1, 2010" twice.

Article 3F.

Research and Development.

(See note for repeal of this Article.)

§ 105-129.51. (See notes) Administration; sunset.

(a) A taxpayer is eligible for the credit allowed in this Article if it satisfies the requirements of G.S. 105-129.83(c), (d), (e), and (f) relating to wage standard, health insurance, environmental impact, and safety and health programs, respectively.

(b) This Article is repealed for taxable years beginning on or after January 1, 2014.

(c) Repealed by Session Laws 2004-124, s. 32D.4, effective for taxable years beginning on or after January 1, 2006. (2004-124, ss. 32D.2, s. 32D.4; 2006-252, s. 2.20; 2008-107, s. 28.2(a).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.2(a), effective July 16, 2008, substituted "January 1, 2014" for "January 1, 2009" in subsection (b).

ARTICLE 3H.

Mill Rehabilitation Tax Credit.

(See G.S. 105-129.75 for repeal of this Article.)

§ 105-129.70. (See note for repeal) Definitions.

The following definitions apply in this Article:

(1) Certified historic structure. — Defined in section 47 of the Code.

(2) Certified rehabilitation. — Defined in G.S. 105-129.36.

(3) **(Effective for taxable years beginning before January 1, 2008)** Cost certification. — The certification obtained by the State Historic Preservation Officer from the taxpayer of the amount of the qualified rehabilitation expenditures or the rehabilitation expenses incurred with respect to an eligible site.

(3) **(Effective for taxable years beginning on or after January 1, 2008)** Cost certification. — The certification obtained by the State Historic Preservation Officer from the taxpayer of the amount of the qualified rehabilitation expenditures or the rehabilitation expenses incurred with respect to a certified rehabilitation of an eligible site.

(3a) Development tier area. — Defined in G.S. 143B-437.08.

(4) **(Effective for taxable years beginning before January 1, 2008)** Eligibility certification. — The certification obtained from the State Historic Preservation Officer that the applicable facility comprises an eligible site and that the rehabilitation is a certified rehabilitation.

(4) **(Effective for taxable years beginning on or after January 1, 2008)** Eligibility certification. — The certification obtained from the State Historic Preservation Officer that the applicable facility comprises an eligible site.

(5) Eligible site. — A site located in this State that satisfies all of the following conditions:

a. It was used as a manufacturing facility or for purposes ancillary to manufacturing, as a warehouse for selling agricultural products, or as a public or private utility.

b. It is a certified historic structure or a State-certified historic structure.

c. It has been at least eighty percent (80%) vacant for a period of at least two years immediately preceding the date the eligibility certification is made.

d. **(Repealed effective for taxable years beginning on or after January 1, 2008)** The cost certification documents that the qualified rehabilitation expenditures for a site for which a taxpayer is allowed a credit under section 47 of the Code or the rehabilitation expenses for a site for which the taxpayer is not allowed a credit under section 47 of the Code exceed three million dollars ($3,000,000) for the site as a whole.

(6) Repealed by Session Laws 2006-252, s. 2.22, effective January 1, 2007.

(7) Pass-through entity. — Defined in G.S. 105-228.90.

(8) Qualified rehabilitation expenditures. — Defined in section 47 of the Code.

(9) Rehabilitation expenses. — Defined in G.S. 105-129.36.

(10) State-certified historic structure. — Defined in G.S. 105-129.36.

(11) State Historic Preservation Officer. — Defined in G.S. 105-129.36. (2006-40, s. 1; 2006-252, s. 2.22; 2008-107, s. 28.4(a).)

Subdivisions (3) and (4) Set Out Twice. — The first versions of subdivisions (3) and (4) set out above are effective for taxable years beginning before January 1, 2008. The second versions of subdivisions (3) and (4) set out above are effective for taxable years beginning on or after January 1, 2008.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.4(a), effective for taxable years beginning on or after January 1, 2008, in subdivision (3), inserted "a certified rehabilitation of"; in subdivision (4), deleted "and that the rehabilitation is a certified rehabilitation" from the end; and deleted subdivision (5)d, which read: "The cost certification documents that the qualified rehabilitation expenditures for a site for which a taxpayer is allowed a credit under section 47 of the Code or the rehabilitation expenses for a site for which the taxpayer is not allowed a credit under section 47 of the Code exceed three million dollars ($3,000,000) for the site as a whole."

§ 105-129.71. (See note for repeal) Credit for income-producing rehabilitated mill property.

(a) **(Effective for taxable years beginning before January 1, 2008)** Credit. — A taxpayer who is allowed a credit under section 47 of the Code for making qualified rehabilitation expenditures with respect to an eligible site is allowed a credit equal to a percentage of the expenditures that qualify for the federal credit. The credit may be claimed in the year in which the eligible site is placed into service. When the eligible site is placed into service in two or more phases in different years, the amount of credit that may be claimed in a year is the amount based on the qualified rehabilitation expenditures associated with the phase placed into service during that year. In order to be eligible for a credit allowed by this Article, the taxpayer must provide to the Secretary a copy of the eligibility certification and the cost certification. The amount of the credit is as follows:

(1) For an eligible site located in a development tier one or two area, determined as of the date of certification, the amount of the credit is equal to forty percent (40%) of the qualified rehabilitation expenditures.

(2) For an eligible site located in a development tier three area, determined as of the date of certification, the amount of the credit is equal to thirty percent (30%) of the qualified rehabilitation expenditures.

(a) **(Effective for taxable years beginning on or after January 1, 2008)** Credit. — A taxpayer who is allowed a credit under section 47 of the Code for making qualified rehabilitation expenditures of at least three million dollars ($3,000,000) with respect to a certified rehabilitation of an eligible site is allowed a credit equal to a percentage of the expenditures that qualify for the federal credit. The credit may be claimed in the year in which the eligible site is placed into service. When the eligible site is placed into service in two or more phases in different years, the amount of credit that may be claimed in a year is the amount based on the qualified rehabilitation expenditures associated with the phase placed into service during that year. In order to be eligible for a credit allowed by this Article, the taxpayer must provide to the Secretary a copy of the eligibility certification and the cost certification. The amount of the credit is as follows:

(1) For an eligible site located in a development tier one or two area, determined as of the date of the eligibility certification, the amount of the credit is equal to forty percent (40%) of the qualified rehabilitation expenditures.

(2) For an eligible site located in a development tier three area, determined as of the date of the eligibility certification, the amount of the

credit is equal to thirty percent (30%) of the qualified rehabilitation expenditures.

(b) Allocation. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section may allocate the credit among any of its owners in its discretion as long as an owner's adjusted basis in the pass-through entity, as determined under the Code, at the end of the taxable year in which the eligible site is placed in service, is at least forty percent (40%) of the amount of credit allocated to that owner. Owners to whom a credit is allocated are allowed the credit as if they had qualified for the credit directly. A pass-through entity and its owners must include with their tax returns for every taxable year in which an allocated credit is claimed a statement of the allocation made by the pass-through entity and the allocation that would have been required under G.S. 105-131.8 or G.S. 105-269.15.

(c) Forfeiture for Change in Ownership. — If an owner of a pass-through entity that has qualified for the credit allowed under this section disposes of all or a portion of the owner's interest in the pass-through entity within five years from the date the eligible site is placed in service and the owner's interest in the pass-through entity is reduced to less than two-thirds of the owner's interest in the pass-through entity at the time the eligible site was placed in service, the owner forfeits a portion of the credit. The amount forfeited is determined by multiplying the amount of credit by the percentage reduction in ownership and then multiplying that product by the forfeiture percentage. The forfeiture percentage equals the recapture percentage found in the table in section 50(a)(1)(B) of the Code.

(d) Exceptions to Forfeiture. — Forfeiture as provided in subsection (c) of this section is not required if the change in ownership is the result of any of the following:

(1) The death of the owner.

(2) A merger, consolidation, or similar transaction requiring approval by the shareholders, partners, or members of the taxpayer under applicable State law, to the extent the taxpayer does not receive cash or tangible property in the merger, consolidation, or other similar transaction.

(e) Liability from Forfeiture. — A taxpayer or an owner of a pass-through entity that forfeits a credit under this section is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.21, computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited. A taxpayer or owner of a pass-through entity that fails to pay the taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. (2006-40, s. 1; 2006-252, s. 2.23; 2006-259, s. 47.5; 2007-491, s. 44(1)a; 2008-107, s. 28.4(b).)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective for taxable years beginning before January 1, 2008. The second version of subsection (a) set out above is effective for taxable years beginning on or after January 1, 2008.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.4(b), effective for taxable years beginning on or after January 1, 2008, in subsection (a), inserted "of at least three million dollars ($3,000,000)" and "a certified rehabilitation of" in the first sentence; and in subdivisions (a)(1) and (a)(2), inserted "the eligibility".

§ 105-129.72. (See note for repeal) Credit for nonincome-producing rehabilitated mill property.

(a) **(Effective for taxable years beginning before January 1, 2008)** Credit. — A taxpayer who is not allowed a federal income tax credit under section 47 of the Code and who makes rehabilitation expenses with respect to an eligible site is allowed a credit equal to a percentage of the rehabilitation expenses. The entire credit may not be taken for the taxable year in which the property is placed in service, but must be taken in five equal installments beginning with the taxable year in which the property is placed in service. When the eligible site is placed into service in two or more phases in different years, the amount of credit that may be claimed in a year is the amount based on the rehabilitation expenses associated with the phase placed into service during that year. In order to be eligible for a credit allowed by this Article, the taxpayer must provide to the Secretary a copy of the eligibility certification and the cost certification. For an eligible site located in a development tier one or two area, determined as of the date of certification, the amount of the credit is equal to forty percent (40%) of the rehabilitation expenses. No credit is allowed for a site located in a development tier three area.

(a) **(Effective for taxable years beginning on or after January 1, 2008)** Credit. — A taxpayer who is not allowed a federal income tax credit under section 47 of the Code and who makes rehabilitation expenses of at least three million dollars ($3,000,000) with respect to a certified rehabilitation of an eligible site is allowed a credit equal to a percentage of the rehabilitation expenses. The entire credit may not be taken for the taxable year in which the property is placed in service, but must be taken in five equal installments beginning with the taxable year in which the property is placed in service. When the eligible site is placed into service in two or more phases in different years, the amount of credit that may be claimed in a year is the amount based on the rehabilitation expenses associated with the phase placed into service during that year. In order to be eligible for a credit allowed by this Article, the taxpayer must provide to the Secretary a copy of the eligibility certification and the cost certification. For an eligible site located in a development tier one or two area, determined as of the date of the eligibility certification, the amount of the credit is equal to forty percent (40%) of the rehabilitation expenses. No credit is allowed for a site located in a development tier three area.

(b) Allocation. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section may allocate the credit among any of its owners in its discretion as long as an owner's adjusted basis in the pass-through entity, as determined under the Code, at the end of the taxable year in which the eligible site is placed in service, is at least forty percent (40%) of the amount of credit allocated to that owner. Owners to whom a credit is allocated are allowed the credit as if they had qualified for the credit directly. A pass-through entity and its owners must include with their tax returns for every taxable year in which an allocated credit is claimed a statement of the allocation made by the pass-through entity and the allocation that would have been required under G.S. 105-131.8 or G.S. 105-269.15.

(c) Forfeiture for Change in Ownership. — If an owner of a pass-through entity that has qualified for the credit allowed under this section disposes of all or a portion of the owner's interest in the pass-through entity within five years from the date the eligible site is placed in service and the owner's interest in the pass-through entity is reduced to less than two-thirds of the owner's interest in the pass-through entity at the time the eligible site was placed in service, the owner forfeits a portion of the credit. The amount forfeited is determined by multiplying the amount of credit by the percentage reduction in ownership and then multiplying that product by the forfeiture percentage. The forfeiture percentage equals the recapture percentage found in the table in section 50(a)(1)(B) of the Code. The remaining allocable credit is allocated equally among the five years in which the credit is claimed.

(d) Exceptions to Forfeiture. — Forfeiture as provided in subsection (c) of this section is not required if the change in ownership is the result of any of the following:

(1) The death of the owner.
(2) A merger, consolidation, or similar transaction requiring approval by the shareholders, partners, or members of the taxpayer under applicable State law, to the extent the taxpayer does not receive cash or tangible property in the merger, consolidation, or other similar transaction.

(e) Liability from Forfeiture. — A taxpayer or an owner of a pass-through entity that forfeits a credit under this section is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.21, computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited. A taxpayer or owner of a pass-through entity that fails to pay the taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. (2006-40, s. 1; 2006-252, s. 2.24; 2007-491, s. 44(1)a; 2008-107, s. 28.4(c).)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective for taxable years beginning before January 1, 2008. The second version of subsection (a) set out above is effective for taxable years beginning on or after January 1, 2008.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.4(c), effective for taxable years beginning on or after January 1, 2008, in subsection (a), in the first sentence, inserted "of at least three million dollars ($3,000,000)" and "a certified rehabilitation of," and in the next to last sentence, inserted "the eligibility."

§ 105-129.75. (Effective for taxable years beginning on or after January 1, 2008) Sunset.

This Article expires January 1, 2011, for rehabilitation projects for which an application for an eligibility certification is submitted on or after that date. (2006-40, s. 1; 2008-107, s. 28.4(d).)

Section Set Out Twice. — The section above is effective for taxable years beginning on or after January 1, 2008. For the section as in effect for taxable years beginning before January 1, 2008, see the main volume.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.4(d), effective for taxable years beginning on or after January 1, 2008, substituted "January 1, 2011, for rehabilitation projects for which an application for an eligibility certification is submitted on or after that date" for "for qualified rehabilitation expenditures and rehabilitation expenses incurred on or after January 1, 2011."

ARTICLE 3J.

Tax Credits for Growing Businesses.

§ 105-129.80. (See notes) Legislative findings.

Editor's Note. —
Session Laws 2008-134, s. 78, provides: "An employee of the State may provide tax information about tax credits claimed under former Article 3A or current Article 3J of Chapter 105 of the General Statutes to the University of North Carolina at Chapel Hill (University) to enable the University to compile statistical information to fulfill a contractual obligation between the University and the North Carolina General Assembly, on behalf of the Joint Select Committee on Economic Development Incentives established by the President Pro Tempore of the Senate and the Speaker of the House of Representatives on March 2, 2007. In lieu of extracting the needed information from these tax returns, the State may provide a copy of the returns to the University so the University can extract the information. The disclosure allowed by this section is an exception to G.S. 105-259. A person to whom a disclosure is made under this section is subject to the same confidentiality requirements as an employee of the State who has access to tax information."

ARTICLE 4.

Income Tax.

Part 1. Corporation Income Tax.

§ 105-130.5. Adjustments to federal taxable income in determining State net income.

(a) The following additions to federal taxable income shall be made in determining State net income:

(1) Taxes based on or measured by net income by whatever name called and excess profits taxes;

(2) Interest paid in connection with income exempt from taxation under this Part;

(3) The contributions deduction allowed by the Code;

(4) Interest income earned on bonds and other obligations of other states or their political subdivisions, less allowable amortization on any bond acquired on or after January 1, 1963;

(5) The amount by which gains have been offset by the capital loss carryover allowed under the Code. All gains recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition;

(6) The net operating loss deduction allowed by the Code; and

(7) Repealed by Session Laws 2001-327, s. 3(a), effective for taxable years beginning on or after January 1, 2001.

(8) Repealed by Session Laws 1987, c. 778, s. 2.

(9) Payments to or charges by a parent, subsidiary or affiliated corporation in excess of fair compensation in all intercompany transactions of any kind whatsoever pursuant to the Revenue Laws of this State.

(10) The total amounts allowed under this Chapter during the taxable year as a credit against the taxpayer's income tax. A corporation that

G.S. 105-130.5(a)(15) and (a)(20) are set out twice. See note.

apportions part of its income to this State shall make the addition required by this subdivision after it determines the amount of its income that is apportioned and allocated to this State and shall not apply to a credit taken under this Chapter the apportionment factor used by it in determining the amount of its apportioned income.

(11) The amount by which the percentage depletion allowance allowed by sections 613 and 613A of the Code for mines, oil and gas wells, and other natural deposits exceeds the cost depletion allowance for these items under the Code, except as otherwise provided herein. This subdivision does not apply to depletion deductions for clay, gravel, phosphate rock, lime, shells, stone, sand, feldspar, gemstones, mica, talc, lithium compounds, tungsten, coal, peat, olivine, pyrophyllite, and other solid minerals or rare earths extracted from the soil or waters of this State. Corporations required to apportion income to North Carolina shall first add to federal taxable income the amount of all percentage depletion in excess of cost depletion that was subtracted from the corporation's gross income in computing its federal income taxes and shall then subtract from the taxable income apportioned to North Carolina the amount by which the percentage depletion allowance allowed by sections 613 and 613A of the Code for solid minerals or rare earths extracted from the soil or waters of this State exceeds the cost depletion allowance for these items.

(12) The amount allowed under the Code for depreciation or as an expense in lieu of depreciation for a utility plant acquired by a natural gas local distribution company, to the extent the plant is included in the company's rate base at zero cost in accordance with G.S. 62-158.

(13) Repealed by Session Laws 2001-427, s. 4(b), effective for taxable years beginning on or after January 1, 2002.

(14) Royalty payments required to be added by G.S. 105-130.7A, to the extent deducted in calculating federal taxable income.

(15) **(Effective for taxable years beginning before January 1, 2008)** The applicable percentage of the amount allowed as a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code, as set out in the table below. In addition, a taxpayer who was allowed a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code in a taxable year beginning before January 1, 2002, and whose North Carolina taxable income in that earlier year reflected that accelerated depreciation deduction must add to federal taxable income in the taxpayer's first taxable year beginning on or after January 1, 2002, an amount equal to the amount of the deduction allowed in the earlier taxable year. These adjustments do not result in a difference in basis of the affected assets for State and federal income tax purposes. The applicable percentage is as follows:

Taxable Year	Percentage
2002	100%
2003	70%
2004	70%
2005 and thereafter	0%

(15) **(Effective for taxable years beginning on or after January 1, 2008)** For taxable years 2002-2005, the applicable percentage of the amount allowed as a special accelerated depreciation deduction under

G.S. 105-130.5(a)(15) and (a)(20) are set out twice. See note.

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section 168(k) or section 1400L of the Code, as set out in the table below. In addition, a taxpayer who was allowed a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code in a taxable year beginning before January 1, 2002, and whose North Carolina taxable income in that earlier year reflected that accelerated depreciation deduction must add to federal taxable income in the taxpayer's first taxable year beginning on or after January 1, 2002, an amount equal to the amount of the deduction allowed in the earlier taxable year. These adjustments do not result in a difference in basis of the affected assets for State and federal income tax purposes. The applicable percentage is as follows:

Taxable Year	Percentage
2002	100%
2003	70%
2004	70%
2005	0%

(15a) **(Effective for taxable years beginning on or after January 1, 2008)** The applicable percentage of the amount allowed as a special accelerated depreciation deduction under section 168(k) of the Code for property placed in service after December 31, 2007, but before January 1, 2009. In addition, a taxpayer who was allowed a special accelerated depreciation deduction in taxable year 2007 for property placed in service during that period, and whose North Carolina taxable income for that year reflected that accelerated depreciation deduction must add to federal taxable income in the taxpayer's 2008 taxable year an amount equal to the applicable percentage of the deduction amount allowed in the 2007 taxable year. These adjustments do not result in a difference in basis of the affected assets for State and federal income tax purposes. The applicable percentage under this subdivision is eighty-five percent (85%).

(16) The amount excluded from gross income under Subchapter R of Chapter 1 of the Code.

(17) The amount excluded from gross income under section 199 of the Code.

(18) Repealed by Session Laws 2006-220, s. 1, effective for taxable years beginning on and after January 1, 2007.

(19) The dividend paid deduction allowed under the Code to a captive REIT, as defined in G.S. 105-130.12.

(20) **(Effective for taxable years beginning before January 1, 2008)** The amount of a donation made to a nonprofit organization for which a credit is claimed under G.S. 105-129.16H.

(20) **(Effective for taxable years beginning on or after January 1, 2008)** The amount of a donation made to a nonprofit organization or a unit of State or local government for which a credit is claimed under G.S. 105-129.16H.

(b) The following deductions from federal taxable income shall be made in determining State net income:

(1) Interest upon the obligations of the United States or its possessions, to the extent included in federal taxable income: Provided, interest upon the obligations of the United States shall not be an allowable deduction unless interest upon obligations of the State of North Carolina or any of its political subdivisions is exempt from income taxes imposed by the United States.

(1a) Interest upon the obligations of any of the following, net of related expenses, to the extent included in federal taxable income:
  a. This State, a political subdivision of this State, or a commission, an authority, or another agency of this State or of a political subdivision of this State.
  b. A nonprofit educational institution organized or chartered under the laws of this State.

(2) Payments received from a parent, subsidiary or affiliated corporation in excess of fair compensation in intercompany transactions which in the determination of the net income or net loss of such corporation were not allowed as a deduction under the Revenue Laws of this State.

(3) Repealed by Session Laws 2003-349, s. 1.1, effective January 1, 2003.

(3a) Dividends treated as received from sources outside the United States as determined under section 862 of the Code, net of related expenses, to the extent included in federal taxable income. Notwithstanding the proviso in subdivision (c)(3) of this section, the netting of related expenses shall be calculated in accordance with subdivision (c)(3) of this section and G.S. 105-130.6A.

(3b) Any amount included in federal taxable income under section 78 or section 951 of the Code, net of related expenses.

(4) Losses in the nature of net economic losses sustained by the corporation in any or all of the 15 preceding years pursuant to the provisions of G.S. 105-130.8. A corporation required to allocate and apportion its net income under the provisions of G.S. 105-130.4 shall deduct its allocable net economic loss only from total income allocable to this State pursuant to the provisions of G.S. 105-130.8.

(5) Contributions or gifts made by any corporation within the income year to the extent provided under G.S. 105-130.9.

(6) Amortization in excess of depreciation allowed under the Code on the cost of any sewage or waste treatment plant, and facilities or equipment used for purposes of recycling or resource recovery of or from solid waste, or for purposes of reducing the volume of hazardous waste generated as provided in G.S. 105-130.10.

(7) Depreciation of emergency facilities acquired prior to January 1, 1955. Any corporation shall be permitted to depreciate any emergency facility, as such is defined in section 168 of the Code, over its useful life, provided such facility was acquired prior to January 1, 1955, and no amortization has been claimed on such facility for State income tax purposes.

(8) The amount of losses realized on the sale or other disposition of assets not allowed under section 1211(a) of the Code. All losses recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition.

(9) With respect to a shareholder of a regulated investment company, the portion of undistributed capital gains of such regulated investment company included in such shareholder's federal taxable income and on which the federal tax paid by the regulated investment company is allowed as a credit or refund to the shareholder under section 852 of the Code.

(10) Repealed by Session Laws 1987, c. 778, s. 2.

(11) If a deduction for an ordinary and necessary business expense was required to be reduced or was not allowed under the Code because the corporation claimed a federal tax credit against its federal income tax liability for the income year in lieu of a deduction, the amount by which the deduction was reduced and the amount of the deduction

that was disallowed. This deduction is allowed only to the extent that a similar credit is not allowed by this Chapter for the amount.

(12) Reasonable expenses, in excess of deductions allowed under the Code, paid for reforestation and cultivation of commercially grown trees; provided, that this deduction shall be allowed only to those corporations in which the real owners of all the shares of such corporation are natural persons actively engaged in the commercial growing of trees, or the spouse, siblings, or parents of such persons. Provided, further, that in no case shall a corporation be allowed a deduction for the same reforestation or cultivation expenditure more than once.

(13) The eligible income of an international banking facility to the extent included in determining federal taxable income, determined as follows:

a. "International banking facility" shall have the same meaning as is set forth in the laws of the United States or regulations of the board of governors of the federal reserve system.

b. The eligible income of an international banking facility for the taxable year shall be an amount obtained by multiplying State taxable income as determined under G.S. 105-130.3 (determined without regard to eligible income of an international banking facility and allocation and apportionment, if applicable) for such year by a fraction, the denominator of which shall be the gross receipts for such year derived by the bank from all sources, and the numerator of which shall be the adjusted gross receipts for such year derived by the international banking facility from:

1. Making, arranging for, placing or servicing loans to foreign persons substantially all the proceeds of which are for use outside the United States;
2. Making or placing deposits with foreign persons which are banks or foreign branches of banks (including foreign subsidiaries or foreign branches of the taxpayer) or with other international banking facilities; or
3. Entering into foreign exchange trading or hedging transactions related to any of the transactions described in this paragraph.

c. The adjusted gross receipts shall be determined by multiplying the gross receipts of the international banking facility by a fraction the numerator of which is the average amount for the taxable year of all assets of the international banking facility which are employed outside the United States and the denominator of which is the average amount for the taxable year of all assets of the international banking facility.

d. For the purposes of this subsection the term "foreign person" means:

1. An individual who is not a resident of the United States;
2. A foreign corporation, a foreign partnership or a foreign trust, as defined in section 7701 of the Code, other than a domestic branch thereof;
3. A foreign branch of a domestic corporation (including the taxpayer);
4. A foreign government or an international organization or an agency of either, or
5. An international banking facility.

For purposes of this paragraph, the terms "foreign" and "domestic" shall have the same meaning as set forth in section 7701 of the Code.

(14) The amount by which the basis of a depreciable asset is required to be reduced under the Code for federal tax purposes because of a tax credit allowed against the corporation's federal income tax liability. This deduction may be claimed only in the year in which the Code requires that the asset's basis be reduced. In computing gain or loss on the asset's disposition, this deduction shall be considered as depreciation.

(15) The amount paid during the income year, pursuant to 7 U.S.C. § 1445-2, as marketing assessments on tobacco grown by the corporation in North Carolina.

(16) The amount of natural gas expansion surcharges collected by a natural gas local distribution company under G.S. 62-158.

(17) To the extent included in federal taxable income, 911 charges imposed under G.S. 62A-43 and remitted to the 911 Fund under that section.

(18) Interest, investment earnings, and gains of a trust, the settlors of which are two or more manufacturers that signed a settlement agreement with this State to settle existing and potential claims of the State against the manufacturers for damages attributable to a product of the manufacturers, if the trust meets all of the following conditions:

a. The purpose of the trust is to address adverse economic consequences resulting from a decline in demand of the manufactured product potentially expected to occur because of market restrictions and other provisions in the settlement agreement.

b. A court of this State approves and retains jurisdiction over the trust.

c. Certain portions of the distributions from the trust are made in accordance with certifications that meet the criteria in the agreement creating the trust and are provided by a nonprofit entity, the governing board of which includes State officials.

(19) To the extent included in federal taxable income, the amount paid to the taxpayer during the taxable year from the Hurricane Floyd Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.

(20) Royalty payments received from a related member who added the payments to income under G.S. 105-130.7A for the same taxable year.

(21) In each of the taxpayer's first five taxable years beginning on or after January 1, 2005, an amount equal to twenty percent (20%) of the amount added to taxable income in a previous year as accelerated depreciation under subdivision (a)(15) of this section.

(21a) **(Effective for taxable years beginning on or after January 1, 2008)** In each of the taxpayer's first five taxable years beginning on or after January 1, 2009, an amount equal to twenty percent (20%) of the amount added to taxable income in taxable year 2008 as accelerated depreciation under subdivision (a)(15a) of this section.

(22) To the extent included in federal taxable income, the amount paid to the taxpayer during the taxable year from the Disaster Relief Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.

(23) A dividend received from a captive REIT, as defined in G.S. 105-130.12.

(24) **(Effective for taxable years beginning on or after January 1, 2008, and expiring for taxable years beginning on or after**

January 1, 2015) Five percent (5%) of the gross purchase price of a qualified sale of a manufactured home community. A qualified sale is a transfer of land comprising a manufactured home community in a single purchase to a group composed of a majority of the manufactured home community leaseholders or to a nonprofit organization that represents such a group. To be eligible for this deduction, a taxpayer must give notice of the sale to the North Carolina Housing Finance Agency under G.S. 42-14.3.

(c) The following other adjustments to federal taxable income shall be made in determining State net income:

(1) In determining State net income, no deduction shall be allowed for annual amortization of bond premiums applicable to any bond acquired prior to January 1, 1963. The amount of premium paid on any such bond shall be deductible only in the year of sale or other disposition.

(2) Federal taxable income must be increased or decreased to account for any difference in the amount of depreciation, amortization, or gains or losses applicable to property which has been depreciated or amortized by use of a different basis or rate for State income tax purposes than used for federal income tax purposes prior to the effective date of this Part.

(3) No deduction is allowed for any direct or indirect expenses related to income not taxed under this Part; provided, no adjustment shall be made under this subsection for adjustments addressed in G.S. 105-130.5(a) and (b). G.S. 105-130.6A applies to the adjustment for expenses related to dividends received that are not taxed under this Part.

(4) The taxpayer shall add to federal taxable income the amount of any recovery during the taxable year not included in federal taxable income, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by this Part but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by the Code. The taxpayer may deduct from federal taxable income the amount of any recovery during the taxable year included in federal taxable income under section 111 of the Code, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by the Code but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by this Part.

(5) A savings and loan association may deduct interest earned on deposits at the Federal Home Loan Bank of Atlanta, or its successor, to the extent included in federal taxable income.

(d) Repealed by Session Laws 1987, c. 778, s. 3.

(e) Notwithstanding any other provision of this section, any recapture of depreciation required under the Code must be included in a corporation's State net income to the extent required for federal income tax purposes.

(f) Expired. (1967, c. 1110, s. 3; 1969, cc. 1113, 1124; 1971, c. 820, s. 1; c. 1206, s. 1; 1973, c. 1287, s. 4; 1975, c. 764, s. 4; 1977, 2nd Sess., c. 1200, s. 1; 1979, c. 179, s. 2; c. 801, s. 32; 1981, c. 704, s. 20; c. 855, s. 1; 1983, c. 61; c. 713, ss. 70-73, 82, 83; 1985, c. 720, s. 1; c. 791, s. 43; 1985 (Reg. Sess., 1986), c. 825; 1987, c. 89; c. 637, s. 1; c. 778, ss. 2, 3; c. 804, s. 3; 1991, c. 598, ss. 3, 10; 1991 (Reg. Sess., 1992), c. 857, s. 1; 1993 (Reg. Sess., 1994), c. 745, ss. 4, 5; 1995, c. 509, s. 50; 1996, 2nd Ex. Sess., c. 14, ss. 4, 10; 1997-439, s. 1; 1998-98, ss. 1(c), 4, 69; 1998-158, s. 5; 1998-171, s. 7; 1999-333, s. 2; 1999-337, s. 1; 1999-463, Ex. Sess., s. 4.6(b); 2000-140, s. 93.1(a); 2000-173, s. 19(c); 2001-327, ss. 1(d), (e), 3(a), (b); 2001-424, s. 12.2(b); 2001-427, ss. 4(b), 10(a); 2002-72, s. 14; 2002-126, ss. 30C.2(a), 30C.2(c); 2002-136, ss. 1, 4; 2003-284, s. 37A.3; 2003-349, s. 1.1; 2005-1, s. 5.7(b); 2005-276, ss. 35.1(b), 39.1(e); 2006-220, s. 1; 2007-323, ss. 31.18(a), (b); 2007-383, s. 5; 2007-397, s. 13(b); 2008-107, ss. 28.1(c), (d), (g), 28.25(b), 28.27(a); 2008-134, s. 2(b).)

Subdivisions (a)(15) and (a)(20) Set Out Twice. — The first versions of subdivisions (a)(15) and (a)(20) set out above are effective for taxable years beginning before January 1, 2008. The second versions of subdivisions (a)(15) and (a)(20) set out above are effective for taxable years beginning on or after January 1, 2008.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, ss. 28.1(c), (d) and (g), 28.25(b), and 28.27(a), effective for taxable years beginning on or after January 1, 2008, in subdivision (a)(15), added "For taxable years 2002-2005" at the beginning, and deleted "and thereafter" following "2005" in the table; added subdivision (a)(15a); in subdivision (a)(20), inserted "or a unit of State or local government"; and added subdivisions (b)(21a) and (b)(24).

Session Laws 2008-134, s. 2(b), effective July 28, 2008, added the last sentence in subdivision (b)(11).

§ 105-130.16. Returns.

(a) **(Effective for taxable years beginning before January 1, 2009)** Return. — Every corporation doing business in this State must file with the Secretary an income tax return showing specifically the items of gross income and the deductions allowed by this Part and any other facts the Secretary requires to make any computation required by this Part. The return of a corporation must be signed by its president, vice-president, treasurer, assistant treasurer, secretary, or assistant secretary. The officer signing the return must furnish an affirmation verifying the return. The affirmation must be in the form required by the Secretary.

(a) **(Effective for taxable years beginning on or after January 1, 2009)** Return. — Every corporation doing business in this State must file with the Secretary an income tax return showing specifically the items of gross income and the deductions allowed by this Part and any other facts the Secretary requires to make any computation required by this Part. The return of a corporation must be signed by its president, vice-president, treasurer, or chief financial officer. The officer signing the return must furnish an affirmation verifying the return. The affirmation must be in the form required by the Secretary.

(b) Correction of Distortions. — When the Secretary has reason to believe that any corporation so conducts its trade or business in such manner as to either directly or indirectly distort its true net income and the net income properly attributable to the State, whether by the arbitrary shifting of income, through price fixing, charges for service, or otherwise, whereby the net income is arbitrarily assigned to one or another unit in a group of taxpayers carrying on business under a substantially common control, the Secretary may require any facts the Secretary considers necessary for the proper computation of the entire net income and the net income properly attributable to the State, and in determining these computations, the Secretary must have regard to the fair profit that would normally arise from the conduct of the trade or business.

(c) Other Corrections. — When any corporation liable to taxation under this Part conducts its business in such a manner as to either directly or indirectly benefit the members or stockholders thereof or any person interested in the business by selling its products or goods or commodities in which it deals at less than the fair price which might be obtained therefor, or when a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and disposes of the products of the corporation so owning a substantial portion of its stock in such a manner as to create a loss or improper net income for either of the corporations, or when a corporation, owning directly or indirectly a substantial portion of the stock of another corporation, acquires and disposes of the products of the corporation of which it so owns a substantial portion of the stock in such manner as to create a loss or improper net income for either of the corporations, the Secretary may determine the amount of taxable income of the such corporations for the calendar or fiscal year, having due regard to the reasonable profits which, but for such arrangement or understanding, might or could have been obtained by the corporations liable to taxation under this Part from dealing in such products, goods or commodities. (1939, c. 158, s. 326; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1951, c. 643, s. 4; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1998-98, s. 69; 1999-337, s. 22; 2008-134, s. 4(a).)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective for taxable years beginning before January 1, 2009. The second version of subsection (a) set out above is effective for taxable years beginning on or after January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 4(a), effective for taxable years beginning on or after January 1, 2009, substituted "or chief financial officer" for "assistant treasurer, secretary, or assistant secretary" in the second sentence of subsection (a).

§ 105-130.41. (Repealed effective for taxable years beginning on or after January 1, 2014) Credit for North Carolina State Ports Authority wharfage, handling, and throughput charges.

(a) Credit. — A taxpayer whose waterborne cargo is loaded onto or unloaded from an ocean carrier calling at the State-owned port terminal at Wilmington or Morehead City, without consideration of the terms under which the cargo is moved, is allowed a credit against the tax imposed by this Part. The amount of credit allowed is equal to the excess of the wharfage, handling (in or out), and throughput charges assessed on the cargo for the current taxable year over an amount equal to the average of the charges for the current taxable year and the two preceding taxable years. The credit applies to forest products, break-bulk cargo and container cargo, including less-than-container-load cargo, that is loaded onto or unloaded from an ocean carrier calling at either the Wilmington or Morehead City port terminal and to bulk cargo that is loaded onto or unloaded from an ocean carrier calling at the Morehead City port terminal. To obtain the credit, taxpayers must provide to the Secretary a statement from the State Ports Authority certifying the amount of charges for which a credit is claimed and any other information required by the Secretary.

(b) Limitations. — This credit may not exceed fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the corporation. Any unused portion of the credit may be carried forward for the succeeding five years. The maximum cumulative credit that may be claimed by a corporation under this section is two million dollars ($2,000,000).

(c) Definitions. — For purposes of this section, the terms "handling" (in or out) and "wharfage" have the meanings provided in the State Ports Tariff Publications, "Wilmington Tariff, Terminal Tariff #6," and "Morehead City Tariff, Terminal Tariff #1." For purposes of this section, the term "throughput" has the same meaning as "wharfage" but applies only to bulk products, both dry and liquid.

G.S. 105-130.41 has a postponed repeal date. See notes.

(c1) Report. — The Department of Revenue must publish by May 1 of each year the following information itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The number of taxpayers taking a credit allowed in this section.
(2) The total amount of charges assessed for the taxable year.
(2a) The amount of the charges attributable to imports.
(2b) The amount of the charges attributable to exports.
(3) The total cost to the General Fund of the credits taken.

(d) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2014. (1991 (Reg. Sess., 1992), c. 977, s. 1; 1993 (Reg. Sess., 1994), c. 681, s. 1; 1995, c. 17, s. 17; c. 495, ss. 1, 3, 4; 1996, 2nd Ex. Sess., c. 18, s. 15.3(a); 1997-443, s. 29.1(a)-(c); 1998-98, s. 69; 2001-517, ss. 1, 2; 2002-99, s. 6(c); 2003-414, s. 7; 2005-429, s. 2.9; 2007-527, s. 26(a); 2008-107, s. 28.5(a), (b).)

Editor's Note. — Subdivisions (c1)(3) and (4), as added by Session Laws 2008-107, s. 28.5(a), have been redesignated as subdivisions (c1)(2a) and (2b), and subsection (c1) is set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.5(a) and (b), effective July 16, 2008, added subdivisions (c1)(3) and (c1)(4), redesignated former subdivision (c1)(3) as present subdivision (c1)(5); and in subsection (d), substituted "January 1, 2014" for "January 1, 2009." See Editor's note.

§ 105-130.47. (Repealed for qualifying expenses occurring on or after January 1, 2014) Credit for qualifying expenses of a production company.

(a) Definitions. — The following definitions apply in this section:

(1) Highly compensated individual. — An individual who directly or indirectly receives compensation in excess of one million dollars ($1,000,000) for personal services with respect to a single production. An individual receives compensation indirectly when a production company pays a personal service company or an employee leasing company that pays the individual.

(2) Live sporting event. — A scheduled sporting competition, game, or race that is not originated by a production company, but originated solely by an amateur, collegiate, or professional organization, institution, or association for live or tape-delayed television or satellite broadcast. A live sporting event does not include commercial advertising, an episodic television series, a television pilot, a music video, a motion picture, or a documentary production in which sporting events are presented through archived historical footage or similar footage taken at least 30 days before it is used.

(3) Production company. — Defined in G.S. 105-164.3.

(4) Qualifying expenses. — The sum of the following amounts spent in this State by a production company in connection with a production, less the amount in excess of one million dollars ($1,000,000) paid to a highly compensated individual:

a. Goods and services leased or purchased. For goods with a purchase price of twenty-five thousand dollars ($25,000) or more, the amount included in qualifying expenses is the purchase price less

G.S. 105-130.47 has a postponed repeal date. See notes.

the fair market value of the good at the time the production is completed.

b. Compensation and wages on which withholding payments are remitted to the Department of Revenue under Article 4A of this Chapter.

c. The cost of production-related insurance coverage obtained on the production. Expenses for insurance coverage purchased from a related member are not qualifying expenses.

(5) Related member. — Defined in G.S. 105-130.7A.

(b) Credit. — A taxpayer that is a production company and has qualifying expenses of at least two hundred fifty thousand dollars ($250,000) with respect to a production is allowed a credit against the taxes imposed by this Part equal to fifteen percent (15%) of the production company's qualifying expenses. For the purposes of this section, in the case of an episodic television series, an entire season of episodes is one production. The credit is computed based on all of the taxpayer's qualifying expenses incurred with respect to the production, not just the qualifying expenses incurred during the taxable year.

(c) Pass-Through Entity. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section does not distribute the credit among any of its owners. The pass-through entity is considered the taxpayer for purposes of claiming the credit allowed by this section. If a return filed by a pass-through entity indicates that the entity is paying tax on behalf of the owners of the entity, the credit allowed under this section does not affect the entity's payment of tax on behalf of its owners.

(d) Return. — A taxpayer may claim the credit allowed by this section on a return filed for the taxable year in which the production activities are completed. The return must state the name of the production, a description of the production, and a detailed accounting of the qualifying expenses with respect to which a credit is claimed.

(e) Credit Refundable. — If the credit allowed by this section exceeds the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, the Secretary must refund the excess to the taxpayer. The refundable excess is governed by the provisions governing a refund of an overpayment by the taxpayer of the tax imposed in this Part. In computing the amount of tax against which multiple credits are allowed, nonrefundable credits are subtracted before refundable credits.

(f) Limitations. — The amount of credit allowed under this section with respect to a production that is a feature film may not exceed seven million five hundred thousand dollars ($7,500,000). No credit is allowed under this section for any production that satisfies one of the following conditions:

(1) It is political advertising.

(2) It is a television production of a news program or live sporting event.

(3) It contains material that is obscene, as defined in G.S. 14-190.1.

(4) It is a radio production.

(g) Substantiation. — A taxpayer allowed a credit under this section must maintain and make available for inspection any information or records required by the Secretary of Revenue. The taxpayer has the burden of proving eligibility for a credit and the amount of the credit. The Secretary may consult with the North Carolina Film Office of the Department of Commerce and the regional film commissions in order to determine the amount of qualifying expenses.

(h) Report. — The Department of Revenue must publish by May 1 of each year the following information, itemized by taxpayer for the 12-month period ending the preceding December 31:

G.S. 105-130.47 has a postponed repeal date. See notes.

(1) The location of sites used in a production for which a credit was claimed.
(2) The qualifying expenses for which a credit was claimed, classified by whether the expenses were for goods, services, or compensation paid by the production company.
(3) The number of people employed in the State with respect to credits claimed.
(4) The total cost to the General Fund of the credits claimed.

(i) Repealed by Session Laws 2006-220, s. 2, effective for taxable years beginning on or after January 1, 2007.

(j) NC Film Office. — To claim a credit under this section, a taxpayer must notify the Division of Tourism, Film, and Sports Development in the Department of Commerce of the taxpayer's intent to claim the production tax credit. The notification must include the title of the production, the name of the production company, a financial contact for the production company, the proposed dates on which the production company plans to begin filming the production, and any other information required by the Division. For productions that have production credits, a taxpayer claiming a credit under this section must acknowledge in the production credits both the North Carolina Film Office and the regional film office responsible for the geographic area in which the filming of the production occurred.

(k) Sunset. — This section is repealed for qualifying expenses occurring on or after January 1, 2014. (2005-276, s. 39.1(a); 2005-345, ss. 47(a), 47(b); 2006-162, s. 4(a); 2006-220, s. 2; 2007-527, s. 24; 2008-107, s. 28.24(a).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.24(a), effective for taxable years beginning on or after January 1, 2008, in subdivision (a)(4), inserted "in excess of one million dollars ($1,000,000)" in the introductory language, and added sub-subdivision (a)(4)c.; added subdivision (a)(5); added present subsection (j); redesignated former subsection (j) as subsection (k); and in subsection (k), substituted "January 1, 2014" for "January 1, 2010."

Part 2. Individual Income Tax.

§ 105-134. Purpose.

Editor's Note. —

Session Laws 2008-107, s. 28.25(c), stated in its prefatory language that "G.S. 105-134(c)(5b) reads as rewritten." There is no subdivision (c)(5b) in G.S. 105-134, and it appears that the amendment was intended to be for G.S. 105-134.6. The amendment has not been implemented at the direction of the Revisor of Statutes.

§ 105-134.6. Adjustments to taxable income.

(a) S Corporations. — Each shareholder's pro rata share of an S Corporation's income is subject to the adjustments provided in this section.

(b) Deductions. — The following deductions from taxable income shall be made in calculating North Carolina taxable income, to the extent each item is included in taxable income:

(1) Interest upon the obligations of any of the following:

a. The United States or its possessions.
b. This State, a political subdivision of this State, or a commission, an authority, or another agency of this State or of a political subdivision of this State.
c. A nonprofit educational institution organized or chartered under the laws of this State.

(2) Gain from the disposition of obligations issued before July 1, 1995, to the extent the gain is exempt from tax under the laws of this State.

(3) Benefits received under Title II of the Social Security Act and amounts received from retirement annuities or pensions paid under the provisions of the Railroad Retirement Act of 1937.

(4) Repealed by Session Laws 1989 (Reg. Sess., 1990), c. 1002, s. 2.

(5) Refunds of state, local, and foreign income taxes included in the taxpayer's gross income.

(5a) Reserved.

(5b) The amount received during the taxable year from one or more State, local, or federal government retirement plans to the extent the amount is exempt from tax under this Part pursuant to a court order in settlement of the following cases: Bailey v. State, 92 CVS 10221, 94 CVS 6904, 95 CVS 6625, 95 CVS 8230; Emory v. State, 98 CVS 0738; and Patton v. State, 95 CVS 04346. Amounts deducted under this subdivision may not also be deducted under subdivision (6) of this subsection.

(6)a. An amount, not to exceed four thousand dollars ($4,000), equal to the sum of the amount calculated in subparagraph b. plus the amount calculated in subparagraph c.
b. The amount calculated in this subparagraph is the amount received during the taxable year from one or more state, local, or federal government retirement plans.
c. The amount calculated in this subparagraph is the amount received during the taxable year from one or more retirement plans other than state, local, or federal government retirement plans, not to exceed a total of two thousand dollars ($2,000) in any taxable year.
d. In the case of a married couple filing a joint return where both spouses received retirement benefits during the taxable year, the maximum dollar amounts provided in this subdivision for various types of retirement benefits apply separately to each spouse's benefits.

(7) Recodified as G.S. 105-134.6(d)(1).

(8) Recodified as G.S. 105-134.6(d)(2).

(9) Income that is (i) earned or received by an enrolled member of a federally recognized Indian tribe and (ii) derived from activities on a federally recognized Indian reservation while the member resides on the reservation. Income from intangibles having a situs on the reservation and retirement income associated with activities on the reservation are considered income derived from activities on the reservation.

(10) The amount by which the basis of property under this Article exceeds the basis of the property under the Code, in the year the taxpayer disposes of the property.

(11) Severance wages received by a taxpayer from an employer as the result of the taxpayer's permanent, involuntary termination from employment through no fault of the employee. The amount of severance wages deducted as the result of the same termination may not exceed thirty-five thousand dollars ($35,000) for all taxable years in which the wages are received.

(12) Repealed by Session Laws 1998-171, s. 2, effective October 1, 1998.

(13) Repealed by Session Laws 2002-126, s. 30C.4, effective for taxable years beginning on or after January 1, 2002.

(14) The amount paid to the taxpayer by the State under G.S. 148-84 as compensation for pecuniary loss suffered by reason of erroneous conviction and imprisonment.

(15) Interest, investment earnings, and gains of a trust, the settlors of which are two or more manufacturers that signed a settlement agreement with this State to settle existing and potential claims of the State against the manufacturers for damages attributable to a product of the manufacturers, if the trust meets all of the following conditions:

a. The purpose of the trust is to address adverse economic consequences resulting from a decline in demand of the manufactured product potentially expected to occur because of market restrictions and other provisions in the settlement agreement.

b. A court of this State approves and retains jurisdiction over the trust.

c. Certain portions of the distributions from the trust are made in accordance with certifications that meet the criteria in the agreement creating the trust and are provided by a nonprofit entity, the governing board of which includes State officials.

(16) The amount paid to the taxpayer during the taxable year from the Hurricane Floyd Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.

(17) In each of the taxpayer's first five taxable years beginning on or after January 1, 2005, an amount equal to twenty percent (20%) of the amount added to taxable income in a previous year as accelerated depreciation under subdivision (c)(8) of this section.

(17a) **(Effective for taxable years beginning on or after January 1, 2008)** In each of the taxpayer's first five taxable years beginning on or after January 1, 2009, an amount equal to twenty percent (20%) of the amount added to taxable income in taxable year 2008 as accelerated depreciation under subdivision (c)(8a) of this section.

(18) The amount paid to the taxpayer during the taxable year from the Disaster Relief Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.

(19) **(Effective for taxable years beginning on or after January 1, 2008 and expires for taxable years beginning on or after January 1, 2015)** Five percent (5%) of the gross purchase price of a qualified sale of a manufactured home community. A qualified sale is a transfer of land comprising a manufactured home community in a single purchase to a group composed of a majority of the manufactured home community leaseholders or to a nonprofit organization that represents such a group. To be eligible for this deduction, a taxpayer must give notice of the sale to the North Carolina Housing Finance Agency under G.S. 42-14.3.

(c) Additions. — The following additions to taxable income shall be made in calculating North Carolina taxable income, to the extent each item is not included in taxable income:

(1) Interest upon the obligations of states other than this State, political subdivisions of those states, and agencies of those states and their political subdivisions.

(2) Any amount allowed as a deduction from gross income under the Code that is taxed under the Code by a separate tax other than the tax imposed in section 1 of the Code.

G.S. 105-134.6(c)(8) and (d)(4) are set out twice. See note.

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(3) Any amount deducted from gross income under section 164 of the Code as state, local, or foreign income tax or as state or local general sales tax to the extent that the taxpayer's total itemized deductions deducted under the Code for the taxable year exceed the standard deduction allowable to the taxpayer under the Code reduced by the amount the taxpayer is required to add to taxable income under subdivision (4) of this subsection.

(3a) The amount by which a shareholder's share of S Corporation income is reduced under section 1366(f)(2) of the Code for the taxable year by the amount of built-in gains tax imposed on the S Corporation under section 1374 of the Code.

(4) The amount by which the taxpayer's additional standard deduction for aged and blind has been increased for inflation under section 63(c)(4)(A) of the Code plus the amount by which the taxpayer's basic standard deduction, including adjustments for inflation, under the Code exceeds the appropriate amount in the following chart based on the taxpayer's filing status:

Filing Status	**Standard Deduction**
Married filing jointly/Surviving Spouse	$6,000
Head of Household	4,400
Single	3,000
Married filing separately	3,000

(4a) The amount by which each of the taxpayer's personal exemptions has been increased for inflation under section 151(d)(4)(A) of the Code. This amount is reduced by five hundred dollars ($500.00) for each personal exemption if the taxpayer's adjusted gross income (AGI), as calculated under the Code, is less than the following amounts:

Filing Status	**AGI**
Married, filing jointly	$100,000
Head of Household	80,000
Single	60,000
Married, filing separately	50,000.

For the purposes of this subdivision, if the taxpayer's personal exemptions have been reduced by the applicable percentage under section 151(d)(3) of the Code, the amount by which the personal exemptions have been increased for inflation is also reduced by the applicable percentage.

(5) The market price of the gleaned crop for which the taxpayer claims a credit for the taxable year under G.S. 105-151.14.

(5a) **(Expires for taxable years beginning on or after January 1, 2011)** The market price of the oyster shells for which the taxpayer claims a credit for the taxable year under G.S. 105-151.30.

(5b) **(Effective for taxable years beginning on or after January 1, 2008)** The amount of a donation made to a nonprofit organization for which a credit is claimed under G.S. 105-129.16H.

(6) The amount by which the basis of property under the Code exceeds the basis of the property under this Article, in the year the taxpayer disposes of the property.

(7) The amount of federal estate tax that is attributable to an item of income in respect of a decedent and is deducted from gross income under section 691(c) of the Code.

(8) **(Effective for taxable years beginning before January 1, 2008)** The applicable percentage of the amount allowed as a special accelerated depreciation deduction under section 168(k) or section 1400L of

G.S. 105-134.6(c)(8) and (d)(4) are set out twice. See note.

the Code, as set out in the table below. In addition, a taxpayer who was allowed a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code in a taxable year beginning before January 1, 2002, and whose North Carolina taxable income in that earlier year reflected that accelerated depreciation deduction must add to federal taxable income in the taxpayer's first taxable year beginning on or after January 1, 2002, an amount equal to the amount of the deduction allowed in the earlier taxable year. These adjustments do not result in a difference in basis of the affected assets for State and federal income tax purposes. The applicable percentage is as follows:

Taxable Year	Percentage
2002	100%
2003	70%
2004	70%
2005 and thereafter	0%

(8) **(Effective for taxable years beginning on or after January 1, 2008)** For taxable years 2002-2005, the applicable percentage of the amount allowed as a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code, as set out in the table below. In addition, a taxpayer who was allowed a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code in a taxable year beginning before January 1, 2002, and whose North Carolina taxable income in that earlier year reflected that accelerated depreciation deduction must add to federal taxable income in the taxpayer's first taxable year beginning on or after January 1, 2002, an amount equal to the amount of the deduction allowed in the earlier taxable year. These adjustments do not result in a difference in basis of the affected assets for State and federal income tax purposes. The applicable percentage is as follows:

Taxable Year	Percentage
2002	100%
2003	70%
2004	70%
2005	0%

(8a) **(Effective for taxable years beginning on or after January 1, 2008)** The applicable percentage of the amount allowed as a special accelerated depreciation deduction under section 168(k) of the Code for property placed in service after December 31, 2007, but before January 1, 2009. In addition, a taxpayer who was allowed a special accelerated depreciation deduction in taxable year 2007 for property placed in service for that period, and whose North Carolina taxable income for that year reflected that accelerated depreciation deduction must add to federal taxable income in the taxpayer's 2008 taxable year an amount equal to the applicable percentage of the deduction amount allowed in the 2007 taxable year. These adjustments do not result in a difference in basis of the affected assets for State and federal income tax purposes. The applicable percentage under this subdivision is eighty-five percent (85%).

(9) Repealed by Session Laws 2006-220, s. 3, effective for taxable years beginning on and after January 1, 2007.

G.S. 105-134.6(c)(8) and (d)(4) are set out twice. See note.

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(10) The amount excluded from gross income under section 199 of the Code.

(d) Other Adjustments. — The following adjustments to taxable income shall be made in calculating North Carolina taxable income:

(1) The amount of inheritance or estate tax attributable to an item of income in respect of a decedent required to be included in gross income under the Code, adjusted as provided in G.S. 105-134.5, 105-134.6, and 105-134.7, may be deducted in the year the item of income is included. The amount of inheritance or estate tax attributable to an item of income in respect of a decedent is (i) the amount by which the inheritance or estate tax paid under Article 1 or 1A of this Chapter on property transferred to a beneficiary by a decedent exceeds the amount of the tax that would have been payable by the beneficiary if the item of income in respect of a decedent had not been included in the property transferred to the beneficiary by the decedent, (ii) multiplied by a fraction, the numerator of which is the amount required to be included in gross income for the taxable year under the Code, adjusted as provided in G.S. 105-134.5, 105-134.6, and 105-134.7, and the denominator of which is the total amount of income in respect of a decedent transferred to the beneficiary by the decedent. For an estate or trust, the deduction allowed by this subdivision shall be computed by excluding from the gross income of the estate or trust the portion, if any, of the items of income in respect of a decedent that are properly paid, credited, or to be distributed to the beneficiaries during the taxable year.

The Secretary may provide to a beneficiary of an item of income in respect of a decedent any information contained on an inheritance or estate tax return that the beneficiary needs to compute the deduction allowed by this subdivision.

(2) The taxpayer may deduct the amount by which the taxpayer's deductions allowed under the Code were reduced, and the amount of the taxpayer's deductions that were not allowed, because the taxpayer elected a federal tax credit in lieu of a deduction. This deduction is allowed only to the extent that a similar credit is not allowed by this Chapter for the amount.

(3) The taxpayer shall add to taxable income the amount of any recovery during the taxable year not included in taxable income, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by this Part but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by the Code. The taxpayer may deduct from taxable income the amount of any recovery during the taxable year included in taxable income under section 111 of the Code, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by the Code but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by this Part.

(4) **(Effective for taxable years beginning on or after January 1, 2007 and beginning before January 1, 2012)** A taxpayer may deduct from taxable income the amount, not to exceed two thousand five hundred dollars ($2,500), contributed to an account in the Parental Savings Trust Fund of the State Education Assistance Authority established pursuant to G.S. 116-209.25. In the case of a married couple filing a joint return, the maximum dollar amount of the deduction is five thousand dollars ($5,000).

G.S. 105-134.6(c)(8) and (d)(4) are set out twice. See note.

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(4) **(Effective for taxable years beginning on or after January 1, 2012)** A taxpayer whose adjusted gross income (AGI), as calculated under the Code, is less than the amount listed in this subdivision may deduct from taxable income the amount, not to exceed two thousand five hundred dollars ($2,500), contributed to an account in the Parental Savings Trust Fund of the State Education Assistance Authority established pursuant to G.S. 116-209.25. In the case of a married couple filing a joint return, the maximum dollar amount of the deduction is five thousand dollars ($5,000).

Filing Status	**AGI**
Married, filing jointly	$100,000
Head of Household	80,000
Single	60,000
Married, filing separately	50,000

(5) The taxpayer shall add to taxable income the amount deducted from taxable income in a prior taxable year under subdivision (4) of this subsection to the extent this amount was withdrawn from the Parental Savings Trust Fund of the State Education Assistance Authority established pursuant to G.S. 116-209.25 and not used to pay for the qualified higher education expenses of the designated beneficiary, unless the withdrawal was made without penalty under section 529 of the Code due to the death or permanent disability of the designated beneficiary.

(6) A taxpayer who is an eligible firefighter or an eligible rescue squad worker may deduct from taxable income the sum of two hundred fifty dollars ($250.00). In the case of a married couple filing a joint return, each spouse may qualify separately for the deduction allowed under this subdivision. In order to claim the deduction allowed under this subdivision, the taxpayer must submit with the tax return any documentation required by the Secretary. An individual may not claim a deduction as both an eligible firefighter and as an eligible rescue squad worker in a single taxable year. The following definitions apply in this subdivision:

a. Eligible firefighter. — An unpaid member of a volunteer fire department who attended at least 36 hours of fire department drills and meetings during the taxable year.

b. Eligible rescue squad worker. — An unpaid member of a volunteer rescue or emergency medical services squad who attended at least 36 hours of rescue squad training and meetings during the taxable year. (1989, c. 718, s. 2; c. 728, s. 1.4; c. 770, ss. 41.2, 41.3; c. 792, s. 1.1; 1989 (Reg. Sess., 1990), c. 984, s. 4; c. 1002, s. 2; 1991, c. 45, s. 9; c. 453, s. 1; c. 689, ss. 253, 254; 1991 (Reg. Sess., 1992), c. 1007, s. 3; 1993, c. 12, s. 8; c. 443, s. 8; c. 485, s. 9; 1993 (Reg. Sess., 1994), c. 745, s. 7; 1995, c. 17, s. 5; c. 42, ss. 1, 2(a), (b); c. 46, s. 3; c. 370, s. 3; 1996, 2nd Ex. Sess., c. 13, s. 8.1; c. 14, s. 9; 1997-226, s. 3; 1997-328, s. 1; 1997-388, s. 4; 1997-525, s. 1; 1998-98, s. 69; 1998-171, ss. 2, 3; 1998-212, ss. 29A.2(c), 29A.13(a); 1999-333, s. 3; 1999-463, Ex Sess., s. 4.6 (a); 2000-140, ss. 65, 93.1(a); 2001-424, ss. 12.2(b), 34.19(a), (b); 2002-126, ss. 30B.1(a), 30B.1(b), 30C.2(b), 30C.2(d), 30C.4; 2003-284, s. 37A.2; 2005-1, s. 5.7(a); 2005-276, ss. 35.1(e), 39.1(f); 2005-435, s. 55; 2006-17, ss. 2, 3; 2006-66, ss. 24.12(a), 24.18(e); 2006-220, s. 3; 2006-221, s. 27(a); 2007-323, ss. 31.19(a)-(d), 31.24(a); 2007-397, s. 13(c); 2008-107, ss. 28.1(e), (f), (h), 28.27(b); 2008-134, s. 2(c).)

Subdivision (d)(4) Set Out Twice. — The first version of subdivision (d)(4) set out above is effective for taxable years beginning on or after January 1, 2007 and before January 1, 2012. The second version of subdivision (d)(4) set out above is effective for taxable years beginning on or after January 1, 2012.

Subdivision (c)(8) Set Out Twice. — The first version of subdivision (c)(8) set out above is effective for taxable years beginning before January 1, 2008. The second version of subdivision (c)(8) set out above is effective for taxable years beginning on or after January 1, 2008.

Editor's Note. —

Session Laws 2008-107, s. 28.25(c), stated in its prefatory language that "G.S. 105-134(c)(5b) reads as rewritten." There is no subdivision (c)(5b) in G.S. 105-134, and it appears that the amendment was intended for G.S. 105-134.6. The amendment would have inserted "or a unit of State or local government" following "nonprofit organization" in subdivision (c)(5b). The amendment has not been implemented at the direction of the Revisor of Statutes.

Session Laws 2008-107, s. 28.27(d), provides, in part, that the amendment to this section by s. 28.27(b), expires for taxable years beginning on or after January 1, 2015.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, ss. 28.1(e), (f), (h), and 28.27(b), effective for taxable years beginning on or after January 1, 2008, added subdivisions (b)(17a) and (b)(19); in subdivision (c)(8), in the introductory paragraph, added "For taxable years 2002-2005," at the beginning of the first sentence, and in the table, deleted "and thereafter" following "2005"; and added subdivision (c)(8a). For expiration of amendment made by s. 28.27(b), see Editor's note.

Session Laws 2008-134, s. 2(c), effective July 28, 2008, substituted "allowed by this Chapter" for "allowed by this Part" near the end of subdivision (d)(2).

§ 105-151.22. (Effective for taxable years ending before January 1, 2014) Credit for North Carolina State Ports Authority wharfage, handling, and throughput charges.

(a) Credit. — A taxpayer whose waterborne cargo is loaded onto or unloaded from an ocean carrier calling at the State-owned port terminal at Wilmington or Morehead City, without consideration of the terms under which the cargo is moved, is allowed a credit against the tax imposed by this Part. The amount of credit allowed is equal to the excess of the wharfage, handling (in or out), and throughput charges assessed on the cargo for the current taxable year over an amount equal to the average of the charges for the current taxable year and the two preceding taxable years. The credit applies to forest products, break-bulk cargo and container cargo, including less-than-container-load cargo, that is loaded onto or unloaded from an ocean carrier calling at either the Wilmington or Morehead City port terminal and to bulk cargo that is loaded onto or unloaded from an ocean carrier calling at the Morehead City port terminal. To obtain the credit, taxpayers must provide to the Secretary a statement from the State Ports Authority certifying the amount of charges for which a credit is claimed and any other information required by the Secretary.

(b) Limitations. — This credit may not exceed fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the taxpayer. Any unused portion of the credit may be carried forward for the succeeding five years. The maximum cumulative credit that may be claimed by a taxpayer under this section is two million dollars ($2,000,000).

(c) Definitions. — For purposes of this section, the terms "handling" (in or out) and "wharfage" have the meanings provided in the State Ports Tariff Publications, "Wilmington Tariff, Terminal Tariff #6," and "Morehead City Tariff, Terminal Tariff #1." For purposes of this section, the term "throughput" has the same meaning as "wharfage" but applies only to bulk products, both dry and liquid.

G.S. 105-151.22 has a postponed repeal date. See notes.

(c1) Report. — The Department of Revenue must publish by May 1 of each year the following information itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The number of taxpayers taking a credit allowed in this section.
(2) The total amount of charges assessed for the taxable year.
(2a) The amount of the charges attributable to imports.
(2b) The amount of the charges attributable to exports.
(3) The total cost to the General Fund of the credits taken.

(d) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2014. (1991 (Reg. Sess., 1992), c. 977, s. 2; 1993 (Reg. Sess., 1994), c. 681, s. 2; 1995, c. 17, s. 17; c. 495, ss. 2-4; 1996, 2nd Ex. Sess., c. 18, s. 15.3(b); 1997-443, s. 29.1 (a), (b), (d); 1998-98, s. 69; 2001-517, ss. 1, 2; 2002-99, s. 6(d); 2003-414, s. 8; 2005-429, s. 2.11; 2007-527, s. 26(b); 2008-107, s. 28.5(c), (d).)

Editor's Note. — Subdivisions (c1)(3) and (4), as added by Session Laws 2008-107, s. 28.5(c), have been redesignated as subdivisions (c1)(2a) and (2b) and subsection (c1) is set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.5(c) and (d), effective July 16, 2008, added subdivisions (c1)(3) and (c1)(4), and redesignated former subdivision (c1)(3) as present subdivision (c1)(5); and in subsection (d), substituted "January 1, 2014" for "January 1, 2009." See Editor's note.

§ 105-151.29. (Repealed for qualifying expenses occurring on or after January 1, 2014) Credit for qualifying expenses of a production company.

(a) Definitions. — The following definitions apply in this section:

(1) Highly compensated individual. — An individual who directly or indirectly receives compensation in excess of one million dollars ($1,000,000) for personal services with respect to a single production. An individual receives compensation indirectly when a production company pays a personal service company or an employee leasing company that pays the individual.

(2) Live sporting event. — A scheduled sporting competition, game, or race that is not originated by a production company, but originated solely by an amateur, collegiate, or professional organization, institution, or association for live or tape-delayed television or satellite broadcast. A live sporting event does not include commercial advertising, an episodic television series, a television pilot, a music video, a motion picture, or a documentary production in which sporting events are presented through archived historical footage or similar footage taken at least 30 days before it is used.

(3) Production company. — Defined in G.S. 105-164.3.

(4) Qualifying expenses. — The sum of the following amounts spent in this State by a production company in connection with a production, less the amount paid in excess of one million dollars ($1,000,000) to a highly compensated individual:

a. Goods and services leased or purchased. For goods with a purchase price of twenty-five thousand dollars ($25,000) or more, the amount included in qualifying expenses is the purchase price less the fair market value of the good at the time the production is completed.

b. Compensation and wages on which withholding payments are remitted to the Department of Revenue under Article 4A of this Chapter.

c. The cost of production-related insurance coverage obtained on the production. Expenses for insurance coverage purchased from a related member are not qualifying expenses.

(5) Related member. — Defined in G.S. 105-130.7A.

(b) Credit. — A taxpayer that is a production company and has qualifying expenses of at least two hundred fifty thousand dollars ($250,000) with respect to a production is allowed a credit against the taxes imposed by this Part equal to fifteen percent (15%) of the production company's qualifying expenses. For the purposes of this section, in the case of an episodic television series, an entire season of episodes is one production. The credit is computed based on all of the taxpayer's qualifying expenses incurred with respect to the production, not just the qualifying expenses incurred during the taxable year.

(c) Pass-Through Entity. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section does not distribute the credit among any of its owners. The pass-through entity is considered the taxpayer for purposes of claiming the credit allowed by this section. If a return filed by a pass-through entity indicates that the entity is paying tax on behalf of the owners of the entity, the credit allowed under this section does not affect the entity's payment of tax on behalf of its owners.

(d) Return. — A taxpayer may claim the credit allowed by this section on a return filed for the taxable year in which the production activities are completed. The return must state the name of the production, a description of the production, and a detailed accounting of the qualifying expenses with respect to which a credit is claimed.

(e) Credit Refundable. — If the credit allowed by this section exceeds the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, the Secretary must refund the excess to the taxpayer. The refundable excess is governed by the provisions governing a refund of an overpayment by the taxpayer of the tax imposed in this Part. In computing the amount of tax against which multiple credits are allowed, nonrefundable credits are subtracted before refundable credits.

(f) Limitations. — The amount of credit allowed under this section with respect to a production that is a feature film may not exceed seven million five hundred thousand dollars ($7,500,000). No credit is allowed under this section for any production that satisfies one of the following conditions:

(1) It is political advertising.

(2) It is a television production of a news program or live sporting event.

(3) It contains material that is obscene, as defined in G.S. 14-190.1.

(4) It is a radio production.

(g) Substantiation. — A taxpayer allowed a credit under this section must maintain and make available for inspection any information or records required by the Secretary of Revenue. The taxpayer has the burden of proving eligibility for a credit and the amount of the credit. The Secretary may consult with the North Carolina Film Office of the Department of Commerce and the regional film commissions in order to determine the amount of qualifying expenses.

(h) Report. — The Department of Revenue must publish by May 1 of each year the following information, itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The location of sites used in a production for which a credit was claimed.

(2) The qualifying expenses for which a credit was claimed, classified by whether the expenses were for goods, services, or compensation paid by the production company.

(3) The number of people employed in the State with respect to credits claimed.

(4) The total cost to the General Fund of the credits claimed.

(i) Repealed by Session Laws 2006-220, s. 4, effective for taxable years beginning on and after January 1, 2007.

(j) NC Film Office. — To claim a credit under this section, a taxpayer must notify the Division of Tourism, Film, and Sports Development in the Department of Commerce of the taxpayer's intent to claim the production tax credit. The notification must include the title of the production, the name of the production company, a financial contact for the production company, the proposed dates on which the production company plans to begin filming the production, and any other information required by the Division. For productions that have production credits, a taxpayer claiming a credit under this section must acknowledge in the production credits both the North Carolina Film Office and the regional film office responsible for the geographic area in which the filming of the production occurred.

(k) Sunset. — This section is repealed for qualifying expenses occurring on or after January 1, 2014. (2005-276, s. 39.1(b); 2005-345, ss. 47(c), 47(d); 2006-162, s. 4(b); 2006-220, s. 4; 2007-527, s. 24; 2008-107, s. 28.24(b).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.24(b), effective for taxable years beginning on or after January 1, 2008, in subdivision (a)(4), inserted "in excess of one million dollars ($1,000,000)" in the introductory language, and added sub-subdivision (a)(4)c.; added subdivision (a)(5); added present subsection (j); redesignated former subsection (j) as subsection (k); and in subsection (k), substituted "January 1, 2014" for "January 1, 2010."

§ 105-151.31. (Repealed for taxable years beginning on or after January 1, 2013) Earned income tax credit.

(a) **(Effective for taxable years beginning before January 1, 2009)** Credit. — An individual who claims for the taxable year an earned income tax credit under section 32 of the Code is allowed a credit against the tax imposed by this Part equal to three and one-half percent (3.5%) of the amount of credit the individual qualified for under section 32 of the Code. A nonresident or part-year resident who claims the credit allowed by this section must reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate.

(a) **(Effective for taxable years beginning on or after January 1, 2009)** Credit. — An individual who claims for the taxable year an earned income tax credit under section 32 of the Code is allowed a credit against the tax imposed by this Part equal to five percent (5%) of the amount of credit the individual qualified for under section 32 of the Code. A nonresident or part-year resident who claims the credit allowed by this section must reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate.

(b) Credit Refundable. — If the credit allowed by this section exceeds the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, the Secretary must refund the excess to the taxpayer. The refundable excess is governed by the provisions governing a refund of an overpayment by the taxpayer of the tax imposed in this Part. Section 3507 of the Code, Advance Payment of Earned Income Credit, does not apply to the credit allowed by this section. In computing the amount of tax against which multiple credits are allowed, nonrefundable credits are subtracted before refundable credits.

(c) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2013. (2007-323, s. 31.4(a); 2008-107, s. 28.9(a).)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective for taxable years beginning before January 1, 2009. The second version of subsection (a) set out above is effective for taxable years beginning on or after January 1, 2009.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.9(a), effective for taxable years beginning on or after January 1, 2009, substituted "five percent (5%)" for "three and one half percent (3.5%)" in the first sentence of subsection (a).

§ 105-154. Information at the source returns.

(a) Repealed by Session Laws 1993, c. 354, s. 14.

(b) Information Returns of Payers. — A person who is a resident of this State, has a place of business in this State, or has an employee, an agent, or another representative in any capacity in this State shall file an information return as required by the Secretary if the person directly or indirectly pays or controls the payment of any income to any taxpayer. The return shall contain all information required by the Secretary. The filing of any return in compliance with this section by a foreign corporation is not evidence that the corporation is doing business in this State.

(c) Information Returns of Partnerships. — A partnership doing business in this State and required to file a return under the Code shall file an information return with the Secretary. A partnership that the Secretary believes to be doing business in this State and to be required to file a return under the Code shall file an information return when requested to do so by the Secretary. The information return shall contain all information required by the Secretary. It shall state specifically the items of the partnership's gross income, the deductions allowed under the Code, and the adjustments required by this Part. The information return shall also include the name and address of each person who would be entitled to share in the partnership's net income, if distributable, and the amount each person's distributive share would be. The information return shall specify the part of each person's distributive share of the net income that represents corporation dividends. The information return shall be signed by one of the partners under affirmation in the form required by the Secretary.

A partnership that files an information return under this subsection shall furnish to each person who would be entitled to share in the partnership's net income, if distributable, any information necessary for that person to properly file a State income tax return. The information shall be in the form prescribed by the Secretary and must be furnished on or before the due date of the information return.

(d) Payment of Tax on Behalf of Nonresident Owner or Partner. — If a business conducted in this State is owned by a nonresident individual or by a partnership having one or more nonresident members, the manager of the business shall report the earnings of the business in this State, the distributive share of the income of each nonresident owner or partner, and any other information required by the Secretary. The manager of the business shall pay with the return the tax on each nonresident owner or partner's share of the income computed at the rate levied on individuals under G.S. 105-134.2(a)(3). The business may deduct the payment for each nonresident owner or partner from the owner or partner's distributive share of the profits of the business in this State. If the nonresident partner is not an individual and the partner has executed an affirmation that the partner will pay the tax with its corporate, partnership, trust, or estate income tax return, the manager of the business is not required to pay the tax on the partner's share. In this case, the manager shall include a copy of the affirmation with the report required by this subsection.

(e) **(Effective for taxable years beginning on or after January 1, 2008)** Publicly Traded Partnership. — The information return and payment requirements under this section are modified as follows for a publicly traded partnership that is described in section 7704(c) of the Code:

(1) The information return required under subsection (c) of this section is limited to partners whose distributive share of the partnership's net income during the tax year was more than five hundred dollars ($500.00).

(2) The payment requirements under subsection (d) of this section do not apply. (1939, c. 158, s. 328; 1945, c. 708, s. 4; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1287, s. 5; 1989, c. 728, s. 1.25; 1989 (Reg. Sess., 1990), c. 814, s. 19; 1991 (Reg. Sess., 1992), c. 930, s. 2; 1993, c. 314, s. 1; c. 354, s. 14; 1998-98, s. 69; 1999-337, s. 26; 2008-107, s. 28.8(a).)

Editor's Note. — Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.8(a), effective for taxable years beginning on or after January 1, 2008, added subsection (e).

Part 5. Tax Credits for Qualified Business Investments.

(Repealed effective for investments made on or after January 1, 2011.)

§ 105-163.012. (Repealed effective for investments made on or after January 1, 2011) Limit; carry-over; ceiling; reduction in basis.

(a) The credit allowed a taxpayer under G.S. 105-163.011 may not exceed the amount of income tax imposed by Part 2 of this Article for the taxable year reduced by the sum of all other credits allowable except tax payments made by or on behalf of the taxpayer. The amount of unused credit allowed under G.S. 105-163.011 may be carried forward for the next five succeeding years. The fifty thousand dollar ($50,000) limitation on the amount of credit allowed a taxpayer under G.S. 105-163.011 does not apply to unused amounts carried forward under this subsection.

(b) **(Effective for investments made before January 1, 2008)** The total amount of all tax credits allowed to taxpayers under G.S. 105-163.011 for investments made in a calendar year may not exceed seven million dollars ($7,000,000). The Secretary of Revenue shall calculate the total amount of tax credits claimed from the applications filed pursuant to G.S. 105-163.011(c). If the total amount of tax credits claimed for investments made in a calendar year exceeds this maximum amount, the Secretary shall allow a portion of the credits claimed by allocating the maximum amount in tax credits in proportion to the size of the credit claimed by each taxpayer.

(b) **(Effective for investments made on or after January 1, 2008)** The total amount of all tax credits allowed to taxpayers under G.S. 105-163.011 for investments made in a calendar year may not exceed seven million five hundred thousand dollars ($7,500,000). The Secretary of Revenue shall calculate the total amount of tax credits claimed from the applications filed pursuant to G.S. 105-163.011(c). If the total amount of tax credits claimed for investments made in a calendar year exceeds this maximum amount, the Secretary shall allow a portion of the credits claimed by allocating the maximum amount in tax credits in proportion to the size of the credit claimed by each taxpayer.

(c) If a credit claimed under G.S. 105-163.011 is reduced as provided in this section, the Secretary shall notify the taxpayer of the amount of the reduction of the credit on or before December 31 of the year following the calendar year in which the investment was made. The Secretary's allocations based on applications filed pursuant to G.S. 105-163.011(c) are final and shall not be adjusted to account for credits applied for but not claimed.

(d) The taxpayer's basis in the equity securities or subordinated debt acquired as a result of an investment in a qualified business shall be reduced for the purposes of this Article by the amount of allowable credit. "Allowable credit" means the amount of credit allowed under G.S. 105-163.011 reduced as provided in subsection (c) of this section. (1987, c. 852, s. 1; 1987 (Reg. Sess., 1988), c. 882, ss. 4, 4.1; 1989 (Reg. Sess., 1990), c. 848, s. 4; 1991, c. 637, s. 3; 1993, c. 443, s. 3; 1993 (Reg. Sess., 1994), c. 745, s. 8; 1996, 2nd Ex. Sess., c. 14, ss. 6, 7; 1998-98, s. 71; 1998-212, s. 29A.15(a); 2003-414, s. 4; 2004-124, s. 32C.1; 2008-107, s. 28.26(a).)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective for investments made before January 1, 2008. The second version of subsection (b) set out above is effective for investments made on or after January 1, 2008.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.26(a), effective for investments made on or after January 1, 2008, substituted "seven million five hundred thousand dollars ($7,500,000)" for "seven million dollars ($7,000,000)" in the first sentence of subsection (b).

ARTICLE 4A.

Withholding; Estimated Income Tax for Individuals.

§ 105-163.9. Refund of overpayment to withholding agent.

A withholding agent who pays the Secretary more under this Article than the Article requires the agent to pay may obtain a refund of the overpayment by filing a request for a refund with the Secretary. No refund is allowed, however, if the withholding agent withheld the amount of the overpayment from the wages or compensation of the agent's employees or contractors. A withholding agent must file a request for a refund within the time period set in G.S. 105-241.6. Interest accrues on a refund as provided in G.S. 105-241.21. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1975, c. 74, s. 1; 1981 (Reg. Sess., 1982), c. 1223, s. 3; 1989 (Reg. Sess., 1990), c. 945, s. 13; 1997-109, s. 2; 2007-491, s. 18; 2008-187, s. 15.)

Editor's Note. — Session Laws 2007-491, s. 18, amended this section in the coded bill drafting format provided by G.S. 120-20.1. In the third sentence, the act struck through "105-266" but failed to strike through the "G.S." that immediately preceded it. Session Laws 2008-187, s. 15, corrected the oversight.

Effect of Amendments. —

Session Laws 2008-187, s. 15, effective August 7, 2008, deleted "G.S." preceding "G.S. 105-241.6" in the third sentence.

Article 5.

Sales and Use Tax.

Part 1. Title, Purpose and Definitions.

§ 105-164.3. Definitions.

The following definitions apply in this Article:

(1) Analytical services. — Testing laboratories that are included in national industry 541380 of NAICS or medical laboratories that are included in national industry 621511 of NAICS.

(1a) Ancillary service. — A service associated with or incidental to the provision of a telecommunications service. The term includes detailed communications billing, directory assistance, vertical service, and voice mail service. A vertical service is a service, such as call forwarding, caller ID, three-way calling, and conference bridging, that allows a customer to identify a caller or manage multiple calls and call connections.

(1b) Bundled transaction. — A retail sale of two or more distinct and identifiable products, at least one of which is taxable and one of which is exempt, for one nonitemized price. Products are not sold for one nonitemized price if an invoice or another sales document made available to the purchaser separately identifies the price of each product. A bundled transaction does not include the retail sale of any of the following:

- a. A product and any packaging item that accompanies the product and is exempt under G.S. 105-164.13(23).
- b. A sale of two or more products whose combined price varies, or is negotiable, depending on the products the purchaser selects.
- c. A sale of a product accompanied by a transfer of another product with no additional consideration.
- d. A product and the delivery or installation of the product.
- e. A product and any service necessary to complete the sale.

(1d) Business. — Includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, profit, benefit or advantage, either direct or indirect. The term "business" shall not be construed in this Article to include occasional and isolated sales or transactions by a person who does not hold himself out as engaged in business.

(1f) Cable service. — The one-way transmission to subscribers of video programming or other programming service and any subscriber interaction required to select or use the service.

(2) Candy. — A preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces that do not require refrigeration. The term does not include any preparation that contains flour.

(3) Clothing. — All human wearing apparel suitable for general use including coats, jackets, hats, hosiery, scarves, and shoes.

(4) Clothing accessories or equipment. — Incidental items worn on the person or in conjunction with clothing including jewelry, cosmetics, eyewear, wallets, and watches.

(4a) Combined general rate. — The State's general rate of tax set in G.S. 105-164.4(a) plus the sum of the rates of the local sales and use taxes authorized by Subchapter VIII of this Chapter for every county in this State.

(4b) Computer. — An electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

(4c) Computer software. — A set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

(4d) Computer supply. — An item that is considered a "school computer supply" under the Streamlined Agreement.

(5) Consumer. — Means and includes every person storing, using or otherwise consuming in this State tangible personal property purchased or received from a retailer either within or without this State.

(5a), (5b) Reserved for future codification purposes.

(5c) Custom computer software. — Computer software that is not prewritten computer software. The term includes a user manual or other documentation that accompanies the sale of the software.

(5d) Delivered electronically. — Delivered to the purchaser by means other than tangible storage media.

(6) Delivery charges. — Charges imposed by the retailer for preparation and delivery of personal property or services to a location designated by the consumer.

(7) Dietary supplement. — A product that is intended to supplement the diet of humans and is required to be labeled as a dietary supplement under federal law, identifiable by the "Supplement Facts" box found on the label.

(7a) Direct mail. — Printed material delivered or distributed by the United States Postal Service or other delivery service to a mass audience or to addresses on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items is not billed directly to the recipients. The term includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. The term does not include multiple items of printed material delivered to a single address.

(8) Direct-to-home satellite service. — Programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground equipment or distribution equipment, except equipment at the subscribers' premises or the uplink process to the satellite.

(8a) Drug. — A compound, substance, or preparation or a component of one of these that meets any of the following descriptions and is not food, a dietary supplement, or an alcoholic beverage:

a. Is recognized in the United States Pharmacopoeia, Homeopathic Pharmacopoeia of the United States, or National Formulary.

b. Is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease.

c. Is intended to affect the structure or function of the body.

(8b) Durable medical equipment. — Equipment that meets all of the conditions of this subdivision. The term includes repair and replacement parts for the equipment. The term does not include mobility enhancing equipment.

a. Can withstand repeated use.
b. Primarily and customarily used to serve a medical purpose.
c. Generally not useful to a person in the absence of an illness or injury.
d. Not worn in or on the body.

(8c) Durable medical supplies. — Supplies related to use with durable medical equipment that are eligible to be covered under the Medicare or Medicaid program.

(8d) Electronic. — Relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(8e) Eligible Internet data center. — A facility that satisfies each of the following conditions:

a. The facility is used primarily or is to be used primarily by a business engaged in "Internet service providers and Web search portals" industry 51811, as defined by NAICS.
b. The facility is comprised of a structure or series of structures located or to be located on a single parcel of land or on contiguous parcels of land that are commonly owned or owned by affiliation with the operator of that facility.
c. The facility is located or to be located in a county that was designated, at the time of application for the written determination required under sub-subdivision d. of this subdivision, either an enterprise tier one, two, or three area or a development tier one or two area pursuant to G.S. 105-129.3 or G.S. 143B-437.08, regardless of any subsequent change in county enterprise or development tier status.
d. The Secretary of Commerce has made a written determination that at least two hundred fifty million dollars ($250,000,000) in private funds has been or will be invested in real property or eligible business property, or a combination of both, at the facility within five years after the commencement of construction of the facility.

(8f) Eligible railroad intermodal facility. — Defined in G.S. 105-129.95.

(8g) Energy Star qualified product. — A product that meets the energy efficient guidelines set by the United States Environmental Protection Agency and the United States Department of Energy and is authorized to carry the Energy Star label.

(9) Engaged in business. — Maintaining, occupying or using permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business, for the selling or delivering of tangible personal property for storage, use or consumption in this State, or permanently or temporarily, directly or through a subsidiary, having any representative, agent, salesman, canvasser or solicitor operating in this State in such selling or delivering, and the fact that any corporate retailer, agent or subsidiary engaged in business in this State may not be legally domesticated or qualified to do business in this State is immaterial. It also means maintaining in this State, either permanently or temporarily, directly or through a subsidiary, tangible personal property for the purpose of lease or rental. It also means making a mail order sale,

as defined in this section, if one of the conditions listed in G.S. 105-164.8(b) is met. It also means the direct shipment of wine to a purchaser in this State by a wine shipper permittee under G.S. 18B-1001.1.

(10) Food. — Substances that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. The substances may be in liquid, concentrated, solid, frozen, dried, or dehydrated form. The term does not include an alcoholic beverage, as defined in G.S. 105-113.68, or a tobacco product, as defined in G.S. 105-113.4.

(11) Food sold through a vending machine. — Food dispensed from a machine or another mechanical device that accepts payment.

(12) Gross sales. — The sum total of the sales price of all retail sales of tangible personal property and services.

(13) Hub. — Either of the following:

a. An interstate air courier's hub is the interstate air courier's principal airport within the State for sorting and distributing letters and packages and from which the interstate air courier has, or expects to have upon completion of construction, no less than 150 departures a month under normal operating conditions.

b. An interstate passenger air carrier's hub is the airport in this State that meets both of the following conditions:

1. The air carrier has allocated to the airport under G.S. 105-338 more than sixty percent (60%) of its aircraft value apportioned to this State.

2. The majority of the air carrier's passengers boarding at the airport are connecting from other airports rather than originating at that airport.

(14) In this (the) State. — Within the exterior limits of the State of North Carolina and includes all territory within such limits owned by or ceded to the United States of America.

(14c) Interstate air business. — An interstate air courier, an interstate freight air carrier, or an interstate passenger air carrier.

(15) Interstate air courier. — A person whose primary business is the furnishing of air delivery of individually addressed letters and packages for compensation, in interstate commerce, except by the United States Postal Service.

(15b) Interstate freight air carrier. — A person whose primary business is scheduled freight air transportation, as defined in the North American Industry Classification System adopted by the United States Office of Management and Budget, in interstate commerce.

(16) Interstate passenger air carrier. — A person whose primary business is scheduled passenger air transportation, as defined in the North American Industry Classification System adopted by the United States Office of Management and Budget, in interstate commerce.

(17) Lease or rental. — A transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. The term does not include any of the following:

a. A transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments.

b. A transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars ($100.00) or one percent (1%) of the total required payments.

c. The providing of tangible personal property along with an operator for a fixed or indeterminate period of time if the operator is necessary for the equipment to perform as designed. For the purpose of this sub-subdivision, an operator must do more than maintain, inspect, or set up the tangible personal property.

(17a) Load and leave. — Delivery to the purchaser by use of a tangible storage media where the tangible storage media is not physically transferred to the purchaser.

(18) Mail order sale. — A sale of tangible personal property, ordered by mail, telephone, computer link, or other similar method, to a purchaser who is in this State at the time the order is remitted, from a retailer who receives the order in another state and transports the property or causes it to be transported to a person in this State. It is presumed that a resident of this State who remits an order was in this State at the time the order was remitted.

(19) Major recycling facility. — Defined in G.S. 105-129.25.

(20) Manufactured home. — A structure that is designed to be used as a dwelling and is manufactured in accordance with the specifications for manufactured homes issued by the United States Department of Housing and Urban Development.

a., b. Repealed by Session Laws 2003-400, s. 13, effective January 1, 2004, and applicable to sales of modular homes on and after that date.

(21) Mobile telecommunications service. — A radio communication service carried on between mobile stations or receivers and land stations and by mobile stations communicating among themselves and includes all of the following:

a. Both one-way and two-way radio communication services.

b. A mobile service that provides a regularly interacting group of base, mobile, portable, and associated control and relay stations for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation.

c. Any service for which a federal license is required in a personal communications service.

(21a) Mobility enhancing equipment. — Equipment that meets all of the conditions of this subdivision. The term includes repair and replacement parts for the equipment. The term does not include durable medical equipment.

a. Primarily and customarily used to provide or increase the ability of an individual to move from one place to another.

b. Appropriate for use either in a home or motor vehicle.

c. Not generally used by a person with normal mobility.

d. Not normally provided on a motor vehicle by a motor vehicle manufacturer.

(21b) Modular home. — A factory-built structure that is designed to be used as a dwelling, is manufactured in accordance with the specifications for modular homes under the North Carolina State Residential Building Code, and bears a seal or label issued by the Department of Insurance pursuant to G.S. 143-139.1.

(21c) Modular homebuilder. — A person who furnishes for consideration a modular home to a purchaser that will occupy the modular home. The purchaser can be a person that will lease or rent the unit as real property.

(22) Moped. — A vehicle that has two or three wheels, no external shifting device, and a motor that does not exceed 50 cubic centimeters piston displacement and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface.

(23) Motor vehicle. — A vehicle that is designed primarily for use upon the highways and is either self-propelled or propelled by a self-propelled vehicle, but does not include:

a. A moped.
b. Special mobile equipment.
c. A tow dolly that is exempt from motor vehicle title and registration requirements under G.S. 20-51(10) or (11).
d. A farm tractor or other implement of husbandry.
e. A manufactured home, a mobile office, or a mobile classroom.
f. Road construction or road maintenance machinery or equipment.

(23a) NAICS. — Defined in G.S. 105-129.81.

(24) Net taxable sales. — Means and includes the gross retail sales of the business of the retailer taxed under this Article after deducting exempt sales and nontaxable sales.

(25) Nonresident retail or wholesale merchant. — A person who does not have a place of business in this State, is engaged in the business of acquiring, by purchase, consignment, or otherwise, tangible personal property and selling the property outside the State, and is registered for sales and use tax purposes in a taxing jurisdiction outside the State.

(25a) Over-the-counter drug. — A drug that can be dispensed under federal law without a prescription and is required by 21 C.F.R. § 210.66 to have a label containing a "Drug Facts" panel and a statement of its active ingredients.

(26) Person. — The same meaning as in G.S. 105-228.90.

(26a) Place of primary use. — The street address representative of where the use of a customer's telecommunications service primarily occurs. The street address must be the customer's residential street address or primary business street address. For mobile telecommunications service, the street address must be within the licensed service area of the service provider. If the customer who contracted with the telecommunications provider for the telecommunications service is not the end user of the service, the end user is considered the customer for the purpose of determining the place of primary use.

(27) Prepaid telephone calling service. — Prepaid wireline calling service or prepaid wireless calling service.

(27a) Prepaid wireless calling service. — A right that meets all of the following requirements:
a. Authorizes the purchase of mobile telecommunications service, either exclusively or in conjunction with other services.
b. Must be paid for in advance.
c. Is sold in units or dollars whose number or dollar value declines with use and is known on a continuous basis.

(27b) Prepaid wireline calling service. — A right that meets all of the following requirements:
a. Authorizes the exclusive purchase of wireline telecommunications service.
b. Must be paid for in advance.
c. Enables the origination of calls by means of an access number, authorization code, or another similar means, regardless of whether the access number or authorization code is manually or electronically dialed.
d. Is sold in units or dollars whose number or dollar value declines with use and is known on a continuous basis.

(28) Prepared food. — Food that meets at least one of the conditions of this subdivision. Prepared food does not include food the retailer sliced, repackaged, or pasteurized but did not heat, mix, or sell with eating utensils.
a. It is sold in a heated state or it is heated by the retailer.

b. It consists of two or more foods mixed or combined by the retailer for sale as a single item. This sub-subdivision does not include foods containing raw eggs, fish, meat, or poultry that require cooking by the consumer as recommended by the Food and Drug Administration to prevent food borne illnesses.

c. It is sold with eating utensils provided by the retailer, such as plates, knives, forks, spoons, glasses, cups, napkins, and straws.

(29) Prescription. — An order, formula, or recipe issued orally, in writing, electronically, or by another means of transmission by a physician, dentist, veterinarian, or another person licensed to prescribe drugs.

(29a) Prewritten computer software. — Computer software, including prewritten upgrades, that is not designed and developed by the author or another creator to the specifications of a specific purchaser. The term includes software designed and developed by the author or another creator to the specifications of a specific purchaser when it is sold to a person other than the specific purchaser.

(30) Production company. — A person engaged in the business of making original motion picture, television, or radio images for theatrical, commercial, advertising, or educational purposes.

(30a) Professional motorsports racing team. — A racing team that satisfies all of the following conditions:

a. The team is operated for profit.

b. A majority of the revenues of the team is derived from sponsorship of the racing team and prize money.

c. The team competes in at least sixty-six percent (66%) of the races sponsored in a single season by a motorsports sanctioning body.

(30b) Prosthetic device. — A replacement, corrective, or supporting device worn on or in the body that meets one of the conditions of this subdivision. The term includes repair and replacement parts for the device.

a. Artificially replaces a missing portion of the body.

b. Prevents or corrects a physical deformity or malfunction.

c. Supports a weak or deformed portion of the body.

(31) Protective equipment. — Items for human wear and designed as protection of the wearer against injury or disease or as protection against damage or injury of other persons or property but not suitable for general use including breathing masks, face shields, hard hats, and tool belts.

(32) Purchase. — Acquired for a consideration whether

a. The acquisition was effected by a transfer of title or possession, or both, or a license to use or consume;

b. The transfer was absolute or conditional regardless of the means by which it was effected; and

c. The consideration is a price or rental in money or by way of exchange or barter.

It shall also include the procuring of a retailer to erect, install or apply tangible personal property for use in this State.

(33) Purchase price. — The term has the same meaning as the term "sales price" when applied to an item subject to use tax.

(34) Retail sale or sale at retail. — The sale, lease, or rental for any purpose other than for resale, sublease, or subrent.

(35) Retailer. — Means and includes every person engaged in the business of making sales of tangible personal property at retail, either within or without this State, or peddling the same or soliciting or taking orders for sales, whether for immediate or future delivery, for storage, use or consumption in this State and every manufacturer,

producer or contractor engaged in business in this State and selling, delivering, erecting, installing or applying tangible personal property for use in this State notwithstanding that said property may be permanently affixed to a building or realty or other tangible personal property. "Retailer" also means a person who makes a mail order sale, as defined in this section, if one of the conditions listed in G.S. 105-164.8(b) is met. Provided, however, that when in the opinion of the Secretary it is necessary for the efficient administration of this Article to regard any salesmen, solicitors, representatives, consignees, peddlers, truckers or canvassers as agents of the dealers, distributors, consignors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them regardless of whether they are making sales on their own behalf or on behalf of such dealers, distributors, consignors, supervisors, employers or persons, the Secretary may so regard them and may regard the dealers, distributors, consignors, supervisors, employers or persons as "retailers" for the purpose of this Article.

(36) Sale or selling. — The transfer of title or possession of tangible personal property, conditional or otherwise, in any manner or by any means whatsoever, for a consideration paid or to be paid.

The term includes the fabrication of tangible personal property for consumers by persons engaged in business who furnish either directly or indirectly the materials used in the fabrication work. The term also includes the furnishing or preparing for a consideration of any tangible personal property consumed on the premises of the person furnishing or preparing the property or consumed at the place at which the property is furnished or prepared. The term also includes a transaction in which the possession of the property is transferred but the seller retains title or security for the payment of the consideration.

If a retailer engaged in the business of selling prepared food and drink for immediate or on-premises consumption also gives prepared food or drink to its patrons or employees free of charge, for the purposes of this Article the property given away is considered sold along with the property sold. If a retailer gives an item of inventory to a customer free of charge on the condition that the customer purchase similar or related property, the item given away is considered sold along with the item sold. In all other cases, property given away or used by any retailer or wholesale merchant is not considered sold, whether or not the retailer or wholesale merchant recovers its cost of the property from sales of other property.

(37) Sales price. — The total amount or consideration for which tangible personal property or services are sold, leased, or rented. The consideration may be in the form of cash, credit, property, or services. The sales price must be valued in money, regardless of whether it is received in money.

a. The term includes all of the following:
   1. The retailer's cost of the property sold.
   2. The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, and any other expense of the retailer.
   3. Charges by the retailer for any services necessary to complete the sale.
   4. Delivery charges.
   5. Installation charges.
   6. Repealed by Session Laws 2007-244, s. 1, effective October 1, 2007.

    7. Credit for trade-in.
    8. Discounts that are reimbursable by a third party and can be determined at the time of sale through any of the following:
        I. Presentation by the consumer of a coupon or other documentation.
        II. Identification of the consumer as a member of a group eligible for a discount.
        III. The invoice the retailer gives the consumer.
  b. The term does not include any of the following:
    1. Discounts that are not reimbursable by a third party, are allowed by the retailer, and are taken by a consumer on a sale.
    2. Interest, financing, and carrying charges from credit extended on the sale, if the amount is separately stated on the invoice, bill of sale, or a similar document given to the consumer.
    3. Any taxes imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer.

(37a) Satellite digital audio radio service. — A radio communication service in which audio programming is digitally transmitted by satellite to an earth-based receiver, whether directly or via a repeater station.

(37b) School instructional material. — Defined in the Streamlined Agreement.

(37d) School supply. — An item that is commonly used by a student in the course of study and is considered a "school supply" or "school art supply" under the Streamlined Agreement.

(38) Secretary. — The Secretary of the North Carolina Department of Revenue.

(39) Repealed by Session Laws 2002-16, s. 3, effective August 1, 2002, and applicable to taxable services reflected on bills dated after August 1, 2002.

(40) Soft drink. — A nonalcoholic beverage that contains natural or artificial sweeteners. The term does not include beverages that contain one or more of the following:
  a. Milk or milk products.
  b. Soy, rice, or similar milk substitutes.
  c. More than fifty percent (50%) vegetable or fruit juice.

(41) Special mobile equipment. — Any of the following:
  a. A vehicle that has a permanently attached crane, mill, well-boring apparatus, ditch-digging apparatus, air compressor, electric welder, feed mixer, grinder, or other similar apparatus is driven on the highway only to get to and from a nonhighway job and is not designed or used primarily for the transportation of persons or property.
  b. A vehicle that has permanently attached special equipment and is used only for parade purposes.
  c. A vehicle that is privately owned, has permanently attached fire-fighting equipment, and is used only for fire-fighting purposes.
  d. A vehicle that has permanently attached playground equipment and is used only for playground purposes.

(42) Sport or recreational equipment. — Items designed for human use and worn in conjunction with an athletic or recreational activity that are not suitable for general use including ballet shoes, cleated athletic shoes, shin guards, and ski boots.

(43) State agency. — A unit of the executive, legislative, or judicial branch of State government, such as a department, a commission, a board, a council, or The University of North Carolina. The term does not include a local board of education.

(44) Storage. — Means and includes any keeping or retention in this State for any purpose by the purchaser thereof, except sale in the regular course of business, of tangible personal property purchased from a retailer.

(45) Storage and Use; Exclusion. — "Storage" and "use" do not include the keeping, retaining or exercising of any right or power over tangible personal property by the purchaser thereof for the original purpose of subsequently transporting it outside the State for use by said purchaser thereafter solely outside the State and which purpose is consummated, or for the purpose of being processed, fabricated or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the State and thereafter used by the purchaser thereof solely outside the State.

(45a) Streamlined Agreement. — The Streamlined Sales and Use Tax Agreement as amended as of June 23, 2007.

(46) Tangible personal property. — Personal property that may be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses. The term includes electricity, water, gas, steam, and prewritten computer software.

(47) Taxpayer. — Any person liable for taxes under this Article.

(48) Telecommunications service. — The electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. The term includes any transmission, conveyance, or routing in which a computer processing application is used to act on the form, code, or protocol of the content for purposes of the transmission, conveyance, or routing, regardless of whether it is referred to as voice-over Internet protocol or the Federal Communications Commission classifies it as enhanced or value added. The term does not include the following:

a. Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a customer whose primary purpose for using the service is to obtain the processed data or information.

b. The sale, installation, maintenance, or repair of tangible personal property.

c. Directory advertising and other advertising.

d. Billing and collection services provided to a third party.

e. Internet access service.

f. Radio and television audio and video programming service, regardless of the medium of delivery, and the transmission, conveyance, or routing of the service by the programming service provider. The term includes cable service and audio and video programming service provided by a mobile telecommunications service provider.

g. Ancillary service.

h. A digital product delivered electronically, including software, music, a ring tone, video, and reading material.

(49) Use. — The exercise of any right, power, or dominion whatsoever over tangible personal property or a service by the purchaser of the property or service. The term includes withdrawal from storage, distribution, installation, affixation to real or personal property, and

exhaustion or consumption of the tangible personal property or service by the owner or purchaser. The term does not include the sale of tangible personal property or a service in the regular course of business.

(50) Use tax. — The tax imposed by Part 2 of this Article.

(50c) Video programming. — Programming provided by, or generally considered comparable to programming provided by, a television broadcast station, regardless of the method of delivery.

(51) Wholesale merchant. — Every person who engages in the business of buying or manufacturing any tangible personal property and selling same to registered retailers, wholesalers and nonresident retail or wholesale merchants for resale. It shall also include persons making sales of tangible personal property which are defined herein as wholesale sales. For the purposes of this Article any person, firm, corporation, estate or trust engaged in the business of manufacturing, producing, processing or blending any articles of commerce and maintaining a store or stores, warehouse or warehouses, or any other place or places, separate and apart from the place of manufacture or production, for the sale or distribution of its products (other than bakery products) to other manufacturers or producers, wholesale or retail merchants, for the purpose of resale shall be deemed a "wholesale merchant."

(52) Wholesale sale. — A sale of tangible personal property by a wholesale merchant to a manufacturer, or registered jobber or dealer, or registered wholesale or retail merchant, for the purpose of resale but does not include a sale to users or consumers not for resale. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 1213, s. 1; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 104; c. 275, s. 6; 1979, c. 48, s. 2; c. 71; c. 801, s. 72; 1983, c. 713, ss. 87, 88; 1983 (Reg. Sess., 1984), c. 1097, ss. 4, 5; 1985, c. 23; 1987, c. 27; c. 557, s. 3.1; c. 854, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 1044, s. 3; c. 1096, ss. 1-3; 1989, c. 692, s. 3.2; 1989 (Reg. Sess., 1990), c. 813, s. 13; 1991, c. 45, s. 15; c. 79, ss. 1, 3; c. 689, s. 190.1(a); 1991 (Reg. Sess., 1992), c. 949, s. 3; 1993, c. 354, s. 16; c. 484, s. 1; c. 507, s. 1; 1995 (Reg. Sess., 1996), c. 649, s. 2; 1996, 2nd Ex. Sess., c. 14, ss. 13, 14; 1997-6, s. 7; 1997-370, s. 1; 1997-426, s. 4; 1998-22, s. 4; 1998-55, ss. 7, 13; 1998-98, ss. 13.1(a), 106; 1999-337, s. 28(a), (b); 1999-360, s. 6(a)-(c); 1999-438, s. 4; 2000-153, s. 4; 2000-173, s. 9; 2001-347, ss. 2.1-2.7; 2001-414, s. 14; 2001-424, s. 34.17(b); 2001-430, ss. 1, 2; 2001-476, s. 18(a); 2001-489, s. 3(a); 2002-16, ss. 1, 2, 3; 2002-170, s. 6; 2003-284, s. 45.2; 2003-400, ss. 13, 14; 2003-402, s. 12; 2004-124, s. 32B.3; 2004-170, ss. 18, 19; 2005-276, ss. 33.2, 33.3; 2006-33, s. 1; 2006-66, ss. 24.10(a), 24.17(a); 2006-151, s. 2; 2006-162, s. 5(a); 2006-168, ss. 4.1, 4.3; 2006-252, ss. 2.25(a), (a1), (c), 2.26; 2007-244, s. 1; 2007-323, ss. 31.14(a), 31.20(a), 31.23(b); 2008-107, s. 28.12(a).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.12(a), effective July 16, 2008, and applicable to sales made on or after that date, added subdivision (8g).

CASE NOTES

Cited in State v. Jones, 186 N.C. App. 405, 651 S.E.2d 589, 2007 N.C. App. LEXIS 2200 (2007).

Part 2. Taxes Levied.

§ 105-164.4. Tax imposed on retailers.

(a) **(Effective until October 1, 2008 — see notes)** A privilege tax is imposed on a retailer at the following percentage rates of the retailer's net taxable sales or gross receipts, as appropriate. The general rate of tax is four and one-quarter percent (4.25%).

(a) **(Effective October 1, 2008 until October 1, 2009 — see notes)** A privilege tax is imposed on a retailer at the following percentage rates of the retailer's net taxable sales or gross receipts, as appropriate. The general rate of tax is four and one-half percent (4.5%).

(a) **(Effective October 1, 2009 — see notes)** A privilege tax is imposed on a retailer at the following percentage rates of the retailer's net taxable sales or gross receipts, as appropriate. The general rate of tax is four and three-quarters percent (4.75%).

(1) The general rate of tax applies to the sales price of each item or article of tangible personal property that is sold at retail and is not subject to tax under another subdivision in this section.

(1a) The rate of two percent (2%) applies to the sales price of each manufactured home sold at retail, including all accessories attached to the manufactured home when it is delivered to the purchaser. The maximum tax is three hundred dollars ($300.00) per article. Each section of a manufactured home that is transported separately to the site where it is to be erected is a separate article.

(1b) The rate of three percent (3%) applies to the sales price of each aircraft or boat sold at retail, including all accessories attached to the item when it is delivered to the purchaser. The maximum tax is one thousand five hundred dollars ($1,500) per article.

(1c), (1d) and (1e) Repealed by Session Laws 2005-276, s. 33.4(b), effective January 1, 2006.

(1f) The rate of two and eighty-three-hundredths percent (2.83%) applies to the sales price of electricity that is measured by a separate meter or another separate device and sold to a commercial laundry or to a pressing and dry-cleaning establishment for use in machinery used in the direct performance of the laundering or the pressing and cleaning service.

a. Repealed by Session Laws 2007-397, s. 10(b), effective October 1, 2007, and applicable to sales occurring on or after that date.

b. Repealed by Session Laws 2006-66, s. 24.19(a), effective July 1, 2007, and applicable to sales made on or after that date.

c. Repealed by Session Laws 2007-397, s. 10(b), effective October 1, 2007, and applicable to sales occurring on or after that date.

(1g) Repealed by Session Laws 2004-110, s. 6.1, effective October 1, 2004, and applicable to sales of electricity made on or after that date.

(1h) **(Expires for sales made on or after October 1, 2007)** The rate of seventeen-hundredths percent (0.17%) applies to the sales price of electricity sold to an aluminum smelting facility for use in connection with the operation of that facility and measured by a separate meter or measuring device.

(1i) Repealed by Session Laws 2007-397, s. 10(a), effective October 1, 2007, and applicable to sales occurring on or after that date.

(1j) **(Effective until July 1, 2009 — see notes)** The rate of one and four-tenths percent (1.4%) applies to the sales price of electricity described in this subdivision and measured by a separate meter or another separate device:

a. Sales of electricity to manufacturing industries and manufacturing plants for use in connection with the operation of the industries and plants.

b. Sales of electricity to farmers to be used by them for any farming purposes other than preparing food, heating dwellings, and other household purposes.

(1j) **(Effective July 1, 2009 until July 1, 2010 — see notes)** The rate of eight-tenths percent (.8%) applies to the sales price of electricity described in this subdivision and measured by a separate meter or another separate device:

a. Sales of electricity to manufacturing industries and manufacturing plants for use in connection with the operation of the industries and plants.

b. Sales of electricity to farmers to be used by them for any farming purposes other than preparing food, heating dwellings, and other household purposes.

(2) The applicable percentage rate applies to the gross receipts derived from the lease or rental of tangible personal property by a person who is engaged in the business of leasing or renting tangible personal property, or is a retailer and leases or rents property of the type sold by the retailer. The applicable percentage rate is the rate and the maximum tax, if any, that applies to a sale of the property that is leased or rented. A person who leases or rents property shall also collect the tax imposed by this section on the separate retail sale of the property.

(3) Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses and persons who rent private residences and cottages to transients are considered retailers under this Article. A tax at the general rate of tax is levied on the gross receipts derived by these retailers from the rental of any rooms, lodgings, or accommodations furnished to transients for a consideration. This tax does not apply to any private residence or cottage that is rented for less than 15 days in a calendar year or to any room, lodging, or accommodation supplied to the same person for a period of 90 or more continuous days.

As used in this subdivision, the term "persons who rent to transients" means (i) owners of private residences and cottages who rent to transients and (ii) rental agents, including "real estate brokers" as defined in G.S. 93A-2, who rent private residences and cottages to transients on behalf of the owners. If a rental agent is liable for the tax imposed by this subdivision, the owner is not liable.

(4) Every person engaged in the business of operating a dry cleaning, pressing, or hat-blocking establishment, a laundry, or any similar business, engaged in the business of renting clean linen or towels or wearing apparel, or any similar business, or engaged in the business of soliciting cleaning, pressing, hat blocking, laundering or linen rental business for any of these businesses, is considered a retailer under this Article. A tax at the general rate of tax is levied on the gross receipts derived by these retailers from services rendered in engaging in any of the occupations or businesses named in this subdivision. The tax imposed by this subdivision does not apply to

receipts derived from coin, token, or card-operated washing machines, extractors, and dryers. The tax imposed by this subdivision does not apply to gross receipts derived from services performed for resale by a retailer that pays the tax on the total gross receipts derived from the services.

(4a) The rate of three percent (3%) applies to the gross receipts derived from sales of electricity, other than sales of electricity subject to tax under another subdivision in this section. A person who sells electricity is considered a retailer under this Article.

(4b) A person who sells tangible personal property at a specialty market, other than the person's own household personal property, is considered a retailer under this Article. A tax at the general rate of tax is levied on the sales price of each article sold by the retailer at the specialty market. The term "specialty market" has the same meaning as defined in G.S. 66-250.

(4c) The combined general rate applies to the gross receipts derived from providing telecommunications service and ancillary service. A person who provides telecommunications service or ancillary service is considered a retailer under this Article. These services are taxed in accordance with G.S. 105-164.4C.

(4d) The sale or recharge of prepaid telephone calling service is taxable at the general rate of tax. The tax applies regardless of whether tangible personal property, such as a card or a telephone, is transferred. The tax applies to a service that is sold in conjunction with prepaid wireless calling service. Prepaid telephone calling service is taxable at the point of sale instead of at the point of use and is sourced in accordance with G.S. 105-164.4B. Prepaid telephone calling service taxed under this subdivision is not subject to tax as a telecommunications service.

(5) Repealed by Session Laws 1998-212, s. 29A.1(a), effective May 1, 1999.

(6) The combined general rate applies to the gross receipts derived from providing video programming to a subscriber in this State. A cable service provider, a direct-to-home satellite service provider, and any other person engaged in the business of providing video programming is considered a retailer under this Article.

(6a) The general rate applies to the gross receipts derived from providing satellite digital audio radio service. For services received by a mobile or portable station, the service is sourced to the subscriber's business or home address. A person engaged in the business of providing satellite digital audio radio service is a retailer under this Article.

(7) The combined general rate applies to the sales price of spirituous liquor other than mixed beverages. As used in this subdivision, the terms "spirituous liquor" and "mixed beverage" have the meanings provided in G.S. 18B-101.

(8) The rate of two and one-half percent (2.5%) applies to the sales price of each modular home sold at retail, including all accessories attached to the modular home when it is delivered to the purchaser. The sale of a modular home to a modular homebuilder is considered a retail sale. A person who sells a modular home at retail is allowed a credit against the tax imposed by this subdivision for sales or use tax paid to another state on tangible personal property incorporated in the modular home. The retail sale of a modular home occurs when a modular home manufacturer sells a modular home to a modular homebuilder or directly to the end user of the modular home.

(b) The tax levied in this section shall be collected from the retailer and paid by him at the time and in the manner as hereinafter provided. Provided, however, that any person engaging or continuing in business as a retailer shall pay the tax required on the net taxable sales of such business at the rates specified when proper books are kept showing separately the gross proceeds of taxable and nontaxable sales of tangible personal property in such form as may be accurately and conveniently checked by the Secretary or his duly authorized agent. If such records are not kept separately the tax shall be paid as a retailer on the gross sales of business and the exemptions and exclusions provided by this Article shall not be allowed. The tax levied in this section is in addition to all other taxes whether levied in the form of excise, license or privilege or other taxes.

(c) Certificate of Registration. — Before a person may engage in business as a retailer or a wholesale merchant, the person must obtain a certificate of registration from the Department in accordance with G.S. 105-164.29. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1963, c. 1169, ss. 3, 11; 1967, c. 1110, s. 6; c. 1116; 1969, c. 1075, s. 5; 1971, c. 887, s. 1; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 752; 1977, c. 903; 1977, 2nd Sess., c. 1218; 1979, c. 17, s. 1; c. 22; c. 48, s. 1; c. 527, s. 1; c. 801, s. 73; 1981, c. 984, ss. 1, 2; 1981 (Reg. Sess., 1982), cc. 1207, 1273; 1983, c. 510; c. 713, ss. 89, 93; c. 805, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1065, ss. 1, 2, 4; c. 1097, ss. 6, 13; 1985, c. 704; 1985 (Reg. Sess., 1986), c. 925; c. 1005; 1987, c. 557, ss. 4, 5; c. 800, ss. 2, 3; c. 854, s. 1; 1987 (Reg. Sess., 1988), c. 1044, s. 4; 1989, c. 692, ss. 3.1, 3.3, 8.4(8); c. 770, s. 74.4; 1989 (Reg. Sess., 1990), c. 813, ss. 14, 15; 1991, c. 598, s. 5; c. 689, s. 311; c. 690, s. 1; 1993, c. 372, s. 1; c. 484, s. 2; 1995, c. 17, s. 6; c. 477, s. 1; 1996, 2nd Ex. Sess., c. 13, ss. 1.1, 9.1, 9.2; 1997-475, s. 1.1; 1998-22, s. 5; 1998-55, ss. 8, 14; 1998-98, ss. 13.2, 48(a), (b); 1998-121, ss. 3, 5; 1998-197, s. 1; 1998-212, s. 29A.1(a); 1999-337, ss. 29, 30; 1999-360, s. 3(a), (b); 1999-438, s. 1; 2000-140, s. 67(a); 2001-424, ss. 34.13(a), 34.17(a), 34.23(b), 34.25(a); 2001-430, ss. 3, 4, 5; 2001-476, ss. 17(b)-(d), (f); 2001-487, ss. 67(b), 122(a)-(c); 2002-16, s. 4; 2003-284, s. 38.1; 2003-400, s. 15; 2004-110, ss. 6.1, 6.2, 6.3; 2005-144, s. 9.1; 2005-276, ss. 33.1, 33.4(a), 33.4(b); 2006-33, ss. 2, 11; 2006-66, ss. 24.1(a), (b), (c), 24.19(a), (b); 2006-151, s. 3; 2007-145, s. 9(a); 2007-323, ss. 31.2(a), (b), 31.16.3(h), 31.16.4(g); 2007-397, ss. 10(a)-(f).)

Editor's Note. — This section has been set out in the supplement to correct a publishing error in the main volume.

CASE NOTES

VI. Cleaning and Laundering Facilities.

VI. CLEANING AND LAUNDERING FACILITIES.

Online travel companies were not "hotel operators" as contemplated by G.S. 105-164.4(a)(3); thus, the companies were neither retailers subjected to the North Carolina state sales tax under G.S. 105-164.4(a)(3) nor were they subjected to allegations by Pitt County that they underpaid the Occupancy Tax imposed by Pitt County, N.C. Code of Ordinances § 8-50 et seq., which levied this tax on the gross receipts derived from the rental of accommodations subject to sales tax under state law. Pitt County v. Hotels.com, L.P., — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 85910 (E.D.N.C. Aug. 12, 2007).

§ 105-164.4B. Sourcing principles.

(a) General Principles. — The following principles apply in determining where to source the sale of a product. These principles apply regardless of the nature of the product.

(1) Over-the-counter. — When a purchaser receives a product at a business location of the seller, the sale is sourced to that business location.

(2) Delivery to specified address. — When a purchaser receives a product at a location specified by the purchaser and the location is not a business location of the seller, the sale is sourced to the location where the purchaser receives the product.

(3) Delivery address unknown. — When a seller of a product does not know the address where a product is received, the sale is sourced to the first address or location listed in this subdivision that is known to the seller:

a. The business or home address of the purchaser.

b. The billing address of the purchaser or, if the product is prepaid wireless calling service, the location associated with the mobile telephone number.

c. The address from which tangible personal property was shipped or from which a service was provided.

(b) Periodic Rental Payments. — When a lease or rental agreement requires recurring periodic payments, the payments are sourced as follows:

(1) For leased or rented property, the first payment is sourced in accordance with the principles set out in subsection (a) of this section and each subsequent payment is sourced to the primary location of the leased or rented property for the period covered by the payment. This subdivision applies to all property except a motor vehicle, an aircraft, transportation equipment, and a utility company railway car.

(2) For leased or rented property that is a motor vehicle or an aircraft but is not transportation equipment, all payments are sourced to the primary location of the leased or rented property for the period covered by the payment.

(3) For leased or rented property that is transportation equipment, all payments are sourced in accordance with the principles set out in subsection (a) of this section.

(4) For a railway car that is leased or rented by a utility company and would be transportation equipment if it were used in interstate commerce, all payments are sourced in accordance with the principles set out in subsection (a) of this section.

(c) Transportation Equipment Defined. — As used in the section, the term "transportation equipment" means any of the following used to carry persons or property in interstate commerce: a locomotive, a railway car, a commercial motor vehicle as defined in G.S. 20-4.01, or an aircraft. The term includes a container designed for use on the equipment and a component part of the equipment.

(d) Exceptions. — This section does not apply to the following:

(1) Telecommunications services. — Telecommunications services are sourced in accordance with G.S. 105-164.4C.

(2) Direct mail. — Direct mail that meets one of the conditions of this subdivision is sourced to the location where the property is delivered. In all other cases, direct mail is sourced in accordance with the principles set out in subdivision (a)(3) of this section.

a. Direct mail purchased pursuant to a direct pay permit.

b. When the purchaser provides the seller with information to show the jurisdictions to which the direct mail is to be delivered. (2001-347, s. 2.9; 2002-16, s. 5; 2003-284, s. 45.3; 2004-170, s. 20; 2006-33, s. 3; 2006-66, s. 24.13(a); 2008-187, s. 42.)

Effect of Amendments. — Session Laws 2008-187, s. 42, effective August 7, 2008, substituted "subdivision (a)(3)" for "subsection (a)" in subdivision (d)(2).

Part 3. Exemptions and Exclusions.

§ 105-164.13. Retail sales and use tax.

The sale at retail and the use, storage, or consumption in this State of the following tangible personal property and services are specifically exempted from the tax imposed by this Article:

Agricultural Group.

(1) Any of the following items sold to a farmer for use by the farmer in the planting, cultivating, harvesting, or curing of farm crops or in the production of dairy products, eggs, or animals. A "farmer" includes a dairy operator, a poultry farmer, an egg producer, a livestock farmer, a farmer of crops, and a farmer of an aquatic species, as defined in G.S. 106-758.
  a. Commercial fertilizer, lime, land plaster, plastic mulch, plant bed covers, potting soil, baler twine, and seeds.
  b. Farm machinery, attachment and repair parts for farm machinery, and lubricants applied to farm machinery. The term "machinery" includes implements that have moving parts or are operated or drawn by an animal. The term does not include implements operated wholly by hand or motor vehicles required to be registered under Chapter 20 of the General Statutes.
  c. A horse or mule.
  d. **(Effective until July 1, 2010 — see notes)** Fuel other than electricity.
  d. **(Effective July 1, 2010 — see notes)** Fuel.

(1a) Sales of the following to a farmer, as defined in subdivision (1) of this section:
  a. A container used for a purpose set out in subdivision (1) of this section or in packaging and transporting the farmer's product for sale.
  b. A grain, feed, or soybean storage facility, and parts and accessories attached to the facility.

(1b) **(Effective July 1, 2010 — see notes)** Electricity sold to a farmer to be used for any farming purpose other than preparing food, heating dwellings, and other household purposes.

(2) Repealed by Session Laws 2001, c. 514, s. 1, effective February 1, 2002.

(2a) Any of the following substances when purchased for use on animals or plants, as appropriate, held or produced for commercial purposes. This exemption does not apply to any equipment or devices used to administer, release, apply, or otherwise dispense these substances:
  a. Remedies, vaccines, medications, litter materials, and feeds for animals.
  b. Rodenticides, insecticides, herbicides, fungicides, and pesticides.
  c. Defoliants for use on cotton or other crops.
  d. Plant growth inhibitors, regulators, or stimulators, including systemic and contact or other sucker control agents for tobacco and other crops.
  e. Semen.

(3) Products of forests and mines in their original or unmanufactured state when such sales are made by the producer in the capacity of producer.

(4) Cotton, tobacco, peanuts or other farm products sold to manufacturers for further manufacturing or processing.

(4a) Baby chicks and poults sold for commercial poultry or egg production.

(4b) Products of a farm sold in their original state by the producer of the products if the producer is not primarily a retail merchant and ice used to preserve agriculture, aquaculture and commercial fishery products until the products are sold at retail.

(4c) Any of the following items concerning the housing, raising, or feeding of animals:

a. Commercially manufactured facilities to be used for commercial purposes for housing, raising, or feeding animals or for housing equipment necessary for these commercial activities.

b. Building materials, supplies, fixtures, and equipment that become a part of and are used in the construction, repair, or improvement of an enclosure or a structure specifically designed, constructed, and used for housing, raising, or feeding animals or for housing equipment necessary for one of these commercial activities.

c. Commercially manufactured equipment, and parts and accessories for the equipment, used in a facility that is exempt from tax under this subdivision or in an enclosure or a structure whose building materials are exempt from tax under this subdivision.

(4d) Any of the following tobacco items:

a. The lease or rental of tobacco sheets used in handling tobacco in the warehouse and transporting tobacco to and from the warehouse.

b. A metal flue sold for use in curing tobacco, whether the flue is attached to a handfired furnace or used in connection with a mechanical burner.

c. A bulk tobacco barn or rack, parts and accessories attached to the tobacco barn or rack, and any similar apparatus, part, or accessory used to cure or dry tobacco or another crop.

(4e) Repealed by Session Laws 2006-162, s. 8(b), effective July 24, 2006.

(4f) Sales of the following to a person who is engaged in the commercial logging business:

a. Logging machinery. — Logging machinery is machinery used to harvest raw forest products for transport to first market.

b. Attachments and repair parts for logging machinery.

c. Lubricants applied to logging machinery.

d. Fuel used to operate logging machinery.

Industrial Group.

(5) Manufactured products produced and sold by manufacturers or producers to other manufacturers, producers, or registered retailers or wholesale merchants, for the purpose of resale except as modified by G.S. 105-164.3(51). This exemption does not extend to or include retail sales to users or consumers not for resale.

(5a) Products that are subject to tax under Article 5F of this Chapter.

(5b) Sales to a telephone company regularly engaged in providing telephone service to subscribers on a commercial basis of central office equipment, switchboard equipment, private branch exchange equipment, terminal equipment other than public pay telephone terminal equipment, and parts and accessories attached to the equipment.

(5c) Sales of towers, broadcasting equipment, and parts and accessories attached to the equipment to a radio or television company licensed by the Federal Communications Commission.

(5d) Sales of broadcasting equipment and parts and accessories attached to the equipment to a cable service provider. For the purposes of this subdivision, "broadcasting equipment" does not include cable.

(6) Repealed by Session Laws 1989 (Regular Session, 1990), c. 1068, s. 1.
(7) Sales of products of waters in their original or unmanufactured state when such sales are made by the producer in the capacity of producer. Fish and seafoods are likewise exempt when sold by the fisherman in that capacity.
(8) Sales to a manufacturer of tangible personal property that enters into or becomes an ingredient or component part of tangible personal property that is manufactured. This exemption does not apply to sales of electricity.
(8a) Sales to a small power production facility, as defined in 16 U.S.C. § 796(17)(A), of fuel used by the facility to generate electricity.
(9) Boats, fuel oil, lubricating oils, machinery, equipment, nets, rigging, paints, parts, accessories, and supplies sold to any of the following:
  a. The holder of a standard commercial fishing license issued under G.S. 113-168.2 for principal use in commercial fishing operations.
  b. The holder of a shellfish license issued under G.S. 113-169.2 for principal use in commercial shellfishing operations.
  c. The operator of a for-hire boat, as defined in G.S. 113-174, for principal use in the commercial use of the boat.
(10) Sales of the following to commercial laundries or to pressing and dry cleaning establishments:
  a. Articles or materials used for the identification of garments being laundered or dry cleaned, wrapping paper, bags, hangers, starch, soaps, detergents, cleaning fluids and other compounds or chemicals applied directly to the garments in the direct performance of the laundering or the pressing and cleaning service.
  b. Laundry and dry-cleaning machinery, parts and accessories attached to the machinery, and lubricants applied to the machinery.
  c. Fuel, other than electricity, used in the direct performance of the laundering or the pressing and cleaning service.

Motor Fuels Group.

(10a) Sales of the following to a major recycling facility:
  a. Lubricants and other additives for motor vehicles or machinery and equipment used at the facility.
  b. Materials, supplies, parts, and accessories, other than machinery and equipment, that are not capitalized by the taxpayer and are used or consumed in the manufacturing and material handling processes at the facility.
  c. Electricity used at the facility.
(10b) Recodified as G.S. 105-164.13(10a)c. by Session Laws 2005-276, s. 33.9, effective January 1, 2006.
(11) Any of the following fuel:
  a. Motor fuel, as defined in G.S. 105-449.60, except motor fuel for which a refund of the per gallon excise tax is allowed under G.S. 105-449.105A or G.S. 105-449.107.
  b. Alternative fuel taxed under Article 36D of this Chapter, unless a refund of that tax is allowed under G.S. 105-449.107.
(11a) Sales of diesel fuel to railroad companies for use in rolling stock other than motor vehicles. The definitions in G.S. 105-333 apply in this subdivision.

Medical Group.

(12) Sales of any of the following items:
  a. Prosthetic devices.

b. Mobility enhancing equipment sold on a prescription.
c. Durable medical equipment sold on prescription.
d. Durable medical supplies sold on prescription.

(13) All of the following drugs, including their packaging materials and any instructions or information about the drugs included in the package with them:
a. Drugs required by federal law to be dispensed only on prescription.
b. Over-the-counter drugs sold on prescription.
c. Insulin.

(13a) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 16.

(13b) Repealed by Session Laws 1999, c. 438, s. 7, effective October 1, 1999.

(13c) Nutritional supplements sold by a chiropractic physician at a chiropractic office to a patient as part of the patient's plan of treatment, as authorized by G.S. 90-151.1.

Printed Materials Group.

(14) Public school books on the adopted list, the selling price of which is fixed by State contract.

(14a) Recodified as subdivision (33a) by Session Laws 2000-120, s. 5, effective July 14, 2000.

Transactions Group.

(15) Accounts of purchasers, representing taxable sales, on which the tax imposed by this Article has been paid, that are found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross sales. In the case of a municipality that sells electricity, the account may be deducted if it meets all the conditions for charge-off that would apply if the municipality were subject to income tax. Any accounts deducted pursuant to this subdivision must be added to gross sales if afterwards collected.

(16) Sales of an article repossessed by the vendor if tax was paid on the sales price of the article.

Exempt Status Group.

(17) Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State.

Unclassified Group.

(18) Repealed by Session Laws 2005-276, s. 33.9, effective January 1, 2006.

(19) Repealed by Session Laws 1991, c. 618, s. 1.

(20) Sales by blind merchants operating under supervision of the Department of Health and Human Services.

(21) The lease or rental of motion picture films used for exhibition purposes where the lease or rental of such property is an established business or part of an established business or the same is incidental or germane to said business of the lessee.

(22) The lease or rental of films, motion picture films, transcriptions and recordings to radio stations and television stations operating under a certificate from the Federal Communications Commission.

(22a) Sales of audiovisual masters made or used by a production company in making visual and audio images for first generation reproduction. For the purpose of this subdivision, an "audiovisual master" is an audio or video film, tape, or disk or another audio or video storage device from which all other copies are made.

(23) Sales of the following packaging items:

a. Wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones or spools, wooden boxes, baskets, coops and barrels, including paper cups, napkins and drinking straws and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail and when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.

b. A container that is used as packaging by the owner of the container or another person to enclose tangible personal property for delivery to a purchaser of the property and is required to be returned to its owner for reuse.

(24) Sales of fuel and other items of tangible personal property for use or consumption by or on ocean-going vessels which ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for the use of such vessel; provided, however, that sales of fuel and other items of tangible personal property made to officers, agents, members of the crew or passengers of such vessels for their personal use shall not be exempted from payment of the sales tax.

(25) Sales by merchants on the Cherokee Indian Reservation when such merchants are authorized to do business on the Reservation and are paying the tribal gross receipts levy to the Tribal Council.

(26) Food sold not for profit by public or private school cafeterias within school buildings during the regular school day.

(26a) Food sold not for profit by a public school cafeteria to a child care center that participates in the Child and Adult Care Food Program of the Department of Public Instruction.

(27) Meals and food products served to students in dining rooms regularly operated by State or private educational institutions or student organizations thereof.

(27a) Bread, rolls, and buns sold at a bakery thrift store. A "bakery thrift store" is a retail outlet of a bakery that sells at wholesale over ninety percent (90%) of the items it makes and sells at the retail outlet day-old bread, rolls, and buns returned to it by retailers that acquired these items from the bakery.

(28) Sales of newspapers by newspaper street vendors, by newspaper carriers making door-to-door deliveries, and by means of vending machines and sales of magazines by magazine vendors making door-to-door sales.

(29) Repealed by Session Laws 2005-435, s. 30, effective September 27, 2005.

(29a) Repealed by Session Laws 1995 (Regular Session, 1996), c. 646, s. 5.

(30) Sales from vending machines when sold by the owner or lessee of said machines at a price of one cent (1¢) per sale.

(31) Sales of meals not for profit to elderly and incapacitated persons by charitable or religious organizations not operated for profit which are entitled to the refunds provided by G.S. 105-164.14(b), when such meals are delivered to the purchasers at their places of abode.

(31a) Food sold by a church or religious organization not operated for profit when the proceeds of the sales are actually used for religious activities.

(31b) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 16.

(32) Sales of motor vehicles, the sale of a motor vehicle body to be mounted on a motor vehicle chassis when a certificate of title has not been issued for the chassis, and the sale of a motor vehicle body mounted on a motor vehicle chassis that temporarily enters the State so the manufacturer of the body can mount the body on the chassis.

(33) Tangible personal property purchased solely for the purpose of export to a foreign country for exclusive use or consumption in that or some other foreign country, either in the direct performance or rendition of professional or commercial services, or in the direct conduct or operation of a trade or business, all of which purposes are actually consummated, or purchased by the government of a foreign country for export which purpose is actually consummated. "Export" shall include the acts of possessing and marshalling such property, by either the seller or the purchaser, for transportation to a foreign country, but shall not include devoting such property to any other use in North Carolina or the United States. "Foreign country" shall not include any territory or possession of the United States.

In order to qualify for this exemption, an affidavit of export indicating compliance with the terms and conditions of this exemption, as prescribed by the Secretary of Revenue, must be submitted by the purchaser to the seller, and retained by the seller to evidence qualification for the exemption.

If the purposes qualifying the property for exemption are not consummated, the purchaser shall be liable for the tax which was avoided by the execution of the aforesaid affidavit as well as for applicable penalties and interest and the affidavit shall contain express provision that the purchaser has recognized and assumed such liability.

The principal purpose of this exemption is to encourage the flow of commerce through North Carolina ports that is now moving through out-of-state ports. However, it is not intended that property acquired for personal use or consumption by the purchaser, including gifts, shall be exempt hereunder.

(33a) Tangible personal property sold by a retailer to a purchaser within or without this State, when the property is delivered in this State to a common carrier or to the United States Postal Service for delivery to the purchaser or the purchaser's designees outside this State and the purchaser does not subsequently use the property in this State.

(34) Sales of items by a nonprofit civic, charitable, educational, scientific or literary organization when the net proceeds of the sales will be given or contributed to the State of North Carolina or to one or more of its agencies or instrumentalities, or to one or more nonprofit charitable organizations, one of whose purposes is to serve as a conduit through which such net proceeds will flow to the State or to one or more of its agencies or instrumentalities.

(35) Sales by a nonprofit civic, charitable, educational, scientific, literary, or fraternal organization when all of the following conditions are met:

a. The sales are conducted only upon an annual basis for the purpose of raising funds for the organization's activities.

b. The proceeds of the sale are actually used for the organization's activities.

c. The products sold are delivered to the purchaser within 60 days after the first solicitation of any sale made during the organization's annual sales period.

(36) Advertising supplements and any other printed matter ultimately to be distributed with or as part of a newspaper.

(37) Repealed by Session Laws 2001-424, s. 34.23(a), effective December 1, 2001, and applicable to sales made on or after that date.

(38) Food and other items lawfully purchased under the Food Stamp Program, 7 U.S.C. § 2011, and supplemental foods lawfully purchased with a food instrument issued under the Special Supplemental Food Program, 42 U.S.C. § 1786, and supplemental foods purchased for direct distribution by the Special Supplemental Food Program.

(39) Sales of paper, ink, and other tangible personal property to commercial printers and commercial publishers for use as ingredients or component parts of free distribution periodicals and sales by printers of free distribution periodicals to the publishers of these periodicals. As used in this subdivision, the term "free distribution periodical" means a publication that is continuously published on a periodic basis monthly or more frequently, is provided without charge to the recipient, and is distributed in any manner other than by mail.

(40) Sales to the Department of Transportation.

(41) Sales of mobile classrooms to local boards of education or to local boards of trustees of community colleges.

(42) Tangible personal property that is purchased by a retailer for resale or is manufactured or purchased by a wholesale merchant for resale and then withdrawn from inventory and donated by the retailer or wholesale merchant to either a governmental entity or a nonprofit organization, contributions to which are deductible as charitable contributions for federal income tax purposes.

(43) Custom computer software. Custom computer software and the portion of prewritten computer software that is modified or enhanced if the modification or enhancement is designed and developed to the specifications of a specific purchaser and the charges for the modification or enhancement are separately stated.

(43a) Computer software delivered electronically or delivered by load and leave.

(44) Piped natural gas. — This item is exempt because it is taxed under Article 5E of this Chapter.

(45) Sales of the following items to an interstate passenger air carrier for use at its hub:
  a. Aircraft lubricants, aircraft repair parts, and aircraft accessories.
  b. Aircraft simulators for flight crew training.

(45a) Sales to an interstate air business of tangible personal property that becomes a component part of or is dispensed as a lubricant into commercial aircraft during its maintenance, repair, or overhaul. For the purpose of this subdivision, commercial aircraft includes only aircraft that has a certified maximum take-off weight of more than 12,500 pounds and is regularly used to carry for compensation passengers, commercial freight, or individually addressed letters and packages.

(45b) Sales of the following items to an interstate air courier for use at its hub:
  a. Aircraft lubricants, aircraft repair parts, and aircraft accessories.
  b. Materials handling equipment, racking systems, and related parts and accessories for the storage or handling and movement of tangible personal property at an airport or in a warehouse or distribution facility.

(46) Sales of electricity by a municipality whose only wholesale supplier of electric power is a federal agency and who is required by a contract with that federal agency to make payments in lieu of taxes.

(47) An amount charged as a deposit on a beverage container that is returnable to the vendor for reuse when the amount is refundable or creditable to the vendee, whether or not the deposit is separately charged.

(48) An amount charged as a deposit on an aeronautic, automotive, industrial, marine, or farm replacement part that is returnable to the vendor for rebuilding or remanufacturing when the amount is refundable or creditable to the vendee, whether or not the deposit is separately charged. This exemption does not include tires or batteries.

(49) Installation charges when the charges are separately stated.

(49a) Delivery charges for delivery of direct mail if the charges are separately stated on an invoice or similar billing document given to the purchaser.

(50) Fifty percent (50%) of the sales price of tangible personal property sold through a coin-operated vending machine, other than tobacco.

(51) Water delivered by or through main lines or pipes for either commercial or domestic use or consumption.

(52) Items subject to sales and use tax under G.S. 105-164.4, other than electricity, telecommunications service, and ancillary service as defined in G.S. 105-164.4, if all of the following conditions are met:

a. The items are purchased by a State agency for its own use and in accordance with G.S. 105-164.29A.

b. The items are purchased pursuant to a valid purchase order issued by the State agency that contains the exemption number of the agency and a description of the property purchased, or the items purchased are paid for with a State-issued check, electronic deposit, credit card, procurement card, or credit account of the State agency.

c. For all purchases other than by an agency-issued purchase order, the agency must provide to or have on file with the retailer the agency's exemption number.

(53) Sales to a professional land surveyor of tangible personal property on which custom aerial survey data is stored in digital form or is depicted in graphic form. Data is custom if it was created to the specifications of the professional land surveyor purchasing the property. A professional land surveyor is a person licensed as a surveyor under Chapter 89C of the General Statutes.

(54) The following telecommunications services and charges:

a. Telecommunications service that is a component part of or is integrated into a telecommunications service that is resold. This exemption does not apply to service purchased by a pay telephone provider who uses the service to provide pay telephone service. Examples of services that are resold include carrier charges for access to an intrastate or interstate interexchange network, interconnection charges paid by a provider of mobile telecommunications service, and charges for the sale of unbundled network elements. An unbundled network element is a network element, as defined in 47 U.S.C. § 153(29), to which access is provided on an unbundled basis pursuant to 47 U.S.C. § 251(c)(3).

b. Pay telephone service.

c. 911 charges imposed under G.S. 62A-43 and remitted to the 911 Fund under that section.

d. Charges for telecommunications service made by a hotel, motel, or another entity whose gross receipts are taxable under G.S. 105-164.4(a)(3) when the charges are incidental to the occupancy of the entity's accommodations.

e. Telecommunications service purchased by a State agency or a unit of local government for the North Carolina Information Highway or another data network owned or leased by the State or unit of local government.

(55) Sales of electricity for use at an eligible Internet data center and eligible business property to be located and used at an eligible Internet data center. As used in this subdivision, "eligible business property" is property that is capitalized for tax purposes under the Code and is used either:

a. For the provision of Internet service or Web search portal services as contemplated by G.S. 105-164.3(8e)a., including equipment cooling systems for managing the performance of the property.

b. For the generation, transformation, transmission, distribution, or management of electricity, including exterior substations and other business personal property used for these purposes.

c. To provide related computer engineering or computer science research.

If the level of investment required by G.S. 105-164.3(8e)d. is not timely made, then the exemption provided under this subdivision is forfeited. If the level of investment required by G.S. 105-164.3(8e)d. is timely made but any specific eligible business property is not located and used at an eligible Internet data center, then the exemption provided for such eligible business property under this subdivision is forfeited. If the level of investment required by G.S. 105-164.3(8e)d. is timely made but any portion of the electricity is not used at an eligible Internet data center, then the exemption provided for such electricity under this subdivision is forfeited. A taxpayer that forfeits an exemption under this subdivision is liable for all past taxes avoided as a result of the forfeited exemption, computed from the date the taxes would have been due if the exemption had not been allowed, plus interest at the rate established under G.S. 105-241.21. If the forfeiture is triggered due to the lack of a timely investment required by G.S. 105-164.3(8e)d., then interest is computed from the date the taxes would have been due if the exemption had not been allowed. For all other forfeitures, interest is computed from the time as of which the eligible business property or electricity was put to a disqualifying use. The past taxes and interest are due 30 days after the date the exemption is forfeited. A taxpayer that fails to pay the past taxes and interest by the due date is subject to the provisions of G.S. 105-236.

(56) Sales to the owner or lessee of an eligible railroad intermodal facility of intermodal cranes, intermodal hostler trucks, and railroad locomotives that reside on the premises of the facility and are used at the facility.

(57) **(Effective July 1, 2010 — see notes)** Fuel and electricity sold to a manufacturer for use in connection with the operation of a manufacturing facility.

(58) Tangible personal property purchased with a client assistance debit card issued for disaster assistance relief by a State agency or a federal agency or instrumentality.

(59) Interior design services provided in conjunction with the sale of tangible personal property. (1957, c. 1340, s. 5; 1959, c. 670; c. 1259, s. 5; 1961, c. 826, s. 2; cc. 1103, 1163; 1963, c. 1169, ss. 7-9; 1965, c. 1041; 1967, c. 756; 1969, c. 907; 1971, c. 990; 1973, c. 476, s. 143; c. 708, s. 1; cc. 1064, 1076; c. 1287, s. 8; 1975, 2nd Sess., c. 982; 1977, c. 771, s. 4; 1977, 2nd Sess., c. 1219, s. 43.6; 1979, c. 46, ss. 1, 2; c. 156, s. 1; c. 201; c. 625, ss. 1, 2; c. 801, ss. 74, 75; 1979, 2nd Sess., c. 1099, s. 1;

1981, cc. 14, 207, 982; 1983, c. 156; c. 570, s. 21; c. 713, ss. 91, 92; c. 873; c. 887; 1983 (Reg. Sess., 1984), c. 1071, s. 1; 1985, c. 114, s. 4; c. 555; c. 656, ss. 24, 25; 1985 (Reg. Sess., 1986), c. 953; c. 973; c. 982, s. 2; 1987, c. 800, s. 1; 1987 (Reg. Sess., 1988), c. 937; 1989, c. 692, ss. 3.5, 3.6; c. 748, s. 1; 1989 (Reg. Sess., 1990), c. 989; c. 1060; c. 1068, ss. 1, 2; 1991, c. 45, s. 17; c. 79, s. 2; c. 618, s. 1; c. 689, s. 314; 1991 (Reg. Sess., 1992), c. 931, ss. 1, 2; c. 935, s. 1; c. 940, s. 1; c. 949, s. 1; c. 1007, s. 44; 1993, c. 484, s. 3; c. 513, s. 11; 1993 (Reg. Sess., 1994), c. 739, s. 1; 1995, c. 390, s. 14; c. 451, s. 1; c. 477, ss. 2, 3; 1995 (Reg. Sess., 1996), c. 646, ss. 4, 5; c. 649, s. 1; 1996, 2nd Ex. Sess., c. 14, ss. 15, 16; 1997-369, s. 2; 1997-370, s. 2; 1997-397, s. 1; 1997-423, s. 3; 1997-443, s. 11A.118(a); 1997-456, s. 27; 1997-506, s. 36; 1997-521, s. 1; 1998-22, s. 6; 1998-55, ss. 9, 15; 1998-98, ss. 14, 14.1, 49, 107; 1998-146, s. 9; 1998-171, s. 10(a), (b); 1998-225, s. 4.3; 1999-337, s. 31; 1999-360, s. 7(a)-(c); 1999-438, ss. 5-12; 2000-120, s. 5; 2000-153, s. 5; 2001-347, s. 2.12; 2001-424, s. 34.23(a); 2001-476, s. 17(e); 2001-509, s. 1; 2001-514, s. 1; 2002-184, s. 9; 2003-284, ss. 45.5, 45.5A; 2003-349, s. 11; 2003-416, ss. 18(a), 21; 2003-431, s. 1; 2004-124, ss. 32B.2, 32B.4; 2005-276, s. 33.9; 2005-435, ss. 30, 31; 2006-19, s. 1; 2006-33, s. 5; 2006-66, s. 24.17(b); 2006-162, ss. 8(a), 8(b); 2006-168, s. 4.2; 2006-252, s. 2.25(b); 2007-244, s. 4; 2007-323, s. 31.23(c); 2007-368, s. 1; 2007-383, s. 6; 2007-397, ss. 10(g), 10(h); 2007-491, s. 44(1)a; 2007-500, s. 1; 2007-527, ss. 10, 27; 2008-107, ss. 28.6(a), 28.20(a).)

Sub-subdivision (1)d. Set Out Twice. — The first version of sub-subdivision (1)d. set out above is effective until July 1, 2010. The second version of sub-subdivision (1)d. set out above is effective July 1, 2010.

Editor's Note. —

Session Laws 2008-107, s. 28.6(b), provides, in part, that the amendment to this section by s. 28.6(a), is applicable to purchases made on or after August 1, 2008.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, ss. 28.6(a) and 28.20(a), effective August 1, 2008, added subdivisions (58) and (59). For applicability, see Editor's note.

§ 105-164.13B. Food exempt from tax.

(a) State Exemption. — Food is exempt from the taxes imposed by this Article unless the food is included in one of the subdivisions in this subsection. The following food items are subject to tax:

(1) Repealed by Session Laws 2005-276, s. 33.10, effective October 1, 2005.

(2) Dietary supplements.

(3) Food sold through a vending machine.

(4) **(Effective until January 1, 2009)** Prepared food.

(4) **(Effective January 1, 2009)** Prepared food, other than bakery items sold without eating utensils by an artisan bakery. The term "bakery item" includes bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas. An artisan bakery is a bakery that meets all of the following requirements:

  a. It derives over eighty percent (80%) of its gross receipts from bakery items.

  b. Its annual gross receipts, combined with the gross receipts of all related persons as defined in G.S. 105-163.010, do not exceed one million eight hundred thousand dollars ($1,800,000).

(5) Soft drinks.

(6) Repealed by Session Laws 2003-284, s. 45.6B, effective January 1, 2004.
(7) Candy.

(b) Administration of Local Food Tax. — The Secretary must administer local sales and use taxes imposed on food as if they were imposed under this Article. This applies to local taxes on food imposed under Subchapter VIII of this Chapter and under Chapter 1096 of the 1967 Session Laws. (1998-212, s. 29A.1(b); 2001-347, s. 2.13; 2001-489, s. 3(b); 2003-284, ss. 45.6, 45.6A, 45.6B; 2003-416, s. 22; 2005-276, s. 33.10; 2008-107, s. 28.19(a).)

Subdivision (a)(4) Set Out Twice. — The first version of subdivision (a)(4) set out above is effective until January 1, 2009. The second version of subdivision (a)(4) set out above is effective January 1, 2009.

Editor's Note. —

Session Laws 2008-107, s. 28.19(a), included amendatory language stating that a new subdivision was being added, but the actual effect of the amendment was to revise subdivision (a)(4). The amendment has been implemented in subdivision (a)(4), and the section has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.19(a), effective January 1, 2009, and applicable to sales made on or after that date, rewrote subdivision (a)(4).

§ 105-164.13D. Sales and use tax holiday for Energy Star qualified products.

(a) The taxes imposed by this Article do not apply to the Energy Star qualified products listed in this section if sold between 12:01 A.M. on the first Friday of November and 11:59 P.M. the following Sunday. The qualified products are:
(1) Clothes washers.
(2) Freezers and refrigerators.
(3) Central air conditioners and room air conditioners.
(4) Air-source heat pumps and geothermal heat pumps.
(5) Ceiling fans.
(6) Dehumidifiers.
(7) Programmable thermostats.

(b) The exemption allowed by this section does not apply to the following:
(1) The sale of a product for use in a trade or business.
(2) The rental of a product. (2008-107, s. 28.12(b).)

Editor's Note. — Session Laws 2008-107, s. 28.12(e), made this section effective July 16, 2008, and applicable to sales made on or after that date.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

§ 105-164.14. Certain refunds authorized.

(a) Interstate Carriers. — An interstate carrier is allowed a refund, in accordance with this section, of part of the sales and use taxes paid by it on the purchase in this State of railway cars and locomotives, and fuel, lubricants, repair parts, and accessories for a motor vehicle, railroad car, locomotive, or airplane the carrier operates. An "interstate carrier" is a person who is engaged in transporting persons or property in interstate commerce for compensation. The Secretary shall prescribe the periods of time, whether monthly, quarterly, semiannually, or otherwise, with respect to which refunds may be claimed, and shall prescribe the time within which, following these periods, an application for refund may be made.

An applicant for refund shall furnish the following information and any proof of the information required by the Secretary:

(1) A list identifying the railway cars, locomotives, fuel, lubricants, repair parts, and accessories purchased by the applicant inside or outside this State during the refund period.
(2) The purchase price of the items listed in subdivision (1) of this subsection.
(3) The sales and use taxes paid in this State on the listed items.
(4) The number of miles the applicant's motor vehicles, railroad cars, locomotives, and airplanes were operated both inside and outside this State during the refund period.
(5) Any other information required by the Secretary.

For each applicant, the Secretary shall compute the amount to be refunded as follows. First, the Secretary shall determine the ratio of the number of miles the applicant operated its motor vehicles, railroad cars, locomotives, and airplanes in this State during the refund period to the number of miles it operated them both inside and outside this State during the refund period. Second, the Secretary shall determine the applicant's proportional liability for the refund period by multiplying this mileage ratio by the purchase price of the items identified in subdivision (1) of this subsection and then multiplying the resulting product by the tax rate that would have applied to the items if they had all been purchased in this State. Third, the Secretary shall refund to each applicant the excess of the amount of sales and use taxes the applicant paid in this State during the refund period on these items over the applicant's proportional liability for the refund period.

(a1) **(Repealed for purchases made on or after January 1, 2011)** Passenger Plane Maximum. — An interstate passenger air carrier is allowed a refund of the net amount of sales and use tax paid by it in this State on fuel during a calendar year in excess of two million five hundred thousand dollars ($2,500,000). The "net amount of sales and use tax paid" is the amount paid less the refund allowed under subsection (a) of this section. A request for a refund must be in writing and must include any information and documentation the Secretary requires. A request for a refund is due within six months after the end of the calendar year for which the refund is claimed. The refund allowed by this subsection is in addition to the refund allowed in subsection (a) of this section. This subsection is repealed for purchases made on or after January 1, 2011.

(a2) Utility Companies. — A utility company is allowed a refund, in accordance with this section, of part of the sales and use taxes paid by it on the purchase in this State of railway cars and locomotives and accessories for a railway car or locomotive the utility company operates. The Secretary shall prescribe the periods of time, whether monthly, quarterly, semiannually, or otherwise, with respect to which refunds may be claimed and shall prescribe the time within which, following these periods, an application for refund may be made.

An applicant for refund shall furnish the following information and any proof of the information required by the Secretary:

(1) A list identifying the railway cars, locomotives, and accessories purchased by the applicant inside or outside this State during the refund period.
(2) The purchase price of the items listed in subdivision (1) of this subsection.
(3) The sales and use taxes paid in this State on the listed items.
(4) The number of miles the applicant's railway cars and locomotives were operated both inside and outside this State during the refund period.

(5) Any other information required by the Secretary.

For each applicant, the Secretary shall compute the amount to be refunded as follows. First, the Secretary shall determine the ratio of the number of miles the applicant operated its railway cars and locomotives in this State during the refund period to the number of miles it operated them both inside and outside this State during the refund period. Second, the Secretary shall determine the applicant's proportional liability for the refund period by multiplying this mileage ratio by the purchase price of the items identified in subdivision (1) of this subsection and then multiplying the resulting product by the tax rate that would have applied to the items if they had all been purchased in this State. Third, the Secretary shall refund to each applicant the excess of the amount of sales and use taxes the applicant paid in this State during the refund period on these items over the applicant's proportional liability for the refund period.

(b) Nonprofit Entities and Hospital Drugs. — A nonprofit entity included in the following list is allowed a semiannual refund of sales and use taxes paid by it under this Article on direct purchases of tangible personal property and services, other than electricity, telecommunications service, and ancillary service, for use in carrying on the work of the nonprofit entity:

(1) Hospitals not operated for profit, including hospitals and medical accommodations operated by an authority created under the Hospital Authorities Law, Article 2 of Chapter 131E of the General Statutes.

(2) An organization that is exempt from income tax under section 501(c)(3) of the Code, other than an organization that is properly classified in any of the following major group areas of the National Taxonomy of Exempt Entities:

a. Community Improvement and Capacity Building.

b. Public and Societal Benefit.

c. Mutual and Membership Benefit.

(3) Repealed by Session Laws 2008-107, s. 28.22(a), effective July 1, 2008, and applicable to purchases made on or after that date.

(4) Qualified retirement facilities whose property is excluded from property tax under G.S. 105-278.6A.

(5) A university affiliated nonprofit organization that procures, designs, constructs, or provides facilities to, or for use by, a constituent institution of The University of North Carolina. For purposes of this subdivision, a nonprofit organization includes an entity exempt from taxation as a disregarded entity of the nonprofit organization.

Sales and use tax liability indirectly incurred by a nonprofit entity on building materials, supplies, fixtures, and equipment that become a part of or annexed to any building or structure that is owned or leased by the nonprofit entity and is being erected, altered, or repaired for use by the nonprofit entity for carrying on its nonprofit activities is considered a sales or use tax liability incurred on direct purchases by the nonprofit entity.

A hospital that is not allowed a refund under this subsection of sales and use taxes paid on its direct purchases of tangible personal property is allowed a semiannual refund of sales and use taxes paid by it on medicines and drugs purchased for use in carrying out its work.

The refunds allowed under this subsection for certain nonprofit entities and for medicines and drugs purchased by hospitals do not apply to organizations, corporations, and institutions that are owned and controlled by the United States, the State, or a unit of local government, except hospital facilities created under Article 2 of Chapter 131E of the General Statutes and nonprofit hospitals owned and controlled by a unit of local government that elect to receive semiannual refunds under this subsection instead of annual refunds under subsection (c).

A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund for the first six months of a calendar year is due the following October 15; a request for a refund for the second six months of a calendar year is due the following April 15.

(c) Certain Governmental Entities. — A governmental entity listed in this subsection is allowed an annual refund of sales and use taxes paid by it under this Article on direct purchases of tangible personal property and services, other than electricity, telecommunications service, and ancillary service. Sales and use tax liability indirectly incurred by a governmental entity on building materials, supplies, fixtures, and equipment that become a part of or annexed to any building or structure that is owned or leased by the governmental entity and is being erected, altered, or repaired for use by the governmental entity is considered a sales or use tax liability incurred on direct purchases by the governmental entity for the purpose of this subsection. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the governmental entity's fiscal year.

This subsection applies only to the following governmental entities:

(1) A county.
(2) A city as defined in G.S. 160A-1.
(2a) A consolidated city-county as defined in G.S. 160B-2.
(2b), (2c) Repealed by Session Laws 2005-276, s. 7.51(a), effective July 1, 2005, and applicable to sales made on or after that date.
(3) A metropolitan sewerage district or a metropolitan water district in this State.
(4) A water and sewer authority created under Chapter 162A of the General Statutes.
(5) A lake authority created by a board of county commissioners pursuant to an act of the General Assembly.
(6) A sanitary district.
(7) A regional solid waste management authority created pursuant to G.S. 153A-421.
(8) An area mental health, developmental disabilities, and substance abuse authority, other than a single-county area authority, established pursuant to Article 4 of Chapter 122C of the General Statutes.
(9) A district health department, or a public health authority created pursuant to Part 1A of Article 2 of Chapter 130A of the General Statutes.
(10) A regional council of governments created pursuant to G.S. 160A-470.
(11) A regional planning and economic development commission or a regional economic development commission created pursuant to Chapter 158 of the General Statutes.
(12) A regional planning commission created pursuant to G.S. 153A-391.
(13) A regional sports authority created pursuant to G.S. 160A-479.
(14) A public transportation authority created pursuant to Article 25 of Chapter 160A of the General Statutes.
(14a) A facility authority created pursuant to Part 4 of Article 20 of Chapter 160A of the General Statutes.
(15) A regional public transportation authority created pursuant to Article 26 of Chapter 160A of the General Statutes, or a regional transportation authority created pursuant to Article 27 of Chapter 160A of the General Statutes.
(16) A local airport authority that was created pursuant to a local act of the General Assembly.
(17) A joint agency created by interlocal agreement pursuant to G.S. 160A-462 to operate a public broadcasting television station.

(18) Repealed by Session Laws 2001-474, s. 7, effective November 29, 2001.

(19) Repealed by Session Laws 2001-474, s. 7, effective November 29, 2001.

(20) A constituent institution of The University of North Carolina, but only with respect to sales and use tax paid by it for tangible personal property or services that are eligible for refund under this subsection acquired by it through the expenditure of contract and grant funds.

(21) The University of North Carolina Health Care System.

(22) A regional natural gas district created pursuant to Article 28 of Chapter 160A of the General Statutes.

(d) Late Applications. — Refunds applied for more than three years after the due date are barred.

(d1) Alcoholic Beverages. — The refunds authorized by this section do not apply to purchases of alcoholic beverages, as defined in G.S. 18B-101.

(e) State Agencies. — The State is allowed quarterly refunds of local sales and use taxes paid indirectly by the State agency on building materials, supplies, fixtures, and equipment that become a part of or annexed to a building or structure that is owned or leased by the State agency and is being erected, altered, or repaired for use by the State agency.

A person who pays local sales and use taxes on building materials or other tangible personal property for a State building project shall give the State agency for whose project the property was purchased a signed statement containing all of the following information:

(1) The date the property was purchased.

(2) The type of property purchased.

(3) The project for which the property was used.

(4) If the property was purchased in this State, the county in which it was purchased.

(5) If the property was not purchased in this State, the county in which the property was used.

(6) The amount of sales and use taxes paid.

If the property was purchased in this State, the person shall attach a copy of the sales receipt to the statement. A State agency to whom a statement is submitted shall verify the accuracy of the statement.

Within 15 days after the end of each calendar quarter, every State agency shall file with the Secretary a written application for a refund of taxes to which this subsection applies paid by the agency during the quarter. The application shall contain all information required by the Secretary. The Secretary shall credit the local sales and use tax refunds directly to the General Fund.

(f) Information to Counties and Cities. — The Secretary must give information on refunds of tax made under this section to a designated county or city official within 30 days after the official makes a written request to the Secretary for the information. For a request made by a county official, the Secretary must give the official a list of each claimant that received a refund in the past 12 months of at least one thousand dollars ($1,000) of tax paid to the county. For a request made by a city official, the Secretary must give the official a list of each claimant that received a refund in the past 12 months of at least one thousand dollars ($1,000) of tax paid to all the counties in which the city is located. The list must include the name and address of each of these claimants and the amount of the refund received from each county covered by the request.

A claimant that has received a refund under this section of tax paid to a county must give information on the refund to a designated official of the county or a city located in the county. The claimant must give the information to the county or city official within 30 days after the official makes a written request to the claimant for the information. For a request by a county or city official, the claimant must give the official a copy of the request for the refund and any supporting documentation requested by the official to verify the request. If a claimant determines that a refund it has received under this section is incorrect, the claimant must file an amended request for a refund.

For the purpose of this subsection, a designated county official is the chair of the board of county commissioners or a county official designated in a resolution adopted by the Board, and a designated city official is the mayor of the city or a city official designated in a resolution adopted by the city's governing board. Information given to a county or city official under this section is not a public record and may not be disclosed except as provided in G.S. 153A-148.1 or G.S. 160A-208.1.

(g) Major Recycling Facilities. — The owner of a major recycling facility is allowed an annual refund of sales and use taxes paid by it under this Article on building materials, building supplies, fixtures, and equipment that become a part of the real property of the recycling facility. Liability incurred indirectly by the owner for sales and use taxes on these items is considered tax paid by the owner. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the major recycling facility's fiscal year. Refunds applied for after the due date are barred.

(h) Low Enterprise or Development Tier Machinery. — Eligible taxpayers are allowed an annual refund of sales and use taxes paid under this Article as provided in this subsection.

(1) Refunds. — An eligible person is allowed an annual refund of sales and use taxes paid by it under this Article at the general rate of tax on eligible machinery and equipment it purchases for use in an enterprise tier one area or an enterprise tier two area, as defined in G.S. 105-129.3 or a development tier one area, as defined in G.S. 143B-437.08. Liability incurred indirectly by the taxpayer for sales and use taxes on these items is considered tax paid by the taxpayer. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred.

(2) Eligibility. — A person is eligible for the refund provided in this subsection if it is engaged primarily in one of the businesses listed in G.S. 105-129.4(a) in an enterprise tier one area or an enterprise tier two area, as defined in G.S. 105-129.3 or if it is engaged primarily in one of the businesses listed in G.S. 105-129.83(a) in a development tier one area, as defined in G.S. 143B-437.08.

(3) Machinery and equipment. — For the purpose of this subsection, the term "machinery and equipment" means engines, machinery, equipment, tools, and implements used or designed to be used in one of the businesses listed in G.S. 105-129.4(a) or G.S. 105-129.83(a). Machinery and equipment are eligible for the refund provided in this subsection if the taxpayer places them in service in an enterprise tier one area or an enterprise tier two area, as defined in G.S. 105-129.3, or a development tier one area, as defined in G.S. 143B-437.08, capitalizes them for tax purposes under the Code, and does not lease them to another party.

(i) **(Repealed for taxes paid on or after January 1, 2008)** Nonprofit Insurance Companies. — Eligible nonprofit insurance companies are allowed an annual refund of sales and use taxes paid under this Article as provided in this subsection.

(1) Refunds. — An eligible nonprofit insurance company is allowed an annual refund of sales and use taxes paid by it under this Article on

building materials, building supplies, fixtures, and equipment that become a part of its real property. Liability incurred indirectly by the company for sales and use taxes on these items is considered tax paid by the company. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the insurance company's fiscal year. Refunds applied for after the due date are barred.

(2) Eligibility. — An insurance company is eligible for the refund provided in this subsection if it meets all of the following conditions:
  a. It is a nonprofit corporation.
  b. It is operated for the exclusive purpose of providing insurance and annuity contracts to or for the benefit of (i) organizations exempt from federal income tax under section 501(c)(3) of the Code and their employees or (ii) public institutions and their employees.
  c. The Secretary of Commerce has certified that the insurance company will invest at least twenty million dollars ($20,000,000) in constructing a facility in this State for the conduct of its operations.

(3) Forfeiture. — If an eligible insurance company does not make the required minimum investment within five years after its first refund under this subsection, it loses its eligibility and forfeits all refunds already received under this subsection. Upon forfeiture, the company is liable for tax under this Article equal to the amount of all past taxes refunded under this subsection, plus interest at the rate established in G.S. 105-241.21, computed from the date each refund was issued. The tax and interest are due 30 days after the date of the forfeiture. A company that fails to pay the tax and interest is subject to the penalties provided in G.S. 105-236.

(j) **(Repealed for sales made on or after January 1, 2013)** Certain Industrial Facilities. — The owner of an eligible facility is allowed an annual refund of sales and use taxes as provided in this subsection.

(1) Refund. — The owner of an eligible facility is allowed an annual refund of sales and use taxes paid by it under this Article on qualified building materials, building supplies, fixtures, and equipment that become a part of the real property of the eligible facility. Liability incurred indirectly by the owner for sales and use taxes on these items is considered tax paid by the owner. Building materials, building supplies, fixtures, and equipment are qualified if they are installed in the construction of the facility. Purchases for subsequent repair, renovation, or equipment replacement are not qualified.

A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred.

(2) Eligibility. — A facility is eligible under this subsection if it meets all of the following conditions:
  a. It is primarily engaged in one of the industries listed in this subsection.
  b. **(See editor's note for effective date)** The Secretary of Commerce has certified that the owner of the facility will invest at least the required amount of private funds to construct the facility in this State. For the purpose of this subsection, costs of construction may include costs of acquiring and improving land for the facility and costs of equipment for the facility. If the facility is located in a development tier one area as defined in G.S.

143B-437.08 the required amount is fifty million dollars ($50,000,000). For all other facilities, the required amount is one hundred million dollars ($100,000,000). In the case of a computer manufacturing facility, the owner may invest these funds either directly or indirectly through a related entity or strategic partner as those terms are defined in G.S. 105-129.61. For the purpose of this subsection, the term "facility" has the same meaning as under G.S. 105-129.61.

c. If the facility is primarily engaged in financial services, securities operations, and related systems development, it satisfies all of the following conditions:

1. It is owned and operated by the business for which the services are provided or by a related entity of that business as defined in G.S. 105-130.7A.
2. No part of it is leased to a third-party tenant that is not a related entity of the business.

d. If the facility is primarily engaged in solar electricity generating materials manufacturing, the business satisfies a wage standard at the facility. The wage standard is equal to one hundred five percent (105%) of the lesser of the average weekly wage for all insured private employers in the State and the average weekly wage for all insured private employers in the county. A business satisfies the wage standard if it pays an average weekly wage that is at least equal to the amount required by this sub-subdivision. In making the wage calculation, the business must include any jobs that were filled for at least 1,600 hours during the calendar year.

(3) Industries. — This subsection applies to the following industries:

a. Air courier services. Air courier services has the same meaning as in G.S. 105-129.2.

b. Aircraft manufacturing. Aircraft manufacturing means the manufacturing or assembling of complete aircraft or of aircraft engines, blisks, fuselage sections, flight decks, flight deck systems or components, wings, fuselage fairings, fins, moving leading and trailing wing edges, wing boxes, nose sections, tailplanes, passenger doors, nacelles, thrust reversers, landing gear, braking systems, or any combination thereof.

c. Bioprocessing. Bioprocessing means biomanufacturing or processing that includes the culture of cells to make commercial products, the purification of biomolecules from cells, or the use of these molecules in manufacturing.

d. Computer manufacturing. Computer manufacturing means manufacturing or assembling electronic computers, such as personal computers, workstations, laptops, and computer servers. The term includes the assembly or integration of processors, coprocessors, memory, storage, and input/output devices into a user-programmable final product. The term includes manufacturing or assembling computer peripheral equipment, such as storage devices, printers, monitors, input/output devices, and terminals only if the manufacture or assembly of this peripheral equipment occurs at a facility or campus at which the taxpayer also manufactures or assembles electronic computers.

e. Reserved for future codification purposes.

f. Financial services, securities operations, and related systems development. Financial services, securities operations, and related systems development means one or both of the following functions:

    1. Performing analysis, operations, trading, or sales functions for investment banking, securities dealing and brokering, securities trading and underwriting, investment portfolio/mutual fund management, retirement services, or employee benefit administration.
    2. Developing information technology systems and applications, managing and enhancing operating applications and databases, or providing, operating, and maintaining telecommunications networks and distributed and mainframe computing resources for investment banking, securities dealing and brokering, securities trading and underwriting, investment portfolio/mutual fund management, retirement services, or employee benefit administration.

g. Motor vehicle manufacturing. Motor vehicle manufacturing means any of the following:
    1. Manufacturing complete automobiles and light-duty motor vehicles.
    2. Manufacturing heavy-duty truck chassis and assembling complete heavy-duty trucks, buses, heavy-duty motor homes, and other special purpose heavy-duty motor vehicles for highway use.
    3. Manufacturing complete military armored vehicles, nonarmored military universal carriers, combat tanks, and specialized components for combat tanks.

h. Reserved for future codification purposes.

i. Reserved for future codification purposes.

j. Pharmaceutical and medicine manufacturing and distribution of pharmaceuticals and medicines. Pharmaceutical and medicine manufacturing means any of the following:
    1. Manufacturing biological and medicinal products. For the purpose of this sub-subdivision, a biological product is a preparation that is synthesized from living organisms or their products and used medically as a diagnostic, preventive, or therapeutic agent. For the purpose of this sub-subdivision, bacteria, viruses, and their parts are considered living organisms.
    2. Processing botanical drugs and herbs by grading, grinding, and milling.
    3. Isolating active medicinal principals from botanical drugs and herbs.
    4. Manufacturing pharmaceutical products intended for internal and external consumption in forms such as ampoules, tablets, capsules, vials, ointments, powders, solutions, and suspensions.

k. Reserved for future codification purposes.

l. Reserved for future codification purposes.

m. Semiconductor manufacturing. Semiconductor manufacturing means development and production of semiconductor material, devices, or components.

n. Solar electricity generating materials manufacturing. Solar energy generating materials manufacturing means the development and production of one or more of the following:
    1. Photovoltaic materials or modules used in producing electricity.
    2. Polymers or polymer films primarily intended for incorporation into photovoltaic materials or modules used in producing electricity.

(4) Forfeiture. — If the owner of an eligible facility does not make the required minimum investment within five years after the first refund under this subsection with respect to the facility, the facility loses its eligibility and the owner forfeits all refunds already received under this subsection. Upon forfeiture, the owner is liable for tax under this Article equal to the amount of all past taxes refunded under this subsection, plus interest at the rate established in G.S. 105-241.21, computed from the date each refund was issued. The tax and interest are due 30 days after the date of the forfeiture. A person that fails to pay the tax and interest is subject to the penalties provided in G.S. 105-236.

(5) Sunset. This subsection is repealed for sales made on or after January 1, 2013.

(k) Reports. — The Department of Revenue shall publish by May 1 of each year the following information itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The number of taxpayers claiming a refund allowed in subsections (a1), (g), (h), (i), (j), and (l) of this section.

(2) The total amount of purchases with respect to which refunds were claimed.

(3) The total cost to the General Fund of the refunds claimed.

(*l*) **(Repealed for purchases made on or after January 1, 2011)** Aviation Fuel for Motorsports Events. — A professional motorsports racing team or a motorsports sanctioning body is allowed a refund of the sales and use tax paid by it in this State on aviation fuel that is used to travel to or from a motorsports event in this State, to travel to a motorsports event in another state from a location in this State, or to travel to this State from a motorsports event in another state. For the purposes of this subsection, a "motorsports event" includes a motorsports race, a motorsports sponsor event, and motor sports testing. A request for a refund must be in writing and must include any information and documentation the Secretary requires. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred. This subsection is repealed for purchases made on or after January 1, 2011.

(m) Professional Motor Racing Vehicles. — A professional motorsports racing team is allowed a refund of fifty percent (50%) of the sales and use tax paid by it in this State on tangible personal property, other than tires or accessories, that comprises any part of a professional motor racing vehicle. For the purposes of this subsection, "accessories" includes instrumentation, telemetry, consumables, and paint. A request for a refund must be in writing and must include any information and documentation the Secretary requires. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred.

(n) Analytical Services Supplies. — A taxpayer engaged in analytical services in this State is allowed a refund of sales and use tax paid by it in this State. The amount of the refund is the greater of the following:

(1) Fifty percent (50%) of the eligible amount sales and use tax paid by it on tangible personal property that is consumed or transformed in analytical service activities. The eligible amount of sales and use tax paid by the taxpayer in this State is the amount by which sales and use taxes paid by the taxpayer in this State in the fiscal year exceed the amount paid by the taxpayer in this State in the 2006-2007 State fiscal year.

(2) Fifty percent (50%) of the amount of sales and use tax paid by it in the fiscal year on medical reagents.

A request for a refund must be in writing and must include any information and documentation that the Secretary requires. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred.

(o) Eligible Railroad Intermodal Facilities. The owner or lessee of an eligible railroad intermodal facility is allowed an annual refund of sales and use taxes paid by it under this Article on building materials, building supplies, fixtures, and equipment that become a part of the real property of the facility. Liability incurred indirectly by the owner or lessee of the facility for sales and use taxes on these items is considered tax paid by the owner or lessee. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred. (1957, c. 1340, s. 5; 1961, c. 826, s. 2; 1963, cc. 169, 1134; 1965, c. 1006; 1967, c. 1110, s. 6; 1969, c. 1298, s. 1; 1971, cc. 89, 286; 1973, c. 476, s. 193; 1977, c. 895, s. 1; 1979, c. 47; c. 801, ss. 77, 79-82; 1983, c. 594, s. 1; c. 891, s. 13; 1983 (Reg. Sess., 1984), c. 1097, s. 7; 1985, cc. 431, 523; 1985 (Reg. Sess., 1986), c. 863, s. 5; 1987, c. 557, ss. 8, 9; c. 850, s. 16; 1987 (Reg. Sess., 1988), c. 1044, s. 5; 1989, c. 168, s. 5; c. 251; c. 780, s. 1.1; 1989 (Reg. Sess., 1990), c. 936, s. 4; 1991, c. 356, s. 1; c. 689, s. 190.1(b); 1991 (Reg. Sess., 1992), c. 814, s. 1; c. 917, s. 1; c. 1030, s. 25; 1995, c. 17, s. 8; c. 21, s. 1; c. 458, s. 7; c. 461, s. 13; c. 472, s. 1; 1995 (Reg. Sess., 1996), c. 646, s. 6; 1996, 2nd Ex. Sess., c. 18, s. 15.7(a); 1997-340, s. 1; 1997-393, s. 2; 1997-423, s. 1; 1997-426, s. 5; 1997-502, s. 3; 1998-55, ss. 16, 17; 1998-98, s. 15; 1998-212, ss. 29A.4(a), 29A.14(i), 29A.18(b); 1999-360, ss. 4, 5(a), (b), 9; 1999-438, s. 14; 2000-56, s. 9; 2000-140, s. 92.A(c); 2001-414, s. 1; 2001-474, s. 7; 2003-416, ss. 18(b)-(e), 23; 2003-431, ss. 2, 3; 2003-435, 2nd Ex. Sess., s. 4.1; 2004-110, s. 5.1; 2004-124, s. 32B.1; 2004-170, s. 21(a); 2004-204, 1st Ex. Sess., s. 3; 2005-276, ss. 7.27(a), 7.51(a), 33.12; 2005-429, s. 2.12; 2005-435, ss. 32(a), 33(a)-(c), 61, 61.1; 2006-33, s. 6; 2006-66, ss. 24.6(a), (b), (c), 24.10(b), 24.13(b), 24A.1(a); 2006-162, ss. 9, 27; 2006-168, s. 3.1; 2006-252, ss. 2.2, 2.3; 2007-323, ss. 31.10(a), 31.20(b), 31.23(d); 2007-345, s. 14.6(a); 2007-491, s. 44(1)a; 2008-107, ss. 28.22(a), 28.23(a), (b); 2008-118, s. 3.10(a); 2008-154, s. 1.)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Session Laws 2008-154, which added subdivision (b)(5) of this section, in s. 2, provides, in part: "Notwithstanding G.S. 105-164.14(b), a request for a refund of sales and use tax paid for the period January 1, 2004, through December 31, 2007, is timely filed if it is submitted to the Secretary of Revenue by October 15, 2008."

Effect of Amendments. —

Session Laws 2008-107, s. 28.22(a), effective July 1, 2008, and applicable to purchases made on or after that date, rewrote subdivision (b)(2); and deleted subdivision (b)(3), which read: "Churches, orphanages, and other charitable or religious institutions and organizations not operated for profit."

Session Laws 2008-107, ss. 28.23(a) and (b), effective July 16, 2008, substituted "January 1, 2011" for "January 1, 2009" in the last sentence of subsections (a1) and (*l*).

Session Laws 2008-118, s. 3.10(a), effective July 1, 2008, added sub-subdivisions (j)(2)d. and (j)(3)n.

Session Laws 2008-154, s. 1, effective January 1, 2004, and applicable to purchases made on or after that date, added subdivision (b)(5). See Editor's note for additional applicability provisions.

CASE NOTES

Corporation Was Charitable Organization Entitled to Refund. — Taxpayer was properly granted summary judgment in the taxpayer's action to recover a refund of a portion of sales and use taxes it paid because there was no genuine issue of material fact as to whether the taxpayer was a charitable organization when the taxpayer did not operate for a profit, and it used purchases for carrying on the work of its charitable programs; the taxpayer was a charitable organization created and maintained for the purpose of dispensing public good or benevolence, and the taxpayer only sought to recover sales and use taxes it paid with respect to products and services used to preserve a mansion and operate an institute. Lynnwood Found. v. N.C. Dep't of Revenue, — N.C. App. —, 660 S.E.2d 611, 2008 N.C. App. LEXIS 991 (2008).

Part 4. Reporting and Payment.

§ 105-164.16. Returns and payment of taxes.

(a) General. — Sales and use taxes are payable when a return is due. A return is due quarterly or monthly as specified in this section. A return must be filed with the Secretary on a form prescribed by the Secretary and in the manner required by the Secretary. A return must be signed by the taxpayer or the taxpayer's agent.

A sales tax return must state the taxpayer's gross sales for the reporting period, the amount and type of sales made in the period that are exempt from tax under G.S. 105-164.13 or are elsewhere excluded from tax, the amount of tax due, and any other information required by the Secretary. A use tax return must state the purchase price of tangible personal property or services that were purchased or received during the reporting period and are subject to tax under G.S. 105-164.6, the amount of tax due, and any other information required by the Secretary. Returns that do not contain the required information will not be accepted. When an unacceptable return is submitted, the Secretary will require a corrected return to be filed.

(b) Quarterly. — A taxpayer who is consistently liable for less than one hundred dollars ($100.00) a month in State and local sales and use taxes must file a return and pay the taxes due on a quarterly basis. A quarterly return covers a calendar quarter and is due by the last day of the month following the end of the quarter.

(b1) Monthly. — A taxpayer who is consistently liable for at least one hundred dollars ($100.00) but less than ten thousand dollars ($10,000) a month in State and local sales and use taxes must file a return and pay the taxes due on a monthly basis. A monthly return is due by the 20th day of the month following the calendar month covered by the return.

(b2) Prepayment. — A taxpayer who is consistently liable for at least ten thousand dollars ($10,000) a month in State and local sales and use taxes must make a monthly prepayment of the next month's tax liability. The prepayment is due on the date a monthly return is due. The prepayment must equal at least sixty-five percent (65%) of any of the following:

(1) The amount of tax due for the current month.
(2) The amount of tax due for the same month in the preceding year.
(3) The average monthly amount of tax due in the preceding calendar year.

(b3) Category. — The Secretary must monitor the amount of State and local sales and use taxes paid by a taxpayer or estimate the amount of taxes to be paid by a new taxpayer and must direct each taxpayer to pay tax and file returns as required by this section. In determining the amount of taxes due from a taxpayer, the Secretary must consider the total amount due from all places of business owned or operated by the same person as the amount due from that person. A taxpayer must file a return and pay tax in accordance with the Secretary's direction.

(c) Repealed by Session Laws 2001-427, s. 6(a), effective January 1, 2002, and applicable to taxes levied on or after that date.

(d) **(Effective for taxable years beginning before January 1, 2010)** Use Tax on Out-of-State Purchases. — Use tax payable by an individual who purchases tangible personal property, excluding purchases of boats and

G.S. 105.164.16(d) is set out twice. See note.

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aircraft, outside the State for a nonbusiness purpose is due on an annual basis. For an individual who is not required to file an individual income tax return under Part 2 of Article 4 of this Chapter, the annual reporting period ends on the last day of the calendar year and a use tax return is due by the following April 15. For an individual who is required to file an individual income tax return, the annual reporting period ends on the last day of the individual's income tax year, and the use tax must be paid on the income tax return as provided in G.S. 105-269.14.

(d) **(Effective for taxable years beginning on or after January 1, 2010)** Use Tax on Out-of-State Purchases. — Notwithstanding subsection (b), an individual who purchases tangible personal property, excluding purchases of boats and aircraft, outside the State for a nonbusiness purpose shall file a use tax return on an annual basis. The annual reporting period ends on the last day of the calendar year. The return is due by the due date, including any approved extensions, for filing the individual's income tax return.

(e) Simultaneous State and Local Changes. — When State and local sales and use tax rates change on the same date because one increases and the other decreases but the combined general rate does not change, sales and use taxes payable on the gross receipts from the following periodic payments are reportable in accordance with the changed State and local rates:

(1) Lease or rental payments billed after the effective date of the changes.

(2) Installment sale payments received after the effective date of the changes by a taxpayer who reports the installment sale on a cash basis. (1957, c. 1340, s. 5; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1979, c. 801, s. 83; 1983 (Reg. Sess., 1984), c. 1097, s. 14; 1985, c. 656, s. 26; 1985 (Reg. Sess., 1986), c. 1007; 1987, c. 557, s. 6; 1989 (Reg. Sess., 1990), c. 945, s. 1; 1991, c. 690, s. 4; 1993, c. 450, s. 7; 1997-77, s. 1; 1998-121, s. 1; 1999-341, s. 1; 2000-120, s. 11; 2001-347, s. 2.14; 2001-414, s. 18; 2001-427, s. 6(a); 2001-430, s. 7; 2002-184, ss. 10, 11; 2003-284, ss. 44.1, 45.8; 2003-416, s. 26; 2005-276, s. 33.24; 2006-162, s. 5(b); 2006-33, s. 9; 2007-527, ss. 11, 12; 2008-134, s. 11.)

Effect of Amendments. —
Session Laws 2008-134, s. 11, effective July 28, 2008, added subsection (e).

Part 8. Administration and Enforcement.

§ 105-164.44I. Distribution of part of sales tax on video programming service and telecommunications service to counties and cities.

(a) Distribution. — The Secretary must distribute to the counties and cities part of the taxes imposed by G.S. 105-164.4(a)(4c) on telecommunications service and G.S. 105-164.4(a)(6) on video programming service. The Secretary must make the distribution within 75 days after the end of each calendar quarter. The amount the Secretary must distribute is the sum of the revenue listed in this subsection. The Secretary must distribute two million dollars ($2,000,000) of this amount in accordance with subsection (b) of this section and the remainder in accordance with subsections (c) and (d) of this section. The revenue to be distributed under this section consists of the following:

(1) The amount specified in G.S. 105-164.44F(a)(2).

(2) Twenty three and six tenths percent (23.6%) of the net proceeds of the taxes collected during the quarter on video programming, other than on direct-to-home satellite service.

(3) Thirty-seven and one tenths percent (37.1%) of the net proceeds of the taxes collected during the quarter on direct-to-home satellite service.

(b) Supplemental PEG Channel Support. — G.S. 105-164.44J sets out the requirements for receipt by a county or city of supplemental PEG channel support funds distributed under this subsection. The Secretary must include the applicable amount of supplemental PEG channel support in each quarterly distribution to a county or city. The amount to include is one-fourth of twenty-five thousand dollars ($25,000) for each qualifying PEG channel certified by the county or city under G.S. 105-164.44J. A county or city may not receive PEG channel support under this subsection for more than three qualifying PEG channels.

The amount of money distributed under this subsection may not exceed two million dollars ($2,000,000) in a fiscal year, plus the amount of any funds returned to the Secretary in the prior fiscal year under G.S. 105-164.44J(d). If the amount to be distributed for qualifying PEG channels in a fiscal year would otherwise exceed this maximum amount, the Secretary must proportionately reduce the applicable amount distributable for each PEG channel. If the amount to be distributed for qualifying PEG channels in a fiscal year is less than this maximum amount, the Secretary must credit the excess amount to the PEG Channel Fund established in G.S. 66-359. For purposes of this subsection, the term "qualifying PEG channel" has the same meaning as in G.S. 105-164.44J.

(c) 2006-2007 Fiscal Year Distribution. — The share of a county or city is its proportionate share of the amount to be distributed to all counties and cities under this subsection. The proportionate share of a county or city is the base amount for the county or city compared to the base amount for all other counties and cities. The base amount of a county or city that did not impose a cable franchise tax under G.S. 153A-154 or G.S. 160A-214 before July 1, 2006, is two dollars ($2.00) times the most recent annual population estimate for that county or city. The base amount of a county or city that imposed a cable franchise tax under either G.S. 153A-154 or G.S. 160A-214 before July 1, 2006, is the amount of cable franchise tax and subscriber fee revenue the county or city certifies to the Secretary that it imposed during the first six months of the 2006-2007 fiscal year. A county or city must make this certification by March 15, 2007. The certification must specify the amount of revenue that is derived from the cable franchise tax and the amount that is derived from the subscriber fee.

(c1) Revised Certification. — If a county or city determines that the amount of cable franchise tax it imposed during the first six months of the 2006-2007 fiscal year differs from the amount certified to the Secretary under subsection (c) of this section, the county or city may submit a new certification to the Secretary revising the amount. For distributions for quarters beginning on or after October 1, 2007, the Secretary must determine the proportionate share of a county or city based upon certifications submitted on or before October 1, 2007. For distributions for quarters beginning on or after April 1, 2008, the Secretary must determine the proportionate share of a county or city based upon certifications submitted on or before April 1, 2008. Certifications submitted after April 1, 2008, may not be used to adjust a county's or city's base amount under subsection (c) of this section.

(d) Subsequent Distributions. — For subsequent fiscal years, the Secretary must multiply the amount of a county's or city's share under this section for the preceding fiscal year by the percentage change in its population for that fiscal year and add the result to the county's or city's share for the preceding fiscal year to obtain the county's or city's adjusted amount. Each county's or city's proportionate share for that year is its adjusted amount compared to the sum of the adjusted amounts for all counties and cities.

(e) Use of Proceeds. — A county or city that imposed subscriber fees during the first six months of the 2006-2007 fiscal year must use a portion of the funds distributed to it each fiscal year under subsections (c) and (d) of this section for the operation and support of PEG channels. The amount of funds that must be used for PEG channel operation and support in fiscal year 2006-2007 is two times the amount of subscriber fee revenue the county or city certified to the Secretary that it imposed during the first six months of the 2006-2007 fiscal year. The amount of funds that must be used for PEG channel operation and support in subsequent fiscal years is the same proportionate amount of the funds that were distributed under subsections (c) and (d) of this section and used for this purpose in fiscal year 2006-2007.

A county or city that used part of its franchise tax revenue in fiscal year 2005-2006 for the operation and support of PEG channels or a publicly owned and operated television station must use the funds distributed to it under subsections (c) and (d) of this section to continue the same level of support for the PEG channels and public stations. The remainder of the distribution may be used for any public purpose.

(f) Late Information. — A county or city that does not submit information that the Secretary needs to make a distribution by the date the information is due is excluded from the distribution. If the county or city later submits the required information, the Secretary must include the county or city in the distribution for the quarter that begins after the date the information is received.

(g) Population Determination. — In making population determinations under this section, the Secretary must use the most recent annual population estimates certified to the Secretary by the State Budget Officer. For purposes of the distributions made under this section, the population of a county is the population of its unincorporated areas plus the population of an ineligible city in the county, as determined under this section.

(h) City Changes. — The following changes apply when a city alters its corporate structure or incorporates:

(1) If a city dissolves and is no longer incorporated, the proportional shares of the remaining counties and cities must be recalculated to adjust for the dissolution of that city.
(2) If two or more cities merge or otherwise consolidate, their proportional shares are combined.
(3) If a city divides into two or more cities, the proportional share of the city that divides is allocated among the new cities on a per capita basis.
(4) If a city incorporates after January 1, 2007, and the incorporation is not addressed by subdivisions (2) or (3) of this subsection, the share of the county in which the new city is located is allocated between the county and the new city on a per capita basis.

(i) Ineligible Cities. — An ineligible city is disregarded for all purposes under this section. A city incorporated on or after January 1, 2000, is not eligible for a distribution under this section unless it meets both of the following requirements:

(1) It is eligible to receive funds under G.S. 136-41.2.
(2) A majority of the mileage of its streets is open to the public.

(j) Nature. — The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution. (2006-151, s. 8; 2006-66, ss. 24.1(h), (i); 2007-145, s. 9(a); 2007-323, ss. 31.2(a), (b); 2007-527, s. 28; 2008-148, ss. 1, 2.)

Effect of Amendments. —
Session Laws 2008-148, ss. 1 and 2, effective August 2, 2008, rewrote subsections (b) and (e).

§ 105-164.44J. Supplemental PEG channel support.

(a) Definitions. — The following definitions apply in this section:
- (1) Existing agreement. — Defined in G.S. 66-350.
- (2) PEG channel. — Defined in G.S. 66-350.
- (3) PEG channel operator. — An entity that does one or more of the following:
  - a. Produces programming for delivery on a PEG channel.
  - b. Provides facilities for the production of programming or playback of programming for delivery on a PEG channel.
- (4) Qualifying PEG channel. — A PEG channel that operates for at least 90 days during a fiscal year and that meets all of the following programming requirements:
  - a. It delivers at least eight hours of scheduled programming a day.
  - b. It delivers at least six hours and 45 minutes of scheduled, non-character-generated programming a day.
  - c. Its programming content does not repeat more than fifteen percent (15%) of the programming content on any other PEG channel provided to the same county or city.
- (5) Supplemental PEG channel support funds. — The amount distributed to a county or city under G.S. 105-164.44I(b).

(b) Certification. — A county or city must certify to the Secretary by July 15 of each year all of the qualifying PEG channels provided for its use during the preceding fiscal year by a cable service provider under either G.S. 66-357 or an existing agreement. The certification must include all of the following:
- (1) An identification of each channel as a public, an education, or a government channel.
- (2) The name and signature of the PEG channel operator for each channel. If a qualifying PEG channel has more than one PEG channel operator, the county or city must include the name of each operator of the PEG channel. A PEG channel operator may be included on the certification of only one county or city for each type of PEG channel that it operates.
- (3) Any other information required by the Secretary.

(c) Use of Funds. — A county or city must use the supplemental PEG channel support funds distributed to it for the operation and support of each of the qualifying PEG channels it certifies by allocating the amount it receives equally among each of the qualifying PEG channels. A county or city must distribute the supplemental PEG channel support funds to the PEG channel operator of the qualifying PEG channel within 30 days of its receipt of the supplemental PEG channel support funds from the Department, or as specified in an interlocal agreement. If a qualifying PEG channel has more than one PEG channel operator, the county or city must distribute the amount allocated for that PEG channel equally to each PEG channel operator, or as specified in an interlocal agreement.

(d) Errors in Certification. — If a county or city determines that it certified a PEG channel in error, the county or city must submit a revised certification to the Secretary, and the county or city must return all supplemental PEG channel support funds distributed to it as a result of the error. The Secretary must add the funds returned to the total amount of supplemental PEG channel support funds to be allocated in the following fiscal year. (2008-148, s. 3.)

Editor's Note. — Session Laws 2008-148, s. 6, made this section effective August 2, 2008.

Session Laws 2008-148, s. 4, provides: "Notwithstanding G.S. 105-164.44J(b), as enacted by this act, certifications of qualifying PEG channels for use in distributing fiscal year 2008-2009 supplemental PEG channel support funds may be submitted to the Secretary on or before September 15, 2008. The distribution of supplemental PEG channel support funds made within 75 days after June 30, 2008, must be based on the qualifying PEG channel certification in effect for the prior distribution."

Article 5A.

North Carolina Highway Use Tax.

§ 105-187.9. (For effective date, see note) Disposition of tax proceeds.

(a) Distribution. — Taxes collected under this Article at the rate of eight percent (8%) shall be credited to the General Fund. Taxes collected under this Article at the rate of three percent (3%) shall be credited to the North Carolina Highway Trust Fund.

(b) **(Effective until July 1, 2009)** Transfer. — In each fiscal year the State Treasurer shall transfer the amounts provided below from the taxes deposited in the Trust Fund to the General Fund. The transfer of funds authorized by this section may be made by transferring one-fourth of the amount at the end of each quarter in the fiscal year or by transferring the full amount annually on July 1 of each fiscal year, subject to the availability of revenue.

(1) The sum of one hundred forty-five million dollars ($145,000,000).

(2) In addition to the amount transferred under subdivision (1) of this subsection, the sum of one million seven hundred thousand dollars ($1,700,000) shall be transferred in the 2001-2002 fiscal year. The amount distributed under this subdivision shall increase in the 2002-2003 fiscal year to the sum of two million four hundred thousand dollars ($2,400,000). In each fiscal year thereafter, the sum transferred under this subdivision shall be the amount distributed in the previous fiscal year plus or minus a percentage of this sum equal to the percentage by which tax collections under this Article increased or decreased for the most recent 12-month period for which data are available.

(b) **(Effective July 1, 2009 until July 1, 2010)** Transfer. — In each fiscal year the State Treasurer shall transfer the amounts provided below from the taxes deposited in the Trust Fund to the General Fund. The transfer of funds authorized by this section may be made by transferring one-fourth of the amount at the end of each quarter in the fiscal year or by transferring the full amount annually on July 1 of each fiscal year, subject to the availability of revenue.

(1) The sum of one hundred six million dollars ($106,000,000).

(2) In addition to the amount transferred under subdivision (1) of this subsection, the sum of one million seven hundred thousand dollars ($1,700,000) shall be transferred in the 2001-2002 fiscal year. The amount distributed under this subdivision shall increase in the 2002-2003 fiscal year to the sum of two million four hundred thousand dollars ($2,400,000). In each fiscal year thereafter, the sum transferred under this subdivision shall be the amount distributed in the previous fiscal year plus or minus a percentage of this sum equal to

the percentage by which tax collections under this Article increased or decreased for the most recent 12-month period for which data are available.

(b) **(Effective July 1, 2010)** Transfer. — In each fiscal year the State Treasurer shall transfer the amounts provided below from the taxes deposited in the Trust Fund to the General Fund. The transfer of funds authorized by this section may be made by transferring one-fourth of the amount at the end of each quarter in the fiscal year or by transferring the full amount annually on July 1 of each fiscal year, subject to the availability of revenue.

(1) The sum of seventy-one million dollars ($71,000,000).

(2) In addition to the amount transferred under subdivision (1) of this subsection, the sum of one million seven hundred thousand dollars ($1,700,000) shall be transferred in the 2001-2002 fiscal year. The amount distributed under this subdivision shall increase in the 2002-2003 fiscal year to the sum of two million four hundred thousand dollars ($2,400,000). In each fiscal year thereafter, the sum transferred under this subdivision shall be the amount distributed in the previous fiscal year plus or minus a percentage of this sum equal to the percentage by which tax collections under this Article increased or decreased for the most recent 12-month period for which data are available. (1989, c. 692, s. 4.1; c. 799, s. 33; 1993, c. 321, s. 164(a); 2001-424, s. 34.24(c); 2001-513, s. 15; 2008-107, s. 25.5(a), (c), (e).)

Subsection (b) Set Out Three Times. — The first version of subsection (b) set out above is effective until July 1, 2009. The second version of subsection (b) set out above is effective July 1, 2009 until July 1, 2010. The third version of subsection (b) set out above is effective July 1, 2010.

Editor's Note. —

Session Laws 2007-323, s. 2.2(d), as amended by Session Laws 2008-107, s. 2.2(d), provides: "Notwithstanding the provisions of G.S. 105-187.9(b)(1), the sum to be transferred under that subdivision for the 2007-2008 fiscal year is one hundred seventy million dollars ($170,000,000) and for the 2008-2009 fiscal year is one hundred forty-five million dollars ($145,000,000)."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 25.5(a), effective July 1, 2008, substituted "forty-five million dollars ($145,000,000)" for "seventy million dollars ($170,000,000)" in subdivision (b)(1).

Session Laws 2008-107, s. 25.5(c), effective July 1, 2009, substituted "one hundred six million dollars ($106,000,000)" for "one hundred forty-five million dollars ($145,000,000)" in subdivision (b)(1).

Session Laws 2008-107, s. 25.5(e), effective July 1, 2010, substituted "seventy-one million dollars ($71,000,000)" for "one hundred six million dollars ($106,000,000)" in subdivision (b)(1).

ARTICLE 5F.

Manufacturing Fuel and Certain Machinery and Equipment.

§ 105-187.51B. Tax imposed on certain recyclers, research and development companies, and industrial machinery refurbishing companies.

(a) Tax. — A privilege tax is imposed on the following:

(1) A major recycling facility that purchases any of the following tangible personal property for use in connection with the facility:
  a. Cranes, structural steel crane support systems, and foundations related to the cranes and support systems.
  b. Port and dock facilities.
  c. Rail equipment.
  d. Material handling equipment.

(2) A research and development company in the physical, engineering, and life sciences that is included in industry 54171 of NAICS and that purchases equipment or an attachment or repair part for equipment that meets all of the following requirements:
  a. Is capitalized by the company for tax purposes under the Code.
  b. Is used by the company in the research and development of tangible personal property.
  c. Would be considered mill machinery or mill machinery parts or accessories under G.S. 105-187.51 if it were purchased by a manufacturing industry or plant and used in the research and development of tangible personal property manufactured by the industry or plant.

(3) A software publishing company that is included in the industry group 5112 of NAICS and that purchases equipment or an attachment or repair part for equipment that meets all of the following requirements:
  a. Is capitalized by the company for tax purposes under the Code.
  b. Is used by the company in the research and development of tangible personal property.
  c. Would be considered mill machinery under G.S. 105-187.51 if it were purchased by a manufacturing industry or plant and used in the research and development of tangible personal property manufactured by the industry or plant.

(4) An industrial machinery refurbishing company that is included in industry group 811310 of NAICS and that purchases equipment or an attachment or repair part for equipment that meets all of the following requirements:
  a. Is capitalized by the company for tax purposes under the Code.
  b. Is used by the company in repairing or refurbishing tangible personal property.
  c. Would be considered mill machinery under G.S. 105-187.51 if it were purchased by a manufacturing industry or plant and used by the industry or plant to manufacture tangible personal property.

(b) Rate. — The tax is one percent (1%) of the sales price of the equipment or other tangible personal property. The maximum tax is eighty dollars ($80.00) per article. (2005-276, s. 33.21; 2006-66, s. 24.9(a); 2006-196, s. 12; 2007-323, s. 31.7(a); 2007-527, s. 13(a); 2008-107, s. 28.21(a).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.21(a), effective July 1, 2008, and applicable to purchases made on or after that date, rewrote the heading and added subdivision (a)(4).

ARTICLE 5G.

Solid Waste Disposal Tax.

§ 105-187.62. Administration.

(a) Collection. — The owner or operator of each landfill and transfer station permitted pursuant to Article 9 of Chapter 130A of the General Statutes must maintain scales designed to determine waste tonnage that are approved by the Department of Agriculture and Consumer Services. Each owner or operator must record waste tonnage disposed of in a landfill or transferred to a station for disposal outside the State and must maintain other records as required by the Secretary of Revenue. An owner or operator may add the amount of the solid waste disposal tax due to the charges made to a third party for disposal of municipal solid waste or construction and demolition debris.

(b) Payment. — The tax imposed by this Article is payable when a return is due. A return and payment are due on a quarterly basis. A quarterly return covers a calendar quarter and is due by the last day of the month following the end of the quarter.

(c) Bad Debt Deduction. — In the event that an owner or operator pays the tax on tonnage received from a customer and the account of that customer is found to be worthless and charged off for income tax purposes, the owner or operator may recover the tax paid on the tonnage it received but for which it was never compensated. The tax shall be recovered by reducing the overall tonnage on which the owner or operator pays tax in a calendar quarter by the tonnage for which it was never compensated from the worthless account. A local government that has paid tax on an account that is subsequently found to be worthless shall recover the tax paid in the same manner, if it meets all the conditions for recovery that would apply if the local government were subject to income tax. If the owner or operator subsequently collects on an account that has been declared worthless, any tax recovered must be repaid in the next calendar quarter. (2007-550, s. 14(a); 2008-207, s. 1.)

Effect of Amendments. — Session Laws 2008-207, s. 1, effective August 9, 2008, designated the previously existing provisions as subsection (a); in subsection (a), inserted "Collection. —" at the beginning, substituted "must" for "shall" in the first sentence and near the beginning of the second sentence, substituted "disposed of in a landfill or transferred to a station for disposal outside the State and must" for "at the time the waste is received and" in the second sentence, deleted the last sentence, which read: "The tax imposed by this Article is payable and a return is due to be filed in the same manner as required under G.S. 105-164.16 for sales and use tax"; and added subsections (b) and (c).

§ 105-187.63. Use of tax proceeds.

From the taxes received pursuant to this Article, the Secretary may retain the costs of collection, not to exceed two hundred twenty-five thousand dollars ($225,000) a year, as reimbursement to the Department. The Secretary must credit or distribute taxes received pursuant to this Article, less the cost of collection, on a quarterly basis as follows:

(1) Fifty percent (50%) to the Inactive Hazardous Sites Cleanup Fund established by G.S. 130A-310.11.

(2) Thirty-seven and one-half percent (37.5%) to cities and counties in the State on a per capita basis, using the most recent annual estimate of population certified by the State Budget Officer. One-half of this amount must be distributed to cities, and one-half of this amount must be distributed to counties. For purposes of this distribution, the

population of a county does not include the population of a city located in the county.

A city or county is excluded from the distribution under this subdivision if it does not provide solid waste management programs and services and is not responsible by contract for payment for these programs and services, unless it is served by a regional solid waste management authority established under Article 22 of Chapter 153A of the General Statutes. The Department of Environment and Natural Resources must provide the Secretary with a list of the cities and counties that are excluded under this subdivision. The list must be provided by May 15 of each year and applies to distributions made in the fiscal year that begins on July 1 of that year.

Funds distributed under this subdivision must be used by a city or county solely for solid waste management programs and services. A city or county that receives funds under this subdivision and is served by a regional solid waste management authority must forward the amount it receives to that authority.

(3) Twelve and one-half percent (12.5%) to the Solid Waste Management Trust Fund established by G.S. 130A-309.12. (2007-543, s. 2; 2007-550, s. 14(a); 2008-207, s. 2.)

Editor's Note. —

Session Laws 2008-207, s. 3, provides: "Notwithstanding G.S. 105-187.63(2), as amended by this act, the Department of Environment and Natural Resources must provide a list to the Secretary of Revenue of the cities and counties that are excluded from the distribution under that subdivision by September 15, 2008. The list applies to distributions made in fiscal year 2008-2009."

Effect of Amendments. —

Session Laws 2008-207, s. 2, effective August 9, 2008, in the second sentence of the introductory paragraph, substituted "Secretary must credit" for "Secretary shall credit," and inserted "on a quarterly basis"; and rewrote subdivision (2).

ARTICLE 6.

Gift Taxes.

§ 105-188. (Repealed effective January 1, 2009) Gift taxes; classification of beneficiaries; exemptions; rates of tax.

Article 6 Repealed Effective January 1, 2009. — This section is repealed effective January 1, 2009, by Session Laws 2008-107, s. 28.18(a).

Session Laws 2008-107, s. 28.18(e), provides: "This section does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute repealed by this act before the effective date of its repeal; nor does it affect the right to any refund or credit of a tax that accrued under the repealed statute before the effective date of its repeal."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

§ 105-188.1. (Repealed effective January 1, 2009) Powers of appointment.

Article 6 Repealed Effective January 1, 2009. — This section is repealed effective January 1, 2009, by Session Laws 2008-107, s. 28.18(a).

§ 105-189. (Repealed effective January 1, 2009) Transfer for less than adequate and full consideration.

Article 6 Repealed Effective January 1, 2009. — This section is repealed effective January 1, 2009, by Session Laws 2008-107, s. 28.18(a).

§ 105-190. (Repealed effective January 1, 2009) Gifts made in property.

Article 6 Repealed Effective January 1, 2009. — This section is repealed effective January 1, 2009, by Session Laws 2008-107, s. 28.18(a).

§ 105-193. (Repealed effective January 1, 2009) Lien for tax; collection of tax.

Article 6 Repealed Effective January 1, 2009. — This section is repealed effective January 1, 2009, by Session Laws 2008-107, s. 28.18(a).

§ 105-194. (Repealed effective January 1, 2009) Death of donor within three years; time of assessment.

Article 6 Repealed Effective January 1, 2009. — This section is repealed effective January 1, 2009, by Session Laws 2008-107, s. 28.18(a).

§ 105-195. (Repealed effective January 1, 2009) Tax to be assessed upon actual value of property; manner of determining value of annuities, life estates and interests less than absolute interest.

Article 6 Repealed Effective January 1, 2009. — This section is repealed effective January 1, 2009, by Session Laws 2008-107, s. 28.18(a).

§ 105-197. (Repealed effective January 1, 2009) When return required; due date of tax and return.

Article 6 Repealed Effective January 1, 2009. — This section is repealed effective January 1, 2009, by Session Laws 2008-107, s. 28.18(a).

§ 105-197.1. (Repealed effective January 1, 2009) Federal corrections.

Article 6 Repealed Effective January 1, 2009. — This section is repealed effective January 1, 2009, by Session Laws 2008-107, s. 28.18(a).

Article 8B.

Taxes Upon Insurance Companies.

§ 105-228.5B. (Effective until June 30, 2010) Proceeds credited to High Risk Pool.

Within 75 days after the end of each fiscal year, the State Treasurer must transfer from the General Fund to the North Carolina Health Insurance Risk Pool Fund established in G.S. 58-50-225 an amount equal to the growth in net revenue from the tax applied to gross premiums under G.S. 105-228.5(d)(2). The growth in revenue from this tax is the difference between the amount of revenue collected during the preceding fiscal year on premiums taxed under that subdivision less $475,545,413, which is the amount of revenue collected during fiscal year 2006-2007 on premiums taxed under that subdivision. The Treasurer must draw the amount required under this section from revenue collected on premiums taxed under that subdivision. (2007-532, s. 4(a); 2008-118, s. 3.2(d).)

Section Set Out Twice. — The section above is effective until June 30, 2010. For the section as amended June 30, 2010, see the following section, also numbered G.S. 105-228.5B.

Effect of Amendments. — Session Laws 2008-118, s. 3.2(d), effective July 1, 2008, deleted "Special" following "Risk Pool" in the first sentence.

§ 105-228.5B. (Effective June 30, 2010) Distribution of part of tax proceeds to High Risk Pool.

Within 75 days after the end of each fiscal year, the State Treasurer must transfer from the General Fund to the North Carolina Health Insurance Risk Pool Fund established in G.S. 58-50-225 an amount equal to thirty percent (30%) of the growth in revenue from the tax applied to gross premiums under G.S. 105-228.5(d)(2). The growth in revenue from this tax is the difference between the amount of revenue collected during the preceding fiscal year on premiums taxed under that subdivision less $475,545,413, which is the amount of revenue collected during fiscal year 2006-2007 on premiums taxed under that subdivision. The Treasurer must draw the amount required under this section from revenue collected on premiums taxed under that subdivision. (2007-532, s. 4(a), (b); 2008-118, s. 3.2(d), (e).)

Section Set Out Twice. — The section above is effective June 30, 2010. For the section as in effect until June 30, 2010, see the preceding section also numbered G.S. 105-228.5B.

Effect of Amendments. —

Session Laws 2008-118, s. 3.2(d), effective July 1, 2008, deleted "Special" following "Risk Pool" in the first sentence.

Session Laws 2008-118, s. 3.2(e), effective June 30, 2010, and applicable to the transfer at the end of fiscal year 2009-2010, substituted "Distribution of part of tax proceeds" for "Proceeds credited" in the section heading, and inserted "thirty percent (30%) of" in the first sentence.

Article 8E.

Excise Tax on Conveyances.

Editor's Note. — The Article 8E heading has been set out in the supplement to correct a publishing error in the main volume.

ARTICLE 9.

General Administration; Penalties and Remedies.

§ 105-228.90. Scope and definitions.

(a) Scope. — This Article applies to Subchapters I, V, and VIII of this Chapter, to the annual report filing requirements of G.S. 55-16-22, to the primary forest product assessment levied under Article 12 of Chapter 113A of the General Statutes, and to inspection taxes levied under Article 3 of Chapter 119 of the General Statutes.

(b) Definitions. — The following definitions apply in this Article:

(1) Charter school. — A nonprofit corporation that has a charter under G.S. 115C-238.29D to operate a charter school.

(1a) City. — A city as defined by G.S. 160A-1(2). The term also includes an urban service district defined by the governing board of a consolidated city-county, as defined by G.S. 160B-2(1).

(1b) Code. — The Internal Revenue Code as enacted as of May 1, 2008, including any provisions enacted as of that date which become effective either before or after that date.

(1c) County. — Any one of the counties listed in G.S. 153A-10. The term also includes a consolidated city-county as defined by G.S. 160B-2(1).

(2) Department. — The Department of Revenue.

(3) Electronic Funds Transfer. — A transfer of funds initiated by using an electronic terminal, a telephone, a computer, or magnetic tape to instruct or authorize a financial institution or its agent to credit or debit an account.

(4) Income tax return preparer. — Any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by Article 4 of this Chapter or any claim for refund of tax imposed by Article 4 of this Chapter. For purposes of this definition, the completion of a substantial portion of a return or claim for refund is treated as the preparation of the return or claim for refund. The term does not include a person merely because the person (i) furnishes typing, reproducing, or other mechanical assistance, (ii) prepares a return or claim for refund of the employer, or an officer or employee of the employer, by whom the person is regularly and continuously employed, (iii) prepares as a fiduciary a return or claim for refund for any person, or (iv) represents a taxpayer in a hearing regarding a proposed assessment.

(4d) Pass-through entity. — An entity or business, including a limited partnership, a general partnership, a joint venture, a Subchapter S Corporation, or a limited liability company, all of which is treated as owned by individuals or other entities under the federal tax laws, in which the owners report their share of the income, losses, and credits from the entity or business on their income tax returns filed with this State. For the purpose of this section, an owner of a pass-through entity is an individual or entity who is treated as an owner under the federal tax laws.

(5) Person. — An individual, a fiduciary, a firm, an association, a partnership, a limited liability company, a corporation, a unit of government, or another group acting as a unit. The term includes an officer or employee of a corporation, a member, a manager, or an employee of a limited liability company, and a member or employee of a partnership who, as officer, employee, member, or manager, is under a duty to perform an act in meeting the requirements of Subchapter I,

V, or VIII of this Chapter, of G.S. 55-16-22, of Article 12 of Chapter 113A of the General Statutes, or of Article 3 of Chapter 119 of the General Statutes.

(6) Secretary. — The Secretary of Revenue.

(7) Tax. — A tax levied under Subchapter I, V, or VIII of this Chapter, the primary forest product assessment levied under Article 12 of Chapter 113A of the General Statutes, or an inspection tax levied under Article 3 of Chapter 119 of the General Statutes. Unless the context clearly requires otherwise, the term "tax" includes penalties and interest as well as the principal amount.

(8) Taxpayer. — A person subject to the tax or reporting requirements of Subchapter I, V, or VIII of this Chapter, of Article 12 of Chapter 113A of the General Statutes, or of Article 3 of Chapter 119 of the General Statutes. (1991 (Reg. Sess., 1992), c. 930, s. 13; 1993, c. 12, s. 1; c. 354, s. 18; c. 450, s. 1; 1993 (Reg. Sess., 1994), c. 662, s. 1; c. 745, s. 13; 1995, c. 17, s. 9; c. 461, s. 14; 1995 (Reg. Sess., 1996), c. 664, s. 1; 1997-55, s. 1; 1997-475, s. 6.9; 1998-171, s. 1; 1999-415, s. 1; 2000-72, s. 1; 2000-126, s. 1; 2000-140, s. 69; 2001-414, s. 23; 2001-427, s. 4(a); 2002-106, s. 1; 2002-126, s. 30C.1(a); 2003-25, s. 1; 2003-284, s. 37A.1; 2003-416, s. 4(d); 2004-110, s. 1.1; 2005-276, ss. 35.1(a), (d); 2006-18, s. 1; 2007-323, s. 31.1(a); 2007-491, s. 25; 2008-107, s. 28.1(a).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 28.1(b), provides: "Notwithstanding subsection (a) of this section, any amendments to the Internal Revenue Code enacted after January 1, 2007, that increase North Carolina taxable income for the 2007 taxable year become effective for taxable years beginning on or after January 1, 2008."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.1(a), effective July 16, 2008, substituted "May 1, 2008" for "January 1, 2007" in subdivision (b)(1b).

§ 105-236. Penalties; situs of violations; penalty disposition.

(a) Penalties. — The following civil penalties and criminal offenses apply:

(1) Penalty for Bad Checks. — When the bank upon which any uncertified check tendered to the Department of Revenue in payment of any obligation due to the Department returns the check because of insufficient funds or the nonexistence of an account of the drawer, the Secretary shall assess a penalty equal to ten percent (10%) of the check, subject to a minimum of one dollar ($1.00) and a maximum of one thousand dollars ($1,000). This penalty does not apply if the Secretary finds that, when the check was presented for payment, the drawer of the check had sufficient funds in an account at a financial institution to pay the check and, by inadvertence, the drawer of the check failed to draw the check on the account that had sufficient funds.

(1a) Penalty for Bad Electronic Funds Transfer. — When an electronic funds transfer cannot be completed due to insufficient funds or the nonexistence of an account of the transferor, the Secretary shall assess a penalty equal to ten percent (10%) of the amount of the transfer, subject to a minimum of one dollar ($1.00) and a maximum of one thousand dollars ($1,000). This penalty may be waived by the Secretary in accordance with G.S. 105-237.

(1b) Making Payment in Wrong Form. — For making a payment of tax in a form other than the form required by the Secretary pursuant to G.S. 105-241(a), the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax, subject to a minimum of one dollar ($1.00) and a maximum of one thousand dollars ($1,000). This penalty may be waived by the Secretary in accordance with G.S. 105-237.

(2) Failure to Obtain a License. — For failure to obtain a license before engaging in a business, trade or profession for which a license is required, the Secretary shall assess a penalty equal to five percent (5%) of the amount prescribed for the license per month or fraction thereof until paid, not to exceed twenty-five percent (25%) of the amount so prescribed, but in any event shall not be less than five dollars ($5.00). In cases in which the taxpayer fails to obtain a license as required under G.S. 105-449.65 or G.S. 105-449.131, the Secretary may assess a penalty of one thousand dollars ($1,000).

(3) Failure to File Return. — In case of failure to file any return on the date it is due, determined with regard to any extension of time for filing, the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax if the failure is for not more than one month, with an additional five percent (5%) for each additional month, or fraction thereof, during which the failure continues, not exceeding twenty-five percent (25%) in the aggregate, or five dollars ($5.00), whichever is the greater.

(4) Failure to Pay Tax When Due. — In the case of failure to pay any tax when due, without intent to evade the tax, the Secretary shall assess a penalty equal to ten percent (10%) of the tax, subject to a minimum of five dollars ($5.00). This penalty does not apply in any of the following circumstances:

a. When the amount of tax shown as due on an amended return is paid when the return is filed.

b. When the Secretary proposes an assessment for tax due but not shown on a return and the tax due is paid within 45 days after the date of the notice of proposed assessment of the tax.

(5) Negligence. —

a. Finding of negligence. — For negligent failure to comply with any of the provisions to which this Article applies, or rules issued pursuant thereto, without intent to defraud, the Secretary shall assess a penalty equal to ten percent (10%) of the deficiency due to the negligence.

b. Large individual income tax deficiency. — In the case of individual income tax, if a taxpayer understates taxable income, by any means, by an amount equal to twenty-five percent (25%) or more of gross income, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency. For purposes of this subdivision, "gross income" means gross income as defined in section 61 of the Code.

c. Other large tax deficiency. — In the case of a tax other than individual income tax, if a taxpayer understates tax liability by twenty-five percent (25%) or more, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency.

d. No double penalty. — If a penalty is assessed under subdivision (6) of this section, no additional penalty for negligence shall be assessed with respect to the same deficiency.

e. **(Effective until January 1, 2009)** Inheritance and gift tax deficiencies. — This subdivision does not apply to inheritance, estate, and gift tax deficiencies that are the result of valuation understatements.

e. **(Effective January 1, 2009)** Estate tax deficiencies. — This subdivision does not apply to estate tax deficiencies that are the result of valuation understatements.

(5a) Misuse of Exemption Certificate. — For misuse of an exemption certificate by a purchaser, the Secretary shall assess a penalty equal to two hundred fifty dollars ($250.00). An exemption certificate is a certificate issued by the Secretary that authorizes a retailer to sell tangible personal property to the holder of the certificate and either collect tax at a preferential rate or not collect tax on the sale. Examples of an exemption certificate include a certificate of resale, a direct pay certificate, and a farmer's certificate.

(5b) Road Tax Understatement. — If a motor carrier understates its liability for the road tax imposed by Article 36B of this Chapter by twenty-five percent (25%) or more, the Secretary shall assess the motor carrier a penalty in an amount equal to two times the amount of the deficiency.

(6) Fraud. — If there is a deficiency or delinquency in payment of any tax because of fraud with intent to evade the tax, the Secretary shall assess a penalty equal to fifty percent (50%) of the total deficiency.

(7) Attempt to Evade or Defeat Tax. — Any person who willfully attempts, or any person who aids or abets any person to attempt in any manner to evade or defeat a tax or its payment, shall, in addition to other penalties provided by law, be guilty of a Class H felony.

(8) Willful Failure to Collect, Withhold, or Pay Over Tax. — Any person required to collect, withhold, account for, and pay over any tax who willfully fails to collect or truthfully account for and pay over the tax shall, in addition to other penalties provided by law, be guilty of a Class 1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision shall be barred before the expiration of six years after the date of the violation.

(9) Willful Failure to File Return, Supply Information, or Pay Tax. — Any person required to pay any tax, to make a return, to keep any records, or to supply any information, who willfully fails to pay the tax, make the return, keep the records, or supply the information, at the time or times required by law, or rules issued pursuant thereto, shall, in addition to other penalties provided by law, be guilty of a Class 1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision shall be barred before the expiration of six years after the date of the violation.

(9a) Aid or Assistance. — Any person, pursuant to or in connection with the revenue laws, who willfully aids, assists in, procures, counsels, or advises the preparation, presentation, or filing of a return, affidavit, claim, or any other document that the person knows is fraudulent or false as to any material matter, whether or not the falsity or fraud is with the knowledge or consent of the person authorized or required to present or file the return, affidavit, claim, or other document, is guilty of a felony as follows:

a. If the person who commits an offense under this subdivision is an income tax return preparer and the amount of all taxes fraudulently evaded on returns filed in one taxable year is one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony.

b. If the person who commits an offense under this subdivision is an income tax return preparer and the amount of all taxes fraudulently evaded on returns filed in one taxable year is less than one hundred thousand dollars ($100,000), the person is guilty of a Class F felony.

c. If the person who commits an offense under this subdivision is not covered under sub-subdivision a. or b. of this subdivision, the person is guilty of a Class H felony.

(10) Failure to File Informational Returns. —

a. Repealed by Session Laws 1998-212, s. 29A.14(m), effective January 1, 1999.

b. The Secretary may request a person who fails to file timely statements of payment to another person with respect to wages, dividends, rents, or interest paid to that person to file the statements by a certain date. If the payer fails to file the statements by that date, the amounts claimed on the payer's income tax return as deductions for salaries and wages, or rents or interest shall be disallowed to the extent that the payer failed to comply with the Secretary's request with respect to the statements.

c. For failure to file an informational return required by Article 36C or 36D of this Chapter by the date the return is due, there shall be assessed a penalty of fifty dollars ($50.00).

(10a) Filing a Frivolous Return. — If a taxpayer files a frivolous return under Part 2 of Article 4 of this Chapter, the Secretary shall assess a penalty in the amount of up to five hundred dollars ($500.00). A frivolous return is a return that meets both of the following requirements:

a. It fails to provide sufficient information to permit a determination that the return is correct or contains information which positively indicates the return is incorrect, and

b. It evidences an intention to delay, impede or negate the revenue laws of this State or purports to adopt a position that is lacking in seriousness.

(10b) Misrepresentation Concerning Payment. — A person who receives money from a taxpayer with the understanding that the money is to be remitted to the Secretary for application to the taxpayer's tax liability and who willfully fails to remit the money to the Secretary is guilty of a Class F felony.

(11) Repealed by Session Laws 2006-162, s. 12(b), effective July 24, 2006.

(12) Repealed by Session Laws 1991, c. 45, s. 27.

(b) Situs. — Violation of a tax law is considered an act committed in part at the office of the Secretary in Raleigh. The certificate of the Secretary that a tax has not been paid, a return has not been filed, or information has not been supplied, as required by law, is prima facie evidence that the tax has not been paid, the return has not been filed, or the information has not been supplied.

(c) Penalty Disposition. — Civil penalties assessed by the Secretary are assessed as an additional tax. The clear proceeds of civil penalties assessed by the Secretary must be credited to the Civil Penalty and Forfeiture Fund established in G.S. 115C-457.1. (1939, c. 158, s. 907; 1953, c. 1302, s. 7; 1959, c. 1259, s. 8; 1963, c. 1169, s. 6; 1967, c. 1110, s. 9; 1973, c. 476, s. 193; c. 1287, s. 13; 1979, c. 156, s. 2; 1985, c. 114, s. 11; 1985 (Reg. Sess., 1986), c. 983; 1987 (Reg. Sess., 1988), c. 1076; 1989, c. 557, ss. 7 to 10; 1989 (Reg. Sess., 1990), c. 1005, s. 9; 1991, c. 45, s. 27; 1991 (Reg. Sess., 1992), c. 914, s. 2; c. 1007, s. 10; 1993, c. 354, s. 22; c. 450, s. 10; c. 539, ss. 709, 710, 1292, 1293; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 390, s. 36; 1995 (Reg. Sess., 1996), c. 646, s. 10; c. 647,

s. 51; c. 696, s. 1; 1997-6, s. 8; 1997-109, s. 3; 1998-178, ss. 1, 2; 1998-212, s. 29A.14(m); 1999-415, ss. 2, 3; 1999-438, ss. 15, 16; 2000-119, s. 2; 2000-120, s. 7; 2000-140, s. 70; 2002-106, ss. 2, 4; 2005-276, s. 6.37(n); 2005-435, s. 1; 2006-162, s. 12(b); 2007-491, s. 26; 2008-107, s. 28.18(b).)

Sub-subdivision (a)(5)e. Set Out Twice. — The first version of sub-subdivision (a)(5)e. set out above is effective until January 1, 2009. The second version of sub-subdivision (a)(5)e. set out above is effective January 1, 2009.

Editor's Note. —

Session Laws 2008-107, s. 28.8(e), provides: "This section does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute repealed by this act before the effective date of its repeal; nor does it affect the right to any refund or credit of a tax that accrued under the repealed statute before the effective date of its repeal."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.18(b), effective January 1, 2009, and applicable to gifts made on or after the date, in sub-subdivision (a)(5)e., substituted "Estate tax" for "Inheritance and gift tax" at the beginning, and substituted "estate tax" for "inheritance, estate, and gift tax" near the middle.

CASE NOTES

Willfulness Shown. —

Sufficient substantial evidence was presented to support the denial of a motion to dismiss, had it been made, since the evidence consisted of: (1) statements made by defendant to a North Carolina Department of Revenue investigator regarding defendant's views on taxes and the reason why defendant did not file returns for two years; and (2) defendant's failure to file individual income tax returns for two years, and defendants' filing of a fraudulent return for one year. Defendant's statements, coupled with defendant's actions, were sufficient to warrant a finding that defendant willfully attempted to evade the state individual income tax. State v. Howell, — N.C. App. —, 662 S.E.2d 922, 2008 N.C. App. LEXIS 1312 (July 15, 2008).

§ 105-237.1. Compromise of liability.

(a) Authority. — The Secretary may compromise a taxpayer's liability for a tax that is collectible under G.S. 105-241.22 when the Secretary determines that the compromise is in the best interest of the State and makes one or more of the following findings:

(1) There is a reasonable doubt as to the amount of the liability of the taxpayer under the law and the facts.

(2) The taxpayer is insolvent and the Secretary probably could not otherwise collect an amount equal to or in excess of the amount offered in compromise. A taxpayer is considered insolvent only in one of the following circumstances:

a. It is plain and indisputable that the taxpayer is clearly insolvent and will remain so in the reasonable future.

b. The taxpayer has been determined to be insolvent in a judicial proceeding.

(3) Collection of a greater amount than that offered in compromise is improbable, and the funds or a substantial portion of the funds offered in the settlement come from sources from which the Secretary could not otherwise collect.

(4) A federal tax assessment arising out of the same facts has been compromised with the federal government on the same or a similar basis as that proposed to the State and the Secretary could probably

not collect an amount equal to or in excess of that offered in compromise.

(5) Collection of a greater amount than that offered in compromise would produce an unjust result under the circumstances.

(b) Written Statement. — When the Secretary compromises a tax liability under this section and the amount of the liability is at least one thousand dollars ($1,000), the Secretary must make a written statement that sets out the amount of the liability, the amount accepted under the compromise, a summary of the facts concerning the liability, and the findings on which the compromise is based. The Secretary must sign the statement and keep a record of the statement. If the compromise settles a dispute that is in litigation, the Secretary must obtain the approval of the Attorney General before accepting the compromise, and the Attorney General must sign the statement describing the compromise. (1957, c. 1340, s. 10; 1959, c. 1259, s. 8; 1973, c. 476, s. 193; 1985, c. 114, s. 11; 1991 (Reg. Sess., 1992), c. 1007, s. 11; 2008-107, s. 28.16(f).)

Editor's Note. — Session Laws 2008-107, s. 28.16(a), provides: "The General Assembly makes the following findings:

"(1) The following areas of the sales and use tax laws are the areas for which the Department of Revenue receives the most questions from taxpayers:

"a. The rate of tax that applies to food and prepared food.

"b. The distinction between a retailer and a performance contractor.

"c. The distinction between a service that is necessary to complete the sale of tangible personal property, and therefore taxable, and a service that is incidental to the sale of tangible personal property, and therefore not taxable.

"d. The determination of whether a person is a manufacturer.

"(2) These areas of the sales and use tax laws have been the subject of legislative changes in recent years.

"(3) Small businesses have fewer resources to devote to resolving the complexities of the sales and use tax laws than large businesses have and, therefore, may be at a disadvantage with respect to compliance issues in complex areas and changing areas.

"(4) Assessments against a small business for inadvertent noncompliance in these complex areas may threaten the viability of the small business.

"(5) The sales and use tax laws are not intended to place the viability of small businesses in jeopardy.

"(6) A study of these complex areas is needed to determine how to make the laws in these areas clearer and to reduce the compliance burden."

Session Laws 2008-107, s. 28.16(h) and (i), provide: "(h) The Revenue Laws Study Committee shall study the issues listed in this Section and report on the study, including any recommendations or legislative proposals, to the 2009 General Assembly.

"(1) The taxation of services necessary to complete the sale of tangible personal property and standards for distinguishing between a service that is taxable as one that is necessary to complete the sale and a service that is incidental to the sale of tangible personal property.

"(2) The applicability of the sales and use tax to performance contracts and standards for distinguishing between performance contractors and retailers.

"(3) The distinction between food and prepared food under the sales and use tax laws and whether to eliminate this distinction by applying a uniform, revenue-neutral rate to all food.

"(i) The Department of Revenue shall make a report to the Revenue Laws Study Committee on customer service improvement initiatives conducted by the Department. The report is due prior to the convening of the 2009 General Assembly and shall address, at a minimum, the following issues:

"(1) A review of the Department's efforts to ensure that inquiries on complicated tax matters are handled or reviewed by appropriate personnel within the Department.

"(2) A review of the Department's efforts to provide accurate and timely information regarding changes in tax law resulting from legislative changes, court decisions, or revised interpretations.

"(3) A review of the Department's outreach efforts designed to assist taxpayers, particularly small business taxpayers, in complying with the State's tax laws.

"(4) A review of the Department's efforts to ensure that taxpayers are informed of their right to request written advice from the Department upon which they may reasonably rely.

"(5) A review of the Department's plan to record telephone calls at the Department's Taxpayer Assistance Center."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.16(f), effective July 16, 2008, rewrote the section.

§ 105-241.10. (Effective January 1, 2009) Limit on refunds and assessments after a federal determination.

The limitations in this section apply when a taxpayer files a timely return reflecting a federal determination that affects the amount of State tax payable and the general statute of limitations for requesting a refund or proposing an assessment of the State tax has expired. A federal determination is a correction or final determination by the federal government of the amount of a federal tax due. A return reflecting a federal determination is timely if it is filed within the time required by G.S. 105-32.8, 105-130.20, 105-159, 105-160.8, or 105-163.6A, as appropriate. The limitations are:

(1) Refund. — A taxpayer is allowed a refund only if the refund is the result of adjustments related to the federal determination.

(2) Assessment. — A taxpayer is liable for additional tax only if the additional tax is the result of adjustments related to the federal determination. A proposed assessment may not include an amount that is outside the scope of this liability. (2007-491, s. 1; 2008-107, s. 28.18(d).)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Editor's Note. —

Session Laws 2008-107, s. 28.18(e), provides: "This section does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute repealed by this act before the effective date of its repeal; nor does it affect the right to any refund or credit of a tax that accrued under the repealed statute before the effective date of its repeal."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.18(d), effective January 1, 2009, and applicable to gifts made on or after that date, deleted "or 105-197.1" near the end of the introductory paragraph and made a related stylistic change.

§ 105-241.11. Requesting review of proposed denial of refund or proposed assessment.

(a) **(Effective for taxable years beginning before January 1, 2008)** Procedure. — A taxpayer who objects to a proposed denial of a refund or a proposed assessment of tax may request a Departmental review of the proposed action by filing a request for review. The request must be filed with the Department within 45 days after the following:

(1) The date the notice of the proposed denial of the refund or proposed assessment was mailed to the taxpayer, if the notice was delivered by mail.

(2) The date the notice of the proposed denial of the refund or proposed assessment was delivered to the taxpayer, if the notice was delivered in person.

G.S. 105-241.11(a) is set out twice. See note.

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(3) The date that inaction by the Department on a request for refund was considered a proposed denial of the refund and the date the time periods set in the other subdivisions of this subsection expire.

(a) **(Effective for taxable years beginning on or after January 1, 2008)** Procedure. — A taxpayer who objects to a proposed denial of a refund or a proposed assessment of tax may request a Departmental review of the proposed action by filing a request for review. The request must be filed with the Department as follows:

(1) Within 45 days of the date the notice of the proposed denial of the refund or proposed assessment was mailed to the taxpayer, if the notice was delivered by mail.

(2) Within 45 days of the date the notice of the proposed denial of the refund or proposed assessment was delivered to the taxpayer, if the notice was delivered in person.

(3) At any time between the date that inaction by the Department on a request for refund is considered a proposed denial of the refund and the date the time periods set in the other subdivisions of this subsection expire.

(b) Filing. — A request for a Departmental review of a proposed denial of a refund or a proposed assessment is considered filed on the following dates:

(1) For a request that is delivered in person, the date it is delivered.

(2) For a request that is not delivered in person, the date the Department receives it. (2007-491, s. 1; 2008-134, s. 5(a).)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective for taxable years beginning before January 1, 2008. The second version of subsection (a) set out above is effective for taxable years beginning on or after January 1, 2008.

Effect of Amendments. — Session Laws 2008-134, s. 5(a), effective for taxable years beginning on or after January 1, 2008, in subsection (a), in the introductory language, substituted "as follows" for "within 45 days after the following"; in subdivisions (a)(1) and (a)(2), substituted "Within 45 days of the date" for "The date"; and in subdivision (a)(3), substituted "At any time between the date that inaction" for "The date that inaction" at the beginning, substituted "refund is considered" for "refund was considered" near the middle, and added language following "denial of the refund."

§ 105-241.14. Final determination after Departmental review.

(a) Refund. — If a taxpayer files a timely request for a Departmental review of a proposed denial of a refund and the Department and the taxpayer are unable to resolve the taxpayer's objection to the proposed denial, the Department must send the taxpayer a notice of final determination concerning the refund. The notice of final determination must state the basis for the determination and inform the taxpayer of the procedure for contesting the determination. The statement of the basis for the determination does not limit the Department from changing the basis.

(b) Assessment. — If a taxpayer files a timely request for a Departmental review of a proposed assessment and the Department and the taxpayer are unable to resolve the taxpayer's objection to the proposed assessment, the Department must send the taxpayer a notice of final determination concerning the assessment. A notice of final determination concerning an assessment must contain the following information:

(1) The basis for the determination. This information may be stated on the notice or be set out in a separate document. The statement of the

basis for the determination does not limit the Department from changing the basis.

(2) The amount of tax, interest, and penalties payable by the taxpayer.

(3) The procedure the taxpayer must follow to contest the final determination.

(4) A statement that the amount payable stated on the notice is collectible by the Department unless the taxpayer contests the final determination.

(5) An explanation of the collection options available to the Department if the taxpayer does not pay the amount shown due on the notice and any remedies available to the taxpayer concerning these collection options.

(c) **(Effective for taxable years beginning before January 1, 2008)** Time Limit. — The process set out in G.S. 105-241.13 for reviewing and attempting to resolve a proposed denial of a refund or a proposed assessment must conclude, and a final determination must be issued within nine months after the date the taxpayer files a request for review. The Department and the taxpayer may extend this time limit by mutual agreement. Failure to issue a notice of final determination within the required time does not affect the validity of a proposed assessment.

(c) **(Effective for taxable years beginning on or after January 1, 2008)** Time Limit. — The process set out in G.S. 105-241.13 for reviewing and attempting to resolve a proposed denial of a refund or a proposed assessment must conclude, and a final determination must be issued within nine months after the date the taxpayer files a request for review. The Department and the taxpayer may extend this time limit by mutual agreement. Failure to issue a notice of final determination within the required time does not affect the validity of a proposed denial of a refund or proposed assessment. (2007-491, s. 1; 2008-134, s. 6(a).)

Subsection (c) Set Out Twice. — The first version of subsection (c) set out above is effective for taxable years beginning before January 1, 2008. The second version of subsection (c) set out above is effective for taxable years beginning on or after January 1, 2008.

Effect of Amendments. — Session Laws 2008-134, s. 6(a), effective for taxable years beginning on or after January 1, 2008, inserted "proposed denial of a refund or" in the last sentence of subsection (c).

§ 105-241.18. Class actions.

(a) Authority. — A class action against the State for the refund of a tax paid may be maintained only on the grounds of an alleged unconstitutional statute and only if the requirements of Rule 23 of the North Carolina Rules of Civil Procedure and the requirements of this section are met. For purposes of this section, a class action commences upon the later of the following:

(1) The date a complaint is filed in accordance with G.S. 105-241.17 alleging the existence of a class pursuant to Rule 23 of the North Carolina Rules of Civil Procedure.

(2) The date a complaint filed in accordance with G.S. 105-241.17 is amended to allege the existence of a class.

(b) Class. — To serve as a class representative of a class action brought under this section, a taxpayer must comply with all of the conditions in G.S. 105-241.17 and the taxpayer's claims must be typical of the claims of the class members. A taxpayer who is not a class representative is eligible to become a member of a class if the taxpayer could have filed a claim for refund under G.S. 105-241.7 as of the date the class action commenced or as of a subsequent date set by the court, whether or not the taxpayer actually filed a claim for refund as of that date. An eligible class member who is not a class representative and who indicates a desire to be included in the class in accordance with the procedure approved by the court under subsection (c) of this section is not required to follow the procedures in G.S. 105-241.11 through G.S. 105-241.17 for the administrative and judicial review of a request for refund or a proposed denial of a request for refund.

(c) Procedure. — To become a member of a class action brought under this section, an eligible taxpayer must affirmatively indicate a desire to be included in the class in response to a notice of the class action. If the court so orders, the Department must provide to a class representative a list of names and last known addresses of all taxpayers who are readily determinable by the Department and who are eligible to become a member of the class. The court must approve the content of a notice of a class action, the method for distributing the notice, and the procedure by which an eligible taxpayer affirmatively indicates a desire to be included in the class. The class representative must advance the costs of notifying eligible taxpayers of the class action.

(d) Statute of Limitations. — The statute of limitations for filing a claim for refund of tax paid due to an alleged unconstitutional statute is tolled for a taxpayer who is eligible to become a member of a class action. The tolling begins on the date the class action is commenced. For a taxpayer who does not join the class, the tolling ends when the taxpayer does not affirmatively indicate a desire to be included in the class within the time and in accordance with the procedure approved by the court under subsection (c) of this section. For a taxpayer who joins the class, the tolling ends when a court enters any of the following in the class action:

(1) A final order denying certification of the class.
(2) A final order decertifying the class.
(3) A final order dismissing the class action without an adjudication on the merits.
(4) A final judgment on the merits.

(e) Effect on Nonparticipating Taxpayers. — A taxpayer who does not become a member of a class may file and prosecute a claim for refund, if the statute of limitations has not otherwise expired for filing the claim, or may contest a pending assessment in accordance with the procedures in G.S. 105-241.11 through G.S. 105-241.17. Except as otherwise provided in this subsection, the effect of an adjudication in a class action on a nonparticipating taxpayer's claim for refund or contest of an assessment is governed by the normal rules relating to claim preclusion and issue preclusion.

If a final judgment on the merits is entered in a class action in favor of the class, the following applies to an eligible taxpayer who did not become a member of the class:

(1) The taxpayer is not entitled to receive any monetary relief awarded to the class on account of taxes previously paid by the taxpayer.
(2) If the taxpayer has been assessed for failure to pay the tax at issue in the class action and the taxpayer has not paid the assessment, then the assessment is abated.
(3) The taxpayer is relieved of any future liability for the tax that is the subject of the class action. (2008-107, s. 28.28(b).)

Editor's Note. — Session Laws 2008-107, s. 28.28(d), made this section effective October 1, 2008, and applicable to actions filed on or after that date.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

§ 105-241.19. Declaratory judgments, injunctions, and other actions prohibited.

The remedies in G.S. 105-241.11 through G.S. 105-241.18 set out the exclusive remedies for disputing the denial of a requested refund, a taxpayer's liability for a tax, or the constitutionality of a tax statute. Any other action is barred. Neither an action for declaratory judgment, an action for an injunction to prevent the collection of a tax, nor any other action is allowed. (2007-491, s. 1; 2008-107, s. 28.28(c).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.28(c), effective October 1, 2008, and applicable to actions filed on or after that date, substituted "G.S. 105-241.18" for "G.S. 105-241.17" in the first sentence.

§ 105-241.22. Collection of tax.

The Department may collect a tax in the following circumstances:

(1) **(Effective for taxable years beginning before January 1, 2008)** When a taxpayer files a return showing tax due with the return and does not pay the amount shown due.

(1) **(Effective for taxable years beginning on or after January 1, 2008)** When a taxpayer files a return showing an amount due with the return and does not pay the amount shown due.

(2) When the Department sends a notice of collection after a taxpayer does not file a timely request for a Departmental review of a proposed assessment of tax.

(3) When a taxpayer and the Department agree on a settlement concerning the amount of tax due.

(4) When the Department sends a notice of final determination concerning an assessment of tax and the taxpayer does not file a timely petition for a contested case hearing on the assessment.

(5) When a final decision is issued on a proposed assessment of tax after a contested case hearing.

(6) When the Office of Administrative Hearings dismisses a petition for a contested case for lack of jurisdiction because the sole issue is the constitutionality of a statute and not the application of a statute. (2007-491, s. 1; 2008-134, s. 7(a).)

Subdivision (1) Set Out Twice. — The first version of subdivision (1) set out above is effective for taxable years beginning before January 1, 2008. The second version of subdivision (1) set out above is effective for taxable years beginning on or after January 1, 2008.

Effect of Amendments. — Session Laws 2008-134, s. 7(a), effective for taxable years beginning on or after January 1, 2008, substituted "showing an amount due" for "showing tax due" in subdivision (1).

§ 105-242.2. Personal liability when certain taxes not paid.

(a) Definitions. — The following definitions apply in this section:

(1) Business entity. — A corporation, a limited liability company, or a partnership.

(2) Responsible person. — Any of the following:

a. The president, treasurer, or chief financial officer of a corporation.

b. A manager of a limited liability company or a partnership.
c. An officer of a corporation, a member of a limited liability company, or a partner in a partnership who has a duty to deduct, account for, or pay taxes listed in subsection (b) of this section.
d. A partner who is liable for the debts and obligations of a partnership under G.S. 59-45 or G.S. 59-403.

(b) Responsible Person. — Each responsible person in a business entity is personally and individually liable for all of the taxes listed in this subsection. If a business entity does not pay a tax it owes after the tax becomes collectible under G.S. 105-241.22, the Secretary may enforce the responsible person's liability for the tax by sending the responsible person a notice of proposed assessment in accordance with G.S. 105-241.9. The taxes for which a responsible person may be held personally and individually liable are:

(1) All sales and use taxes collected by the business entity upon its taxable transactions.
(2) All sales and use taxes due upon taxable transactions of the business entity but upon which it failed to collect the tax, but only if the person knew, or in the exercise of reasonable care should have known, that the tax was not being collected.
(3) All taxes due from the business entity pursuant to the provisions of Articles 36C and 36D of Subchapter V of this Chapter and all taxes payable under those Articles by it to a supplier for remittance to this State or another state.
(4) All income taxes required to be withheld from the wages of employees of the business entity.

(c) Repealed by Session Laws 1991 (Regular Session, 1992), c. 1007, s. 15.

(d) Distributions. — An officer, partner, trustee, or receiver of a business entity required to file a report with the Secretary who has custody of funds of the entity and who allows the funds to be paid out or distributed to the owners of the entity without having remitted to the Secretary any State taxes that are due is personally liable for the payment of the tax. The Secretary may enforce an individual's liability under this subsection by sending the individual a notice of proposed assessment in accordance with G.S. 105-241.9.

(e) Statute of Limitations. — The period of limitations for assessing a responsible person for unpaid taxes under this section expires one year after the expiration of the period of limitations for assessing the business entity. (1939, c. 158, s. 923; 1941, c. 50, s. 10; 1955, c. 1350, s. 23; 1973, c. 476, s. 193; c. 1287, s. 13; 1983, c. 220, s. 1; 1991, c. 690, s. 7; 1991 (Reg. Sess., 1992), c. 1007, s. 15; 1995, c. 390, s. 15; 1995 (Reg. Sess., 1996), c. 647, s. 52; 1997-6, s. 9; 1998-212, s. 29A.14(p); 1999-337, s. 34; 2007-491, s. 34; 2008-134, s. 10(a).)

Editor's Note. —
This section was formerly G.S. 105-253, as enacted by Session Laws 1939-158, s. 923. It was recodified as this section by Session Laws 2008-134, s. 10(a), effective July 1, 2008, and applicable to taxes that become collectible on or after that date.

Effect of Amendments. —
Session Laws 2008-134, s. 10(a), effective July 1, 2008, and applicable to taxes that become collectible on or after that date, recodified former G.S. 105-253 as this section and rewrote the section.

§ 105-243.1. Collection of tax debts.

Editor's Note. —
Session Laws 2007-323, s. 6.9(b), as amended by Session Laws 2008-107, s. 23.1, provides: "The General Assembly finds that a computer system that records tax payments and determines when the payments are overdue directly and primarily relates to the collection of overdue tax debts and that the proceeds of the collection assistance fee imposed by G.S. 105-243.1 may be applied to the cost of the computer system. The Department of Revenue is authorized to use funds in the 20% Collection

Assistance Fee Account, Budget Code 24704-2474, during the 2007-2008 and 2008-2009 fiscal years to replace the Department's current computer system, and these funds are appropriated to the Department for that purpose. For fiscal year 2007-2008, the Department shall not use more than fifteen million dollars ($15,000,000) from the Account to replace the Department's current computer system. For fiscal year 2008-2009, the Department shall not use more than twenty-five million dollars ($25,000,000) from the Account to replace the Department's current computer system.

"Funds appropriated under this subsection may be transferred to Budget Code 24708-2478 to be applied to expenditures for a replacement computer system. Funds appropriated under this subsection that are not transferred to Budget Code 24708-2478 remain in the Account until they are transferred to that Budget Code or withdrawn for expenditures for a replacement computer system. Funds appropriated under this subsection that are not expended at the end of the 2007-2009 biennium remain available for expenditure for the purpose designated in this subsection."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

§ 105-244.2. (Expires January 1, 2010) Reduction of certain sales tax assessments against small businesses.

(a) Reduction. — The Secretary must reduce an assessment against a small business for State and local sales and use taxes and waive any penalties imposed as part of the assessment when the assessment is made as the result of an audit of the small business by the Department and all of the following apply:

(1) The gross receipts of the business for the calendar year preceding the year in which the audit period begins, combined with the gross receipts of all related persons as defined in G.S. 105-163.010, do not exceed one million eight hundred thousand dollars ($1,800,000).

(2) The business remitted to the Department all the sales and use taxes it collected during the audit period.

(3) The business had not been told by the Department in a prior audit to collect sales and use taxes in the circumstance that is the basis of the assessment, as reflected in the written audit comments of the prior audit.

(4) The business made a good faith effort to comply with the sales and use tax laws and the assessment is based on the incorrect application of one of the following complex areas of these laws:

a. The rate of tax that applies to prepared food.

b. The distinction between a retailer and a performance contractor.

c. The distinction between a service that is necessary to complete the sale of tangible personal property, and is therefore taxable, and a service that is incidental to the sale of tangible personal property, and is therefore not taxable.

d. The determination of whether a person is a manufacturer.

(b) Amount. — The amount by which a sales and use tax assessment against a small business must be reduced under this section is a percentage of the assessment. The percentage is determined by the average monthly gross receipts of the business for the calendar year for which annual gross receipts are determined under subdivision (a)(1) of this section. A reduction of an assessment under this section and the waiver of penalties imposed as part of the assessment apply only to the amount of an assessment attributable to the incorrect application of one of the complex areas of the law listed in subdivision (a)(4) of this section.

The following table sets out the applicable percentage reductions of an assessment:

Average Monthly Gross Receipts of Business Over	Average Monthly Gross Receipts Up To	Percentage Reduction
-0-	$ 50,000	98%
$ 50,000	$100,000	95%
$100,000	$150,000	90%

(c) Application. — This section applies to the following:

(1) A proposed assessment that is pending on July 15, 2008.

(2) An assessment that becomes collectible under G.S. 105-241.22 on or after July 15, 2008.

(3) An assessment that meets all of the following conditions:

a. It became collectible under G.S. 105-241.22 before July 15, 2008, or was identified in a notice of final assessment issued under former G.S. 105-241.1 before July 15, 2008.

b. It is not paid as of July 15, 2008.

c. If it had been paid within six months after it became collectible under G.S. 105-241.22 or was identified in a notice of final assessment issued under former G.S. 105-241.1, a timely claim for refund could be filed under G.S. 105-241.7 for a refund of the assessment.

(4) A claim for refund filed in accordance with G.S. 105-241.7 for a refund of an assessment.

(d) Expiration. — This section expires January 1, 2010. The expiration applies to an assessment that becomes collectible under G.S. 105-241.22 on or after the expiration date and to a claim for refund filed on or after the expiration date for a refund of an assessment paid before the expiration date. (2008-107, s. 28.16(b).)

Editor's Note. — Session Laws 2008-107, s. 28.16(j), made this section effective July 16, 2008.

Session Laws 2008-107, s. 28.16(a), provides: "The General Assembly makes the following findings:

"(1) The following areas of the sales and use tax laws are the areas for which the Department of Revenue receives the most questions from taxpayers:

"a. The rate of tax that applies to food and prepared food.

"b. The distinction between a retailer and a performance contractor.

"c. The distinction between a service that is necessary to complete the sale of tangible personal property, and therefore taxable, and a service that is incidental to the sale of tangible personal property, and therefore not taxable.

"d. The determination of whether a person is a manufacturer.

"(2) These areas of the sales and use tax laws have been the subject of legislative changes in recent years.

"(3) Small businesses have fewer resources to devote to resolving the complexities of the sales and use tax laws than large businesses have and, therefore, may be at a disadvantage with respect to compliance issues in complex areas and changing areas.

"(4) Assessments against a small business for inadvertent noncompliance in these complex areas may threaten the viability of the small business.

"(5) The sales and use tax laws are not intended to place the viability of small businesses in jeopardy.

"(6) A study of these complex areas is needed to determine how to make the laws in these areas clearer and to reduce the compliance burden."

Session Laws 2008-107, s. 28.16(h) and (i), provide: "(h) The Revenue Laws Study Committee shall study the issues listed in this Section and report on the study, including any recommendations or legislative proposals, to the 2009 General Assembly.

"(1) The taxation of services necessary to complete the sale of tangible personal property and standards for distinguishing between a service that is taxable as one that is necessary to complete the sale and a service that is incidental to the sale of tangible personal property.

"(2) The applicability of the sales and use tax to performance contracts and standards for distinguishing between performance contractors and retailers.

"(3) The distinction between food and prepared food under the sales and use tax laws and whether to eliminate this distinction by applying a uniform, revenue-neutral rate to all food.

"(i) The Department of Revenue shall make a report to the Revenue Laws Study Committee on customer service improvement initiatives conducted by the Department. The report is due prior to the convening of the 2009 General Assembly and shall address, at a minimum, the following issues:

"(1) A review of the Department's efforts to ensure that inquiries on complicated tax matters are handled or reviewed by appropriate personnel within the Department.

"(2) A review of the Department's efforts to provide accurate and timely information regarding changes in tax law resulting from legislative changes, court decisions, or revised interpretations.

"(3) A review of the Department's outreach efforts designed to assist taxpayers, particularly small business taxpayers, in complying with the State's tax laws.

"(4) A review of the Department's efforts to ensure that taxpayers are informed of their right to request written advice from the Department upon which they may reasonably rely.

"(5) A review of the Department's plan to record telephone calls at the Department's Taxpayer Assistance Center."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

§ 105-246. Actions, when tried.

CASE NOTES

Applied in In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

§ 105-249.2. Due date extended and penalties waived for certain military personnel or persons affected by a presidentially declared disaster.

(a) Combat. — The Secretary may not assess interest or a penalty against a taxpayer for any period that is disregarded under section 7508 of the Code in determining the taxpayer's liability for a federal tax. A taxpayer is granted an extension of time to file a return or take another action concerning a State tax for any period during which the Secretary may not assess interest or a penalty under this section.

(b) Disaster. — The penalties in G.S. 105-236(a)(2), (3), and (4) may not be assessed for any period in which the time for filing a federal return or report or for paying a federal tax is extended under section 7508A of the Code because of a presidentially declared disaster. For the purpose of this section, "presidentially declared disaster" has the same meaning as in section 1033(h)(3) of the Code. (1967, c. 706, s. 1; 1991, c. 439, s. 1; 1991 (Reg. Sess., 1992), c. 922, s. 10; 2001-87, s. 1; 2001-414, s. 24; 2006-162, s. 18; 2008-187, s. 16.)

Editor's Note. — The reference in subsection (b) to "G.S. 105-236(2), (3), and (4)" should probably be to "G.S. 105-236(a)(2), (3), and (4)." Session Laws 2008-187, s. 15, corrected the reference.

Effect of Amendments. —

Session Laws 2008-187, s. 16, effective August 7, 2008, substituted "G.S. 105-236(a)(2), (3), and (4)" for "G.S. 105-236(2), (3), and (4)" in the first sentence of subsection (b).

§ 105-251. Information required of taxpayer and corrections based on information.

(a) Scope of Information. — A taxpayer must give information to the Secretary when the Secretary requests the information. The Secretary may request a taxpayer to provide only the following kinds of information on a return, a report, or otherwise:

(1) Information that identifies the taxpayer.
(2) Information needed to determine the liability of the taxpayer for a tax.
(3) Information needed to determine whether an item is subject to a tax.
(4) Information that enables the Secretary to collect a tax.
(5) Other information the law requires a taxpayer to provide or the Secretary needs to perform a duty a law requires the Secretary to perform.

(b) Correction of Liability. — When a taxpayer provides information to the Secretary within the statute of limitations and the information establishes that an assessment against the taxpayer is incorrect or that the taxpayer is allowed a refund, the Secretary must adjust the assessment or issue the refund in accordance with the information. This action is a correction of an error by the Department or by the taxpayer and is not part of the process for the administrative or judicial review of a proposed assessment or a claim for refund. (1939, c. 158, s. 921; 1973, c. 476, s. 193; 1993 (Reg. Sess., 1994), c. 661, s. 2; 2008-134, s. 71.)

Effect of Amendments. — Session Laws 2008-134, s. 71, effective July 28, 2008, rewrote the section heading, which formerly read: "Type of information a taxpayer must provide"; designated the previously existing provisions as subsection (a); in subsection (a), inserted "Scope of Information. —" at the beginning; and added subsection (b).

§ 105-253: Recodified as G.S. 105-242.2 by Session Laws 2008-134, s. 10(a), effective July 1, 2008, and applicable to taxes that become collectible on or after that date.

Editor's Note. — Former G.S. 105-253 was recodified as G.S. 105-242.2 by Session Laws 2008-134, s. 10(a), effective July 1, 2008, and applicable to taxes that become collectible on or after that date.

§ 105-258. Powers of Secretary of Revenue; who may sign and verify legal documents; who may serve civil papers.

CASE NOTES

Rules of Civil Procedure Apply. — Because G.S. 105-258 is a civil action, the statute is subject to the rules of civil procedure, except to the extent the statute prescribes a different procedure. In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

Jurisdiction Existed. — Because a taxpayer did not contend that the Secretary of the North Carolina Department of Revenue failed to follow the procedure prescribed in G.S. 105-258, the trial court did not err in denying the taxpayer's motion to dismiss on the grounds of lack of jurisdiction or failure to serve process in that any failure to file and serve a complaint by civil process as prescribed by the North Carolina Rules of Civil Procedure was not a jurisdictional defect because the statute provided jurisdiction to the superior court upon application by the Secretary. In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

Sufficiency of Application to Compel Production. — Trial court did not err in denying a taxpayer's motion to dismiss for failure to state a claim because the application to compel the production of documents in response to an administrative summons contained specific facts sufficient to provide notice to the taxpayer's accounting firm of the nature of the claim. In re Summons Issued to Ernst & Young, LLP, — N.C. App. —, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (Aug. 5, 2008).

§ 105-258.2. (Effective January 1, 2009) Taxpayer conversations.

(a) Scope. — This section applies to a conversation that is conducted by telephone or in person, is between a taxpayer and an employee of the Department, and occurs at an office of the Department if the conversation is in person. It does not apply to a conversation that occurs at a presentation, a conference, or another forum.

(b) Documentation. — The Secretary must document advice given to a taxpayer in a conversation with that taxpayer when the taxpayer gives the Secretary the taxpayer's identifying information, asks the Secretary about the application of a tax to the taxpayer in specific circumstances, and requests that the Secretary document the advice in the taxpayer's records. The documentation may be an entry in the account record of the taxpayer or by another method determined by the Secretary. The documentation must set out the date of the conversation, the question asked, and the advice given.

(c) **(Effective July 1, 2009)** Sales Tax Inquiries. — The Secretary must document advice given in a conversation with a person who is not registered as a retailer or a wholesale merchant under Article 5 of this Chapter when the person gives the Secretary the person's name and address, describes a business in which the person is engaged, asks if the person is required to be registered under Article 5 of this Chapter, and requests that the Secretary document the advice. The Secretary must keep a record of the person's inquiry that sets out the date of the conversation, the person making the inquiry, the business described in the conversation, and the advice given. (2008-107, s. 28.16(c), (d).)

Editor's Note. — Session Laws 2008-107, s. 28.16(j), makes this section effective January 1, 2009.

Session Laws 2008-107, s. 28.16(a), provides: "The General Assembly makes the following findings:

"(1) The following areas of the sales and use tax laws are the areas for which the Department of Revenue receives the most questions from taxpayers:

"a. The rate of tax that applies to food and prepared food.

"b. The distinction between a retailer and a performance contractor.

"c. The distinction between a service that is necessary to complete the sale of tangible personal property, and therefore taxable, and a service that is incidental to the sale of tangible personal property, and therefore not taxable.

"d. The determination of whether a person is a manufacturer.

"(2) These areas of the sales and use tax laws have been the subject of legislative changes in recent years.

"(3) Small businesses have fewer resources to devote to resolving the complexities of the sales and use tax laws than large businesses have and, therefore, may be at a disadvantage with respect to compliance issues in complex areas and changing areas.

"(4) Assessments against a small business for inadvertent noncompliance in these complex areas may threaten the viability of the small business.

"(5) The sales and use tax laws are not intended to place the viability of small businesses in jeopardy.

"(6) A study of these complex areas is needed to determine how to make the laws in these areas clearer and to reduce the compliance burden."

Session Laws 2008-107, ss. 28.16(g), (h), and (i), provide: "(g) The Department of Revenue is directed to establish a plan to record telephone calls received at the Department's Taxpayer Assistance Center and to implement this plan by July 1, 2010. The plan shall, at a minimum, provide for recording calls for the purpose of training and evaluation with respect to customer service and quality control measures. The Department may retain up to seven hundred thousand dollars ($700,000) of the amount collected under Article 5 of Chapter 105 of the General Statutes in fiscal year 2008-2009 for this purpose, and this amount is appropriated to the Department for this purpose. Amounts not used in fiscal year 2008-2009 for this purpose do not revert but remain available to the Department for this purpose until the system is implemented.

"(h) The Revenue Laws Study Committee shall study the issues listed in this Section and report on the study, including any recommendations or legislative proposals, to the 2009 General Assembly.

"(1) The taxation of services necessary to complete the sale of tangible personal property and standards for distinguishing between a service that is taxable as one that is necessary to complete the sale and a service that is incidental to the sale of tangible personal property.

"(2) The applicability of the sales and use tax to performance contracts and standards for distinguishing between performance contractors and retailers.

"(3) The distinction between food and prepared food under the sales and use tax laws and whether to eliminate this distinction by applying a uniform, revenue-neutral rate to all food.

"(i) The Department of Revenue shall make a report to the Revenue Laws Study Committee on customer service improvement initiatives conducted by the Department. The report is due prior to the convening of the 2009 General Assembly and shall address, at a minimum, the following issues:

"(1) A review of the Department's efforts to ensure that inquiries on complicated tax matters are handled or reviewed by appropriate personnel within the Department.

"(2) A review of the Department's efforts to provide accurate and timely information regarding changes in tax law resulting from legislative changes, court decisions, or revised interpretations.

"(3) A review of the Department's outreach efforts designed to assist taxpayers, particularly small business taxpayers, in complying with the State's tax laws.

"(4) A review of the Department's efforts to ensure that taxpayers are informed of their right to request written advice from the Department upon which they may reasonably rely.

"(5) A review of the Department's plan to record telephone calls at the Department's Taxpayer Assistance Center."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.16(d), effective July 1, 2009, added subsection (c).

§ 105-259. Secrecy required of officials; penalty for violation.

(a) Definitions. — The following definitions apply in this section:
- (1) Employee or officer. — The term includes a former employee, a former officer, and a current or former member of a State board or commission.
- (2) Tax information. — Any information from any source concerning the liability of a taxpayer for a tax, as defined in G.S. 105-228.90. The term includes the following:
  - a. Information contained on a tax return, a tax report, or an application for a license for which a tax is imposed.
  - b. Information obtained through an audit of a taxpayer or by correspondence with a taxpayer.
  - c. Information on whether a taxpayer has filed a tax return or a tax report.
  - d. A list or other compilation of the names, addresses, social security numbers, or similar information concerning taxpayers.

  The term does not include (i) statistics classified so that information about specific taxpayers cannot be identified, (ii) an annual report required to be filed under G.S. 55-16-22 or (iii) the amount of tax refunds paid to a governmental entity listed in G.S. 105-164.14(c) or to a State agency.

(b) Disclosure Prohibited. — An officer, an employee, or an agent of the State who has access to tax information in the course of service to or employment by the State may not disclose the information to any other person unless the disclosure is made for one of the following purposes:

(1) To comply with a court order, an administrative law judge's order in a contested tax case, or a law.

(2) Review by the Attorney General or a representative of the Attorney General.

(3) To exchange the following types of information with a tax official of another jurisdiction if the laws of the other jurisdiction allow it to provide similar tax information to a representative of this State:

a. Information to aid the jurisdiction in collecting a tax imposed by this State or the other jurisdiction.

b. Information needed for statistical reports and revenue estimates.

(4) To provide a governmental agency or an officer of an organized association of taxpayers with a list of taxpayers who have paid a privilege license tax under Article 2 of this Chapter.

(5) To furnish to the chair of a board of county commissioners information on the county sales and use tax.

(5a) Reserved.

(5b) To furnish to the finance officials of a city a list of the utility taxable gross receipts and piped natural gas tax revenues attributable to the city under G.S. 105-116.1 and G.S. 105-187.44 or under former G.S. 105-116 and G.S. 105-120.

(5c) To provide the following information to a regional public transportation authority or a regional transportation authority created pursuant to Article 26 or Article 27 of Chapter 160A of the General Statutes on an annual basis, when the information is needed to enable the authority to administer its tax laws:

a. The name, address, and identification number of retailers who collect the tax on leased vehicles imposed by G.S. 105-187.5.

b. The name, address, and identification number of a retailer audited by the Department of Revenue regarding the tax on leased vehicles imposed by G.S. 105-187.5, when the Department determines that the audit results may be of interest to the authority.

(5d) To provide the following information to a county or city on an annual basis, when the county or city needs the information for the administration of its local prepared food and beverages tax, room occupancy tax, vehicle rental tax, or heavy equipment rental tax:

a. The name, address, and identification number of retailers who collect the sales and use taxes imposed under Article 5 of this Chapter and may be engaged in a business subject to one or more of these local taxes.

b. The name, address, and identification number of a retailer audited by the Department regarding the sales and use taxes imposed under Article 5 of this Chapter, when the Department determines that the audit results may be of interest to the county or city in the administration of one or more of these local taxes.

(6) To sort, process, or deliver tax information on behalf of the Department of Revenue.

(6a) To furnish the county or city official designated under G.S. 105-164.14(f) a list of claimants that have received a refund of the county sales or use tax to the extent authorized in G.S. 105-164.14(f).

(7) To exchange information with the Division of the State Highway Patrol of the Department of Crime Control and Public Safety, the Division of Motor Vehicles of the Department of Transportation, the

International Fuel Tax Association, Inc., or the Joint Operations Center for National Fuel Tax Compliance when the information is needed to fulfill a duty imposed on the Department of Revenue, the Division of the State Highway Patrol of the Department of Crime Control and Public Safety, or the Division of Motor Vehicles of the Department of Transportation.

(7a) To furnish the name and identifying information of motor carriers whose licenses have been revoked to the administrator of a national criminal justice system database that makes the information available only to criminal justice agencies and public safety organizations.

(8) To furnish to the Department of State Treasurer, upon request, the name, address, and account and identification numbers of a taxpayer who may be entitled to property held in the Escheat Fund.

(9) To furnish to the Employment Security Commission the name, address, and account and identification numbers of a taxpayer when the information is requested by the Commission in order to fulfill a duty imposed under Article 2 of Chapter 96 of the General Statutes.

(9a) To furnish information to the Employment Security Commission to the extent required for its NC WORKS study of the working poor pursuant to G.S. 108A-29(r). The Employment Security Commission shall use information furnished to it under this subdivision only in a nonidentifying form for statistical and analytical purposes related to its NC WORKS study. The information that may be furnished under this subdivision is the following with respect to individual income taxpayers, as shown on the North Carolina income tax forms:

a. Name, social security number, spouse's name, spouse's social security number, and county of residence.

b. Filing status and federal personal exemptions.

c. Federal taxable income, additions to federal taxable income, and total of federal taxable income plus additional income.

d. Income while a North Carolina resident, total income from North Carolina sources while a nonresident, and total income from all sources.

e. Exemption for children, nonresidents' and part-year residents' exemption for children, and credit for children.

f. Expenses for child and dependent care, portion of expenses paid while a resident of North Carolina, portion of expenses paid while a resident of North Carolina that was incurred for dependents who were under the age of seven and dependents who were physically or mentally incapable of caring for themselves, credit for child and dependent care expenses, other qualifying expenses, credit for other qualifying expenses, total credit for child and dependent care expenses.

(10) Review by the State Auditor to the extent authorized in G.S. 147-64.7.

(11) To give a spouse who elects to file a joint tax return a copy of the return or information contained on the return.

(11a) To provide a copy of a return to the taxpayer who filed the return.

(11b) In the case of a return filed by a corporation, a partnership, a trust, or an estate, to provide a copy of the return or information on the return to a person who has a material interest in the return if, under the circumstances, section 6103(e)(1) of the Code would require disclosure to that person of any corresponding federal return or information.

(11c) In the case of a return of an individual who is legally incompetent or deceased, to provide a copy of the return to the legal representative of the estate of the incompetent individual or decedent.

(12) To contract with a financial institution for the receipt of withheld income tax payments under G.S. 105-163.6 or for the transmittal of payments by electronic funds transfer.

(13) To furnish the following to the Fiscal Research Division of the General Assembly, upon request:

a. A sample, suitable in character, composition, and size for statistical analyses, of tax returns or other tax information from which taxpayers' names and identification numbers have been removed.

b. An analysis of the fiscal impact of proposed legislation.

(14) To exchange information concerning a tax imposed by Subchapter V of this Chapter with the Standards Division of the Department of Agriculture and Consumer Services when the information is needed to administer the Gasoline and Oil Inspection Act, Article 3 of Chapter 119 of the General Statutes.

(15) To exchange information concerning a tax imposed by Articles 2A, 2C, or 2D of this Chapter with one of the following agencies when the information is needed to fulfill a duty imposed on the Department or the agency:

a. The North Carolina Alcoholic Beverage Control Commission.

b. The Division of Alcohol Law Enforcement of the Department of Crime Control and Public Safety.

c. The Bureau of Alcohol, Tobacco, and Firearms of the United States Treasury Department.

d. Law enforcement agencies.

e. The Division of Community Corrections of the Department of Correction.

(15a) To furnish to the head of the appropriate State or federal law enforcement agency information concerning the commission of an offense under the jurisdiction of that agency discovered by the Department during a criminal investigation of the taxpayer.

(16) To furnish to the Department of Secretary of State the name, address, tax year end, and account and identification numbers of a corporation liable for corporate income or franchise taxes or of a limited liability company liable for a corporate or a partnership tax return to enable the Secretary of State to notify the corporation or the limited liability company of the annual report filing requirement or that its articles of incorporation or articles of organization or its certificate of authority has been suspended.

(16a) To provide the North Carolina Self-Insurance Security Association information on self-insurers' premiums as determined under G.S. 105-228.5(b), (b1), and (c) for the purpose of collecting the assessments authorized in G.S. 97-133(a).

(17) To inform the Business License Information Office of the Department of Commerce of the status of an application for a license for which a tax is imposed and of any information needed to process the application.

(18) To furnish to the Office of the State Controller the name, address, and account and identification numbers of a taxpayer upon request to enable the State Controller to verify statewide vendor files or track debtors of the State.

(19) To furnish to the North Carolina Industrial Commission information concerning workers' compensation reported to the Secretary under G.S. 105-163.7.

(20) **(Repealed effective January 1, 2012)** To furnish to the Environmental Management Commission information concerning whether a person who is requesting certification of a dry-cleaning facility or wholesale distribution facility from the Commission is liable for privilege tax under Article 5D of this Chapter.

(21) To exchange information concerning the tax on piped natural gas imposed by Article 5E of this Chapter with the North Carolina Utilities Commission or the Public Staff of that Commission.

(22) To provide the Secretary of Administration pursuant to G.S. 143-59.1 a list of vendors and their affiliates who meet one or more of the conditions of G.S. 105-164.8(b) but refuse to collect the use tax levied under Article 5 of this Chapter on their sales delivered to North Carolina.

(23) To provide public access to a database containing the names and account numbers of taxpayers who are not required to pay sales and use taxes under Article 5 of this Chapter to a retailer because of an exemption or because they are authorized to pay the tax directly to the Department of Revenue.

(24) To furnish the Department of Commerce and the Employment Security Commission a copy of the qualifying information required in G.S. 105-129.7(b) or G.S. 105-129.86(b).

(25) To provide public access to a database containing the names of retailers who are registered to collect sales and use taxes under Article 5 of this Chapter.

(26) To contract for the collection of tax debts pursuant to G.S. 105-243.1.

(27) To provide a report required under this Chapter.

(28) To exchange information concerning a tax credit claimed under Article 3E of this Chapter with the North Carolina Housing Finance Agency.

(29) To provide to the Economic Investment Committee established pursuant to G.S. 143B-437.48 information necessary to implement Part 2F of Article 10 of Chapter 143B of the General Statutes.

(30) To prove that a business does not meet the definition of "small business" under Article 3F of this Chapter because the annual receipts of the business, combined with the annual receipts of all related persons, exceeds the applicable amount.

(31) **(Repealed for business activities occurring in taxable years beginning on or after January 1, 2020)** To verify with a related entity or strategic partner information relating to that entity provided by a taxpayer claiming a credit under Article 3G of this Chapter.

(32) Repealed by Session Laws 2006-162, s. 4(c), as amended by Session Laws 2007-527, s. 24, effective July 24, 2006.

(33) To provide to the North Carolina State Lottery Commission the information required under G.S. 18C-141.

(34) To exchange information concerning a tax credit claimed under G.S. 105-130.47 or G.S. 105-151.29 with the North Carolina Film Office of the Department of Commerce and with the regional film commissions.

(35) To furnish to a taxpayer claiming a credit under Article 3G of this Chapter information from a related entity or strategic partner to the extent that information was used by the Secretary to adjust the amount of tax credit claimed by the taxpayer.

(36) To furnish to a taxpayer claiming a credit under G.S. 105-130.47 or G.S. 105-151.29 information used by the Secretary to adjust the amount of the credit claimed by the taxpayer.

(37) To furnish the Department of Commerce with the information needed to complete the studies required under G.S. 105-129.2A and G.S. 105-129.82.

(38) **(Effective for taxable years beginning before January 1, 2008)** To verify with a nonprofit organization information relating to eligibility for a credit under G.S. 105-129.16H.

(38) **(Effective for taxable years beginning on or after January 1, 2008)** To verify with a nonprofit organization or a unit of State or local government information relating to eligibility for a credit under G.S. 105-129.16H.

(c) Punishment. — A person who violates this section is guilty of a Class 1 misdemeanor. If the person committing the violation is an officer or employee, that person shall be dismissed from public office or public employment and may not hold any public office or public employment in this State for five years after the violation. (1939, c. 158, s. 928; 1951, c. 190, s. 2; 1973, c. 476, s. 193; c. 903, s. 4; c. 1287, s. 13; 1975, c. 19, s. 29; c. 275, s. 7; 1977, c. 657, s. 6; 1979, c. 495; 1983, c. 7; 1983 (Reg. Sess., 1984), c. 1004, s. 3; c. 1034, s. 125; 1987, c. 440, s. 4; 1989, c. 628; c. 728, s. 1.47; 1989 (Reg. Sess., 1990), c. 945, s. 15; 1993, c. 485, s. 31; c. 539, s. 712; 1994, Ex. Sess., c. 14, s. 51; c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 679, s. 8.4; 1995, c. 17, s. 11; c. 21, s. 2; 1997-118, s. 6; 1997-261, s. 14; 1997-340, s. 2; 1997-392, s. 4.1; 1997-475, s. 6.11; 1998-22, ss. 10, 11; 1998-98, ss. 13.1(b), 20; 1998-139, s. 1; 1998-212, s. 12.27A(o); 1999-219, s. 7.1; 1999-340, s. 8; 1999-341, s. 8; 1999-360, s. 2.1; 1999-438, s. 18; 1999-452, s. 28.1; 2000-120, s. 8; 2000-173, s. 11; 2001-205, s. 1; 2001-380, s. 5; 2001-476, s. 8(b); 2001-487, ss. 47(d), 123; 2002-87, s. 7; 2002-106, s. 5; 2002-172, s. 2.3; 2003-349, s. 4; 2003-416, s. 2; 2004-124, s. 32D.3; 2004-170, s. 23; 2004-204, 1st Ex. Sess., s. 4; 2005-276, ss. 31.1(cc), 39.1(c), 7.27(b); 2005-400, s. 20; 2005-429, s. 2.13; 2005-435, ss. 32(b), 32(c), 37, 48; 2006-162, s. 4(c); 2006-196, s. 11; 2006-252, s. 2.21; 2007-397, s. 13(d); 2007-491, s. 38; 2007-527, ss. 24, 33, 34, 35, 36; 2008-107, s. 28.25(d); 2008-144, s. 4.)

Subdivision (b)(38) Set Out Twice. — The first version of subdivision (b)(38) set out above is effective for taxable years beginning before January 1, 2008. The second version of subdivision (b)(38) set out above is effective for taxable years beginning on or after January 1, 2008.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Session Laws 2008-134, s. 78, provides: "An employee of the State may provide tax information about tax credits claimed under former Article 3A or current Article 3J of Chapter 105 of the General Statutes to the University of North Carolina at Chapel Hill (University) to enable the University to compile statistical information to fulfill a contractual obligation between the University and the North Carolina General Assembly, on behalf of the Joint Select Committee on Economic Development Incentives established by the President Pro Tempore of the Senate and the Speaker of the House of Representatives on March 2, 2007. In lieu of extracting the needed information from these tax returns, the State may provide a copy of the returns to the University so the University can extract the information. The disclosure allowed by this section is an exception to G.S. 105-259. A person to whom a disclosure is made under this section is subject to the same confidentiality requirements as an employee of the State who has access to tax information."

Effect of Amendments. —

Session Laws 2008-107, s. 28.25(d), effective for taxable years beginning on or after January 1, 2008, inserted "or a unit of State or local government" in subdivision (b)(38).

Session Laws 2008-144, s. 4, effective August 2, 2008, in subdivision (b)(5d), substituted "tax, room occupancy tax, vehicle rental tax, or heavy equipment rental" for "tax or room occupancy" in the introductory language, in sub-subdivision (b)(5d)a, substituted "one or more of these local taxes" for "a local prepared food and beverages tax or room occupancy tax," and in sub-subdivision (b)(5d)b, deleted "of Revenue" following "Department", and substituted "one or more of these local taxes" for "its local prepared food and beverages tax or room occupancy tax."

§ 105-263. (Effective January 1, 2009) Extensions of time for filing a report or return.

The Secretary may extend the time in which a person must file a report or return with the Secretary. To obtain an extension of time for filing a report or return, a person must comply with any application requirement set by the Secretary. An extension of time for filing a franchise tax return or an income tax return does not extend the time for paying the tax due or the time when a penalty attaches for failure to pay the tax. An extension of time for filing a report or any return other than a franchise tax return or an income tax return extends the time for paying the tax due and the time when a penalty attaches for failure to pay the tax. When an extension of time for filing a report or return extends the time for paying the tax expected to be due with the report or return, interest, at the rate established pursuant to G.S. 105-241.21, accrues on the tax due from the original due date of the report or return to the date the tax is paid. (1939, c. 158, s. 932; 1973, c. 476, s. 193; 1977, c. 1114, s. 2; 1989 (Reg. Sess., 1990), c. 984, s. 14; 1991 (Reg. Sess., 1992), c. 930, s. 11; 1997-300, s. 1; 2007-491, s. 44(1)a; 2008-107, s. 28.18(c).)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Editor's Note. —

Session Laws 2008-107, s. 28.18(e), provides: "This section does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute repealed by this act before the effective date of its repeal; nor does it affect the right to any refund or credit of a tax that accrued under the repealed statute before the effective date of its repeal."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.18(c), effective January 1, 2009, and applicable to gifts made on or after the date, substituted "franchise tax return or an income tax return" for "franchise tax return, an income tax return, or a gift tax return" twice.

§ 105-264. Effect of Secretary's interpretation of revenue laws.

(a) Interpretation. — It is the duty of the Secretary to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules. An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation. If the Secretary changes an interpretation, a taxpayer who relied on it before it was changed is not liable for any penalty or additional assessment on any tax that accrued before the interpretation was changed and was not paid by reason of reliance upon the interpretation.

(b) Advice. — If a taxpayer requests specific advice from the Department and receives erroneous advice in response, the taxpayer is not liable for any penalty or additional assessment attributable to the erroneous advice furnished by the Department to the extent that the following conditions are all satisfied:

(1) The advice was reasonably relied upon by the taxpayer.

(2) The penalty or additional assessment did not result from the taxpayer's failure to provide adequate or accurate information.

(3) The Department provided the advice in writing or the Department's records establish that the Department provided erroneous verbal advice.

(c) Revised Interpretations. — This section does not prevent the Secretary from changing an interpretation and it does not prevent a change in an interpretation from applying on and after the effective date of the change. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14; 1973, c. 476, s. 193; 1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e).)

Editor's Note. — Session Laws 2008-107, s. 28.16(a), provides: "The General Assembly makes the following findings:

"(1) The following areas of the sales and use tax laws are the areas for which the Department of Revenue receives the most questions from taxpayers:

"a. The rate of tax that applies to food and prepared food.

"b. The distinction between a retailer and a performance contractor.

"c. The distinction between a service that is necessary to complete the sale of tangible personal property, and therefore taxable, and a service that is incidental to the sale of tangible personal property, and therefore not taxable.

"d. The determination of whether a person is a manufacturer.

"(2) These areas of the sales and use tax laws have been the subject of legislative changes in recent years.

"(3) Small businesses have fewer resources to devote to resolving the complexities of the sales and use tax laws than large businesses have and, therefore, may be at a disadvantage with respect to compliance issues in complex areas and changing areas.

"(4) Assessments against a small business for inadvertent noncompliance in these complex areas may threaten the viability of the small business.

"(5) The sales and use tax laws are not intended to place the viability of small businesses in jeopardy.

"(6) A study of these complex areas is needed to determine how to make the laws in these areas clearer and to reduce the compliance burden."

Session Laws 2008-107, ss. 28.16(g), (h), and (i), provide: "(g) The Department of Revenue is directed to establish a plan to record telephone calls received at the Department's Taxpayer Assistance Center and to implement this plan by July 1, 2010. The plan shall, at a minimum, provide for recording calls for the purpose of training and evaluation with respect to customer service and quality control measures. The Department may retain up to seven hundred thousand dollars ($700,000) of the amount collected under Article 5 of Chapter 105 of the General Statutes in fiscal year 2008-2009 for this purpose, and this amount is appropriated to the Department for this purpose. Amounts not used in fiscal year 2008-2009 for this purpose do not revert but remain available to the Department for this purpose until the system is implemented.

"(h) The Revenue Laws Study Committee shall study the issues listed in this Section and report on the study, including any recommendations or legislative proposals, to the 2009 General Assembly.

"(1) The taxation of services necessary to complete the sale of tangible personal property and standards for distinguishing between a service that is taxable as one that is necessary to complete the sale and a service that is incidental to the sale of tangible personal property.

"(2) The applicability of the sales and use tax to performance contracts and standards for distinguishing between performance contractors and retailers.

"(3) The distinction between food and prepared food under the sales and use tax laws and whether to eliminate this distinction by applying a uniform, revenue-neutral rate to all food.

"(i) The Department of Revenue shall make a report to the Revenue Laws Study Committee on customer service improvement initiatives conducted by the Department. The report is due prior to the convening of the 2009 General Assembly and shall address, at a minimum, the following issues:

"(1) A review of the Department's efforts to ensure that inquiries on complicated tax matters are handled or reviewed by appropriate personnel within the Department.

"(2) A review of the Department's efforts to provide accurate and timely information regarding changes in tax law resulting from legislative changes, court decisions, or revised interpretations.

"(3) A review of the Department's outreach efforts designed to assist taxpayers, particularly small business taxpayers, in complying with the State's tax laws.

"(4) A review of the Department's efforts to ensure that taxpayers are informed of their right to request written advice from the Department upon which they may reasonably rely.

"(5) A review of the Department's plan to record telephone calls at the Department's Taxpayer Assistance Center."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.16(e), effective July 16, 2008, rewrote the section.

§ 105-264.1. Secretary's interpretation applies to local taxes that are based on State taxes.

An interpretation by the Secretary of a law administered by the Secretary applies to a local law administered by a unit of local government when the local law refers to the State law to determine the application of the local law. A person who is subject to the local law or the unit of local government that administers the local law may ask the Secretary for an interpretation of the State law that determines the application of the local law. An interpretation by the Secretary of a State law that determines the application of a local law provides the same protections against liability under the local law that it provides under the State law. (2008-134, s. 12(a).)

Editor's Note. — Session Laws 2008-134, s. 79, made this section effective July 28, 2008.

SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

Article 11.

Short Title, Purpose, and Definitions.

§ 105-271. Official title.

CASE NOTES

Cited in In re Appeal of Parker, — N.C. App. —, 664 S.E.2d 1, 2008 N.C. App. LEXIS 1338 (2008).

§ 105-273. (Effective for taxes imposed for taxable years beginning before July 1, 2008) Definitions.

Section Set Out Twice. — The section above is effective for taxes imposed for taxable years beginning before July 1, 2008. For the section as amended effective for taxes imposed for taxable years beginning on or after July 1, 2008, see the following section, also numbered G.S. 105-273.

CASE NOTES

Privilege "Belonging" or "Appertaining" to Real Property. — Non-refundable membership fee in a continuing care retirement community was a right and privilege "belonging" or "appertaining to" the taxpayers' real property and was properly included in its tax appraisal value. In re Appeal of Tillman, — N.C. App. —, 653 S.E.2d 911, 2007 N.C. App. LEXIS 2563 (2007).

§ 105-273. (Effective for taxes imposed for taxable years beginning on or after July 1, 2008) Definitions.

The following definitions apply in this Subchapter:

(1) Abstract. — The document on which the property of a taxpayer is listed for ad valorem taxation and on which the appraised and assessed values of the property are recorded.

(2) Appraisal. — The true value of property or the process by which true value is ascertained.

(3) Assessment. — The tax value of property or the process by which the assessment is determined.

(4) Repealed by Session Laws 1973, c. 695, s. 15, effective January 1, 1974.

(4a) Code. — Defined in G.S. 105-228.90.

(5) Collector or tax collector. — A person charged with the duty of collecting taxes for a county or municipality.

(5a) Construction contractor. — A taxpayer who is regularly engaged in building, installing, repairing, or improving real property.

(6) Corporation. — An organization having capital stock represented by [shares] or an incorporated, nonprofit organization.

(6a) Discovered property. — Any of the following:
- a. Property that was not listed during a listing period.
- b. Property that was listed but the listing included a substantial understatement.
- c. Property that has been granted an exemption or exclusion and does not qualify for the exemption or exclusion.

(6b) Discover property. — Determine any of the following:
- a. Property has not been listed during a listing period.
- b. A taxpayer made a substantial understatement of listed property.
- c. Property was granted an exemption or exclusion and the property does not qualify for an exemption or exclusion.

(7) Document. — A book, paper, record, statement, account, map, plat, film, picture, tape, object, instrument, or any other thing conveying information.

(7a) Failure to list property. — Any of the following:
- a. Failure to list property during a listing period.
- b. A substantial understatement of listed property.
- c. Failure to notify the assessor that property granted an exemption or exclusion under an application for exemption or exclusion does not qualify for the exemption or exclusion.

(8) Intangible personal property. — Patents, copyrights, secret processes, formulae, good will, trademarks, trade brands, franchises, stocks, bonds, cash, bank deposits, notes, evidences of debt, leasehold interests in exempted real property, bills and accounts receivable, or other like property.

(8a) Inventories. — Any of the following:
- a. Goods held for sale in the regular course of business by manufacturers, retail and wholesale merchants, and construction contrac-

tors. As to retail and wholesale merchants and construction contractors, the term includes packaging materials that accompany and become a part of the goods sold.

b. Goods held by construction contractors to be furnished in the course of building, installing, repairing, or improving real property.

c. As to manufacturers, raw materials, goods in process, finished goods, or other materials or supplies that are consumed in manufacturing or processing or that accompany and become a part of the sale of the property being sold. The term does not include fuel used in manufacturing or processing and materials or supplies not used directly in manufacturing or processing.

d. A modular home as defined in G.S. 105-164.3(21b) that is used exclusively as a display model and held for eventual sale at the retail merchant's place of business.

e. Crops, livestock, poultry, feed used in the production of livestock and poultry, or other agricultural or horticultural products held for sale, whether in process or ready for sale.

(9) List or listing. — An abstract, when the term is used as a noun.

(10) Repealed by Session Laws 1987, c. 43, s. 1.

(10a) Local tax official. — A county assessor, an assistant county assessor, a member of a county board of commissioners, a member of a county board of equalization and review, a county tax collector, or the municipal equivalent of one of these officials.

(10b) Manufacturer. — A taxpayer who is regularly engaged in the mechanical or chemical conversion or transformation of materials or substances into new products for sale or in the growth, breeding, raising, or other production of new products for sale. The term does not include delicatessens, cafes, cafeterias, restaurants, and other similar retailers that are principally engaged in the retail sale of foods prepared by them for consumption on or off their premises.

(11) Municipal corporation or municipality. — A city, town, incorporated village, sanitary district, rural fire protection district, rural recreation district, mosquito control district, hospital district, metropolitan sewerage district, watershed improvement district, a consolidated city-county as defined by G.S. 160B-2, or another district or unit of local government by or for which ad valorem taxes are levied.

(12) Person. — An individual, a trustee, an executor, an administrator, another fiduciary, a corporation, a limited liability company, an unincorporated association, a partnership, a sole proprietorship, a company, a firm, or another legal entity.

(13) Real property, real estate, or land. — Any of the following:

a. The land itself.

b. Buildings, structures, improvements, or permanent fixtures on land.

c. All rights and privileges belonging or in any way appertaining to the property.

d. A manufactured home as defined in G.S. 143-143.9(6), unless it is considered tangible personal property for failure to meet all of the following requirements:

1. It is a residential structure.
2. It has the moving hitch, wheels, and axles removed.
3. It is placed upon a permanent foundation either on land owned by the owner of the manufactured home or on land in which

G.S. 105-273 is set out twice. See note.

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the owner of the manufactured home has a leasehold interest pursuant to a lease with a primary term of at least 20 years and the lease expressly provides for disposition of the manufactured home upon termination of the lease.

(13a) Retail merchant. — A taxpayer who is regularly engaged in the sale of tangible personal property, acquired by a means other than manufacture, processing, or producing by the merchant, to users or consumers.

(13b) Substantial understatement. — The omission of a material portion of the value, quantity, or other measurement of taxable property. The determination of materiality in each case shall be made by the assessor, subject to the taxpayer's right to review of the determination by the county board of equalization and review or board of commissioners and appeal to the Property Tax Commission.

(14) Tangible personal property. — All personal property that is not intangible and that is not permanently affixed to real property.

(15) Tax or taxes. — The principal amount of any property tax or dog license tax and costs, penalties, and interest.

(16) Taxing unit. — A county or municipality authorized to levy ad valorem property taxes.

(17) Taxpayer. — A person whose property is subject to ad valorem property taxation by any county or municipality and any person who, under the terms of this Subchapter, has a duty to list property for taxation.

(18) Valuation. — Appraisal and assessment.

(19) Wholesale merchant. — A taxpayer who is regularly engaged in the sale of tangible personal property, acquired by a means other than manufacture, processing, or producing by the merchant, to other retail or wholesale merchants for resale or to manufacturers for use as ingredient or component parts of articles being manufactured for sale. (1939, c. 310, s. 2; 1971, c. 806, s. 1; 1973, c. 695, ss. 14, 15; 1985, c. 656, s. 20; 1985 (Reg. Sess., 1986), c. 947, ss. 3, 4; 1987, c. 43, s. 1; c. 440, s. 2; c. 805, s. 3; c. 813, ss. 1-4; 1991, c. 34, s. 3; 1991 (Reg. Sess., 1992), c. 975, s. 1; c. 1004, s. 1; 1993, c. 354, s. 23; c. 459, s. 1; 1995, c. 461, s. 15; 1998-212, s. 29A.18(c); 2001-506, s. 1; 2002-156, s. 4; 2003-400, s. 4; 2006-106, ss. 1, 8; 2008-35, s. 1.1.)

Section Set Out Twice. — The section above is effective for taxes imposed for taxable years beginning on or after July 1, 2008. For the section as in effect for taxes imposed for taxable years beginning before July 1, 2008, see the main volume.

Editor's Note. — The bracketed word "[shares]" has been added in subdivision (6) at the direction of the Revisor of Statutes.

Effect of Amendments. —

Session Laws 2008-35, s. 1.1, effective for taxes imposed for taxable years beginning on or after July 1, 2008, rewrote the section.

CASE NOTES

Privilege "Belonging" or "Appertaining" to Real Property. — Non-refundable membership fee in a continuing care retirement community was a right and privilege "belonging" or "appertaining to" the taxpayers' real property and was properly included in its tax appraisal value. In re Appeal of Tillman, — N.C. App. —, 653 S.E.2d 911, 2007 N.C. App. LEXIS 2563 (2007).

Article 12.

Property Subject to Taxation.

§ 105-274. Property subject to taxation.

CASE NOTES

Privilege "Belonging" or "Appertaining" to Real Property. — Non-refundable membership fee in a continuing care retirement community was a right and privilege "belonging" or "appertaining to" the taxpayers' real property and was properly included in its tax appraisal value. In re Appeal of Tillman, — N.C. App. —, 653 S.E.2d 911, 2007 N.C. App. LEXIS 2563 (2007).

§ 105-275. Property classified and excluded from the tax base.

The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, assessed, or taxed:

(1) Repealed by Session Laws 1987, c. 813, s. 5.

(2) Tangible personal property that has been imported from a foreign country through a North Carolina seaport terminal and which is stored at such a terminal while awaiting further shipment for the first 12 months of such storage. (The purpose of this classification is to encourage the development of the ports of this State.)

(3) Real and personal property owned by nonprofit water or nonprofit sewer associations or corporations.

(4) Repealed by Session Laws 1987, c. 813, s. 5.

(5) Vehicles that the United States government gives to veterans on account of disabilities they suffered in World War II, the Korean Conflict, or the Vietnam Era so long as they are owned by:

a. A person to whom a vehicle has been given by the United States government or

b. Another person who is entitled to receive such a gift under Title 38, section 252, United States Code Annotated.

(5a) A motor vehicle owned by a disabled veteran that is altered with special equipment to accommodate a service-connected disability. As used in this section, disabled veteran means a person as defined in 38 U.S.C. § 101(2) who is entitled to special automotive equipment for a service-connected disability, as provided in 38 U.S.C. § 3901.

(6) Special nuclear materials held for or in the process of manufacture, processing, or delivery by the manufacturer or processor thereof, regardless whether the manufacturer or processor owns the special nuclear materials. The terms "manufacture" and "processing" do not include the use of special nuclear materials as fuel. The term "special nuclear materials" includes (i) uranium 233, uranium enriched in the isotope 233 or in the isotope 235; and (ii) any material artificially enriched by any of the foregoing, but not including source material. "Source material" means any material except special nuclear material which contains by weight one twentieth of one percent (0.05%) or more of (i) uranium, (ii) thorium, or (iii) any combination thereof. Provided however, that to qualify for this exemption no such nuclear materials shall be discharged into any river, creek or stream in North Carolina. The classification and exclusion provided for herein shall be

denied to any manufacturer, fabricator or processor who permits burial of such material in North Carolina or who permits the discharge of such nuclear materials into the air or into any river, creek or stream in North Carolina if such discharge would contravene in any way the applicable health and safety standards established and enforced by the Department of Environment and Natural Resources or the Nuclear Regulatory Commission. The most stringent of these standards shall govern.

(7) Real and personal property that is:
  a. Owned either by a nonprofit corporation formed under the provisions of Chapter 55A of the General Statutes or by a bona fide charitable organization, and either operated by such owning organization or leased to another such nonprofit corporation or charitable organization, and
  b. Appropriated exclusively for public parks and drives.

(8)a. Real and personal property that is used or, if under construction, is to be used exclusively for air cleaning or waste disposal or to abate, reduce, or prevent the pollution of air or water (including, but not limited to, waste lagoons and facilities owned by public or private utilities built and installed primarily for the purpose of providing sewer service to areas that are predominantly residential in character or areas that lie outside territory already having sewer service), if the Department of Environment and Natural Resources or a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 furnishes a certificate to the tax supervisor of the county in which the property is situated or to be situated stating that the Environmental Management Commission or local air pollution control program has found that the described property:
    1. Has been or will be constructed or installed;
    2. Complies with or that plans therefor which have been submitted to the Environmental Management Commission or local air pollution control program indicate that it will comply with the requirements of the Environmental Management Commission or local air pollution control program;
    3. Is being effectively operated or will, when completed, be required to operate in accordance with the terms and conditions of the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program; and
    4. Has or, when completed, will have as its primary rather than incidental purpose the reduction of water pollution resulting from the discharge of sewage and waste or the reduction of air pollution resulting from the emission of air contaminants.

  a1. Sub-subdivision a. of this subdivision shall not apply to an animal waste management system, as defined in G.S. 143-215.10B, unless the Environmental Management Commission determines that the animal waste management system will accomplish all of the following:
    1. Eliminate the discharge of animal waste to surface waters and groundwater through direct discharge, seepage, or runoff.
    2. Substantially eliminate atmospheric emissions of ammonia.
    3. Substantially eliminate the emission of odor that is detectable beyond the boundaries of the parcel or tract of land on which the farm is located.

4. Substantially eliminate the release of disease-transmitting vectors and airborne pathogens.
5. Substantially eliminate nutrient and heavy metal contamination of soil and groundwater.

b. Real or personal property that is used or, if under construction, is to be used exclusively for recycling or resource recovering of or from solid waste, if the Department of Environment and Natural Resources furnishes a certificate to the tax supervisor of the county in which the property is situated stating the Department of Environment and Natural Resources has found that the described property has been or will be constructed or installed, complies or will comply with the rules of the Department of Environment and Natural Resources, and has, or will have as its primary purpose recycling or resource recovering of or from solid waste.

c. Tangible personal property that is used exclusively, or if being installed, is to be used exclusively, for the prevention or reduction of cotton dust inside a textile plant for the protection of the health of the employees of the plant, in accordance with occupational safety and health standards adopted by the State of North Carolina pursuant to Article 16 of G.S. Chapter 95. Notwithstanding the exclusive use requirement of this sub-subdivision, all parts of a ventilation or air conditioning system that are integrated into a system used for the prevention or reduction of cotton dust, except for chillers and cooling towers, are excluded from taxation under this sub-subdivision. The Department of Revenue shall adopt guidelines to assist the tax supervisors in administering this exclusion.

d. Real or personal property that is used or, if under construction, is to be used by a major recycling facility as defined in G.S. 105-129.25 predominantly for recycling or resource recovering of or from solid waste, if the Department of Environment and Natural Resources furnishes a certificate to the tax supervisor of the county in which the property is situated stating the Department of Environment and Natural Resources has found that the described property has been or will be constructed or installed for use by a major recycling facility, complies or will comply with the rules of the Department of Environment and Natural Resources, and has, or will have as a purpose recycling or resource recovering of or from solid waste.

(9) through (11) Repealed by Session Laws 1987, c. 813, s. 5.

(12) Real property owned by a nonprofit corporation or association exclusively held and used by its owner for educational and scientific purposes as a protected natural area. (For purposes of this subdivision, the term "protected natural area" means a nature reserve or park in which all types of wild nature, flora and fauna, and biotic communities are preserved for observation and study.)

(13) Repealed by Session Laws 1973, c. 904.

(14) Motor vehicles chassis belonging to nonresidents, which chassis temporarily enters the State for the purpose of having a body mounted thereon.

(15) Upon the date on which each county's next general reappraisal of real property under the provisions of G.S. 105-286(a) becomes effective, standing timber, pulpwood, seedlings, saplings, and other forest growth. (The purpose of this classification is to encourage proper forest management practices and to develop and maintain the forest resources of the State.)

(16) Non-business Property. — As used in this subdivision, the term "non-business property" means personal property that is used by the owner of the property for a purpose other than the production of income and is not used in connection with a business. The term includes household furnishings, clothing, pets, lawn tools, and lawn equipment. The term does not include motor vehicles, mobile homes, aircraft, watercraft, or engines for watercraft.

(17) Real and personal property belonging to the American Legion, Veterans of Foreign Wars, Disabled American Veterans, or to any similar veterans organizations chartered by the Congress of the United States or organized and operated on a statewide or nationwide basis, and any post or local organization thereof, when used exclusively for meeting or lodge purposes by said organization, together with such additional adjacent real property as may be necessary for the convenient and normal use of the buildings thereon. Notwithstanding the exclusive-use requirement hereinabove established, if a part of a property that otherwise meets this subdivision's requirements is used for a purpose that would require that it not be listed, appraised, assessed or taxed if the entire property were so used, that part, according to its value, shall not be listed, appraised, assessed or taxed. The fact that a building or facility is incidentally available to and patronized by the general public, so far as there is no material amount of business or patronage with the general public, shall not defeat the classification granted by this section.

(18) Real and personal property belonging to the Grand Lodge of Ancient, Free and Accepted Masons of North Carolina, the Prince Hall Masonic Grand Lodge of North Carolina, their subordinate lodges and appendant bodies including the Ancient and Arabic Order Nobles of the Mystic Shrine, and the Ancient Egyptian Order Nobles of the Mystic Shrine, when used exclusively for meeting or lodge purposes by said organization, together with such additional adjacent real property as may be necessary for the convenient normal use of the buildings thereon. Notwithstanding the exclusive-use requirement hereinabove established, if a part of a property that otherwise meets this subdivision's requirements is used for a purpose that would require that it not be listed, appraised, assessed or taxed if the entire property were so used, that part, according to its value, shall not be listed, appraised, assessed or taxed. The fact that a building or facility is incidentally available to and patronized by the general public, so far as there is no material amount of business or patronage with the general public, shall not defeat the classification granted by this section.

(19) Real and personal property belonging to the Loyal Order of Moose, the Benevolent and Protective Order of Elks, the Knights of Pythias, the Odd Fellows, the Woodmen of the World, and similar fraternal or civic orders and organizations operated for nonprofit benevolent, patriotic, historical, charitable, or civic purposes, when used exclusively for meeting or lodge purposes by the organization, together with as much additional adjacent real property as may be necessary for the convenient normal use of the buildings. Notwithstanding the exclusive-use requirement of this subdivision, if a part of a property that otherwise meets this subdivision's requirements is used for a purpose that would require that it not be listed, appraised, assessed, or taxed if the entire property were so used, that part, according to its value, shall not be listed, appraised, assessed, or taxed. The fact that a building or facility is incidentally available to and patronized by the general public, so far as there is no material amount of business or

patronage with the general public, shall not defeat the classification granted by this section. Nothing in this subdivision shall be construed so as to include social fraternities, sororities, and similar college, university, or high school organizations in the classification for exclusion from ad valorem taxes.

(20) Real and personal property belonging to Goodwill Industries and other charitable organizations organized for the training and rehabilitation of disabled persons when used exclusively for training and rehabilitation, including commercial activities directly related to such training and rehabilitation.

(21) **(Repealed effective for taxes imposed for taxable years beginning on or after July 1, 2009)** The first thirty-eight thousand dollars ($38,000) in assessed value of housing together with the necessary land therefor, owned and used as a residence by a disabled veteran who receives benefits under 38 U.S.C. § 2101. This exclusion shall be the total amount of the exclusion applicable to such property.

(22) Repealed by Session Laws 1987, c. 813, s. 5.

(23) Tangible personal property imported from outside the United States and held in a Foreign Trade Zone for the purpose of sale, manufacture, processing, assembly, grading, cleaning, mixing or display and tangible personal property produced in the United States and held in a Foreign Trade Zone for exportation, either in its original form or as altered by any of the above processes.

(24) Cargo containers and container chassis used for the transportation of cargo by vessels in ocean commerce.

The term "container" applies to those nondisposable receptacles of a permanent character and strong enough for repeated use and specially designed to facilitate the carriage of goods, by one or more modes of transport, one of which shall be by ocean vessels, without intermediate reloadings and fitted with devices permitting its ready handling particularly in the transfer from one transport mode to another.

(24a) Aircraft that is owned or leased by an interstate air courier, is apportioned under G.S. 105-337 to the air courier's hub in this State, and is used in the air courier's operations in this State. For the purpose of this subdivision, the terms "interstate air courier" and "hub" have the meanings provided in G.S. 105-164.3.

(25) Tangible personal property shipped into this State for the purpose of repair, alteration, maintenance or servicing and reshipment to the owner outside this State.

(26) For the tax year immediately following transfer of title, tangible personal property manufactured in this State for the account of a nonresident customer and held by the manufacturer for shipment. For the purpose of this subdivision, the term "nonresident" means a taxpayer having no place of business in North Carolina.

(27), (28) Repealed by Session Laws 1983, c. 643, s. 1.

(29) Real property and easements wholly and exclusively held and used for nonprofit historic preservation purposes by a nonprofit historical association or institution, including real property owned by a nonprofit corporation organized for historic preservation purposes and held by its owner exclusively for sale under an historic preservation agreement to be prepared and recorded, at the time of sale, under the provisions of the Conservation and Historic Preservation Agreements Act, Article 4, Chapter 121 of the General Statutes of North Carolina.

(29a) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Land within an historic district, held by a nonprofit corporation organized for historic preservation purposes, for use as a future site for an historic structure that is to be moved to the site from another location. Property may be classified under this subdivision for no more than five years. The taxes that would otherwise be due on land classified under this subdivision shall be a lien on the real property of the taxpayer as provided in G.S. 105-355(a). The taxes shall be carried forward in the records of the taxing unit or units as deferred taxes and shall be payable five years from the fiscal year the exclusion is first claimed unless an historic structure is moved onto the site during that time. If an historic structure has not been moved to the site within five years, then deferred taxes for the preceding five fiscal years shall immediately be payable, together with interest as provided in G.S. 105-360 for unpaid taxes that shall accrue on the deferred taxes as if they had been payable on the dates on which they would originally become due. All liens arising under this subdivision are extinguished upon either the payment of any deferred taxes under this subdivision or the location of an historic structure on the site within the five-year period allowed under this subdivision.

(29a) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Land that is within an historic district and is held by a nonprofit corporation organized for historic preservation purposes for use as a future site for an historic structure that is to be moved to the site from another location. Property may be classified under this subdivision for no more than five years. The taxes that would otherwise be due on land classified under this subdivision shall be a lien on the real property of the taxpayer as provided in G.S. 105-355(a). The taxes shall be carried forward in the records of the taxing unit or units as deferred taxes. The deferred taxes are due and payable in accordance with G.S. 105-277.1F when the property loses its eligibility for deferral as a result of a disqualifying event. A disqualifying event occurs when an historic structure is not moved to the property within five years from the first day of the fiscal year the property was classified under this subdivision.

(30) Repealed by Session Laws 1987, c. 813, s. 5.

(31) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Intangible personal property other than leasehold interests in exempted real property. This subdivision does not affect the taxation of software not otherwise excluded by subdivision (40) of this section.

(31) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Intangible personal property other than a leasehold interest that is in exempted real property and is not excluded under subdivision (31e) of this section. This subdivision does not affect the taxation of software not otherwise excluded by subdivision (40) of this section.

(31a) through (31d) Repealed by Session Laws 1997-23, s. 3.

(31e) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** A leasehold interest in real property that is exempt under G.S. 105-278.1 and is used to provide affordable housing for employees of the unit of government that owns the property.

(32) Recodified as G.S. 105-278.6A by Session Laws 1998-212, s. 29A.18(a), effective for taxes imposed for taxable years beginning on or after July 1, 1998.

(32a) Inventories owned by contractors.

(33) Inventories owned by manufacturers.

(34) Inventories owned by retail and wholesale merchants.

(35) Severable development rights, as defined in G.S. 136-66.11(a), when severed and evidenced by a deed recorded in the office of the register of deeds pursuant to G.S. 136-66.11(c).

(36) Repealed by Session Laws 2001-474, s. 8, effective November 29, 2001.

(37) Poultry and livestock and feed used in the production of poultry and livestock.

(38) Repealed by Session Laws 2001-474, s. 8, effective November 29, 2001.

(39) Real and personal property that is: (i) owned by a nonprofit corporation organized upon the request of a State or local government unit for the sole purpose of financing projects for public use, (ii) leased to a unit of State or local government whose property is exempt from taxation under G.S. 105-278.1, and (iii) used in whole or in part for a public purpose by the unit of State or local government. If only part of the property is used for a public purpose, only that part is excluded from the tax. This subdivision does not apply if any distributions are made to members, officers, or directors of the nonprofit corporation.

(39a) A correctional facility, including construction in progress, that is located on land owned by the State and is constructed pursuant to a contract with the State, and any leasehold interest in the land owned by the State upon which the correctional facility is located.

(40) Computer software and any documentation related to the computer software. As used in this subdivision, the term “computer software” means any program or routine used to cause a computer to perform a specific task or set of tasks. The term includes system and application programs and database storage and management programs.

The exclusion established by this subdivision does not apply to computer software and its related documentation if the computer software meets one or more of the following descriptions:

a. It is embedded software. “Embedded software” means computer instructions, known as microcode, that reside permanently in the internal memory of a computer system or other equipment and are not intended to be removed without terminating the operation of the computer system or equipment and removing a computer chip, a circuit, or another mechanical device.

b. It is purchased or licensed from a person who is unrelated to the taxpayer and it is capitalized on the books of the taxpayer in accordance with generally accepted accounting principles, including financial accounting standards issued by the Financial Accounting Standards Board. A person is unrelated to a taxpayer if (i) the taxpayer and the person are not subject to any common ownership, either directly or indirectly, and (ii) neither the taxpayer nor the person has any ownership interest, either directly or indirectly, in the other.

This subdivision does not affect the value or taxable status of any property that is otherwise subject to taxation under this Subchapter.

The provisions of the exclusion established by this subdivision are not severable. If any provision of this subdivision or its application is held invalid, the entire subdivision is repealed.

(41) Objects of art held by the North Carolina State Art Society, Incorporated.

(42) A vehicle that is offered at retail for short-term lease or rental and is owned or leased by an entity engaged in the business of leasing or

renting vehicles to the general public for short-term lease or rental. For the purposes of this subdivision, the term "short-term lease or rental" shall have the same meaning as in G.S. 105-187.1, and the term "vehicle" shall have the same meaning as in G.S. 153A-156(e) and G.S. 160A-215.1(e). A gross receipts tax as set forth by G.S. 153A-156 and G.S. 160A-215.1 is substituted for and replaces the ad valorem tax previously levied on these vehicles.

(42a) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2009)** Heavy equipment on which a gross receipts tax may be imposed under G.S. 153A-156.1 and G.S. 160A-215.2.

(43) Real or tangible personal property that is subject to a capital lease pursuant to G.S. 115C-531.

(44) **(Effective for taxable years beginning on or after July 1, 2008)** Free samples of drugs that are required by federal law to be dispensed only on prescription and are given to physicians and other medical practitioners to dispense free of charge in the course of their practice.

(45) **(Effective for taxable years beginning on or after July 1, 2008)** Eighty percent (80%) of the appraised value of a solar energy electric system. For purposes of this subdivision, the term "solar energy electric system" means all equipment used directly and exclusively for the conversion of solar energy to electricity. (1939, c. 310, s. 303; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1; c. 1121, s. 3; 1973, cc. 290, 451; c. 476, s. 128; c. 484; c. 695, s. 1; c. 790, s. 1; cc. 904, 962, 1028, 1034, 1077; c. 1262, s. 23; c. 1264, s. 1; 1975, cc. 566, 755; c. 764, s. 6; 1977, c. 771, s. 4; c. 782, s. 2; c. 1001, ss. 1, 2; 1977, 2nd Sess., c. 1200, s. 4; 1979, c. 200, s. 1; 1979, 2nd Sess., c. 1092; 1981, c. 86, s. 1; 1981 (Reg. Sess., 1982), c. 1244, ss. 1, 2; 1983, c. 643, ss. 1, 2; c. 693; 1983 (Reg. Sess., 1984), c. 1060; 1985, c. 510, s. 1; c. 656, s. 37; 1985 (Reg. Sess., 1986), c. 982, s. 18; 1987, c. 356; c. 622, s. 2; c. 747, s. 8; c. 777, s. 6; c. 813, ss. 5, 6, 22; c. 850, s. 17; 1987 (Reg. Sess., 1988), c. 1041, s. 1.1; 1989, c. 148, s. 4; c. 168, s. 6; c. 705; c. 723, s. 1; c. 727, ss. 28, 29; 1991, c. 717, s. 1; 1991 (Reg. Sess., 1992), c. 975, s. 2; 1993, c. 459, s. 2; 1993 (Reg. Sess., 1994), c. 745, s. 39; 1995, c. 41, s. 2; c. 509, s. 51; 1995 (Reg. Sess., 1996), c. 646, s. 12; 1997-23, ss. 1, 3, 9; 1997-443, s. 11A.119(a); 1997-456, s. 27; 1998-55, ss. 10, 18; 1998-212, s. 29A.18(a); 1999-337, s. 35(a); 2000-2, s. 1; 2000-18, s. 1, 2000-140, ss. 71, 72(a); 2001-84, s. 3; 2001-427, s. 15(a); 2001-474, s. 8; 2002-104, s. 1; 2003-284, s. 43A.1; 2007-477, s. 1; 2007-527, s. 37; 2008-35, s. 2.1; 2008-107, s. 28.11(a); 2008-134, s. 72; 2008-144, s. 1; 2008-146, ss. 4.1, 5.1; 2008-171, ss. 7(a), (b).)

Subdivisions (29a) and (31) Set Out Twice. — The first versions of subdivisions (29a) and (31) set out above are effective for taxes imposed for taxable years beginning before July 1, 2008. The second versions of subdivisions (29a) and (31) set out above are effective for taxes imposed for taxable years beginning on or after July 1, 2008.

Editor's Note. —

Session Laws 2008-107, s. 28.11(h), provides, in part, that the Revisor of Statutes is authorized to correct any reference or citation in the General Statutes to any portion of Session Laws 2008-35 that is recodified or amended by Session Laws 2008-107, s. 28.11(h) by deleting incorrect references and substituting correct references. The reference in subdivision (29a) to G.S. 105-277.1C has been changed to G.S. 105-277.1F.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Session Laws 2008-146, ss. 4.2 and 5.2, each, provide: "This section is effective for taxes imposed for taxable years beginning on or after July 1, 2008."

Session Laws 2008-171, s. 8, provides, in part: "Notwithstanding G.S. 105-282.1, an application for the exclusion in G.S. 105-275(31e), as enacted by this act, is timely if filed on or before September 1, 2008."

Effect of Amendments. —

Session Laws 2008-35, s. 2.1, effective for taxes imposed for taxable years beginning on or after July 1, 2008, rewrote subdivision (29a).

Session Laws 2008-107, s. 28.11(a), effective for taxes imposed for taxable years beginning on or after July 1, 2009, repeals subdivision (21).

Session Laws 2008-134, s. 72, effective July 28, 2008, substituted "to be prepared and recorded, at the time of sale" for "prepared and recorded" in subdivision (29).

Session Laws 2008-144, s. 1, effective for taxes imposed for taxable years beginning on or after July 1, 2009, added subdivision (42a).

Session Laws 2008-146, ss. 4.1 and 5.1, effective for taxable years beginning on or after July 1, 2008, added subdivisions (44) and (45).

Session Laws 2008-171, ss. 7(a) and (b), effective for taxes imposed for taxable years beginning on or after July 1, 2008, in subdivision (31), substituted "a leasehold interest that is in exempted real property and is not excluded under subdivision (31e) of this section" for "leasehold interests in exempted real property"; and added subdivision (31e). See Editor's note for applicability.

§ 105-277.1. (Effective for taxes imposed for taxable years beginning before July 1, 2009) Property tax homestead exclusion.

(a) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Exclusion. — A permanent residence owned and occupied by a qualifying owner is designated a special class of property under Article V, Sec. 2(2) of the North Carolina Constitution and is taxable in accordance with this section. The amount of the appraised value of the residence equal to the exclusion amount is excluded from taxation. The exclusion amount is the greater of twenty thousand dollars ($20,000) or fifty percent (50%) of the appraised value of the residence. A qualifying owner is an owner who meets all of the following requirements as of January 1 preceding the taxable year for which the benefit is claimed:

(1) Is at least 65 years of age or totally and permanently disabled.
(2) Has an income for the preceding calendar year of not more than the income eligibility limit.
(3) Is a North Carolina resident.

(a) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008 and before July 1, 2009)** Exclusion. — A permanent residence owned and occupied by a qualifying owner is designated a special class of property under Article V, Sec. 2(2) of the North Carolina Constitution and is taxable in accordance with this section. The amount of the appraised value of the residence equal to the exclusion amount is excluded from taxation. The exclusion amount is the greater of twenty-five thousand dollars ($25,000) or fifty percent (50%) of the appraised value of the residence. A qualifying owner is an owner who meets all of the following requirements as of January 1 preceding the taxable year for which the benefit is claimed:

(1) Is at least 65 years of age or totally and permanently disabled.
(2) Has an income for the preceding calendar year of not more than the income eligibility limit.
(3) Is a North Carolina resident.

(a1) Temporary Absence. — An otherwise qualifying owner does not lose the benefit of this exclusion because of a temporary absence from his or her permanent residence for reasons of health, or because of an extended absence while confined to a rest home or nursing home, so long as the residence is unoccupied or occupied by the owner's spouse or other dependent.

(a2) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Income Eligibility Limit. — Until July 1, 2003, the income eligibility limit is eighteen thousand dollars ($18,000). For taxable years beginning on or after July 1, 2003, the income eligibility limit is the amount for the preceding year, adjusted by the same percentage of this amount as the percentage of any cost-of-living adjustment made to the benefits under Titles II and XVI of the Social Security Act for the preceding calendar year, rounded to the nearest one hundred dollars ($100.00). On or before July 1 of each year, the Department of Revenue must determine the income eligibility amount to be in effect for the taxable year beginning the following July 1 and must notify the assessor of each county of the amount to be in effect for that taxable year.

(a2) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008 and before July 1, 2009)** Income Eligibility Limit. — For the taxable year beginning on July 1, 2008, the income eligibility limit is twenty-five thousand dollars ($25,000). For taxable years beginning on or after July 1, 2009, the income eligibility limit is the amount for the preceding year, adjusted by the same percentage of this amount as the percentage of any cost-of-living adjustment made to the benefits under Titles II and XVI of the Social Security Act for the preceding calendar year, rounded to the nearest one hundred dollars ($100.00). On or before July 1 of each year, the Department of Revenue must determine the income eligibility amount to be in effect for the taxable year beginning the following July 1 and must notify the assessor of each county of the amount to be in effect for that taxable year.

(b) Definitions. — The following definitions apply in this section:

(1) Code. — The Internal Revenue Code, as defined in G.S. 105-228.90.

(1a) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Income. — Adjusted gross income, as defined in section 62 of the Code, plus all other moneys received from every source other than gifts or inheritances received from a spouse, lineal ancestor, or lineal descendant. For married applicants residing with their spouses, the income of both spouses must be included, whether or not the property is in both names.

(1a) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008 and before July 1, 2009)** Income. — All moneys received from every source other than gifts or inheritances received from a spouse, lineal ancestor, or lineal descendant. For married applicants residing with their spouses, the income of both spouses must be included, whether or not the property is in both names.

(1b) Owner. — A person who holds legal or equitable title, whether individually, as a tenant by the entirety, a joint tenant, or a tenant in common, or as the holder of a life estate or an estate for the life of another. A manufactured home jointly owned by husband and wife is considered property held by the entirety.

(2) Repealed by Session Laws 1993, c. 360, s. 1.

(2a) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 20.

(3) Permanent residence. — A person's legal residence. It includes the dwelling, the dwelling site, not to exceed one acre, and related improvements. The dwelling may be a single family residence, a unit in a multi-family residential complex, or a manufactured home.

(4) Totally and permanently disabled. — A person is totally and permanently disabled if the person has a physical or mental impairment that substantially precludes him or her from obtaining gainful employment and appears reasonably certain to continue without substantial improvement throughout his or her life.

(c) Application. — An application for the exclusion provided by this section should be filed during the regular listing period, but may be filed and must be accepted at any time up to and through June 1 preceding the tax year for which the exclusion is claimed. When property is owned by two or more persons other than husband and wife and one or more of them qualifies for this exclusion, each owner must apply separately for his or her proportionate share of the exclusion.

(1) Elderly Applicants. — Persons 65 years of age or older may apply for this exclusion by entering the appropriate information on a form made available by the assessor under G.S. 105-282.1.

(2) Disabled Applicants. — Persons who are totally and permanently disabled may apply for this exclusion by (i) entering the appropriate information on a form made available by the assessor under G.S. 105-282.1 and (ii) furnishing acceptable proof of their disability. The proof must be in the form of a certificate from a physician licensed to practice medicine in North Carolina or from a governmental agency authorized to determine qualification for disability benefits. After a disabled applicant has qualified for this classification, the applicant is not required to furnish an additional certificate unless the applicant's disability is reduced to the extent that the applicant could no longer be certified for the taxation at reduced valuation.

(d) Multiple Ownership. — A permanent residence owned and occupied by husband and wife as tenants by the entirety is entitled to the full benefit of this exclusion notwithstanding that only one of them meets the age or disability requirements of this section. When a permanent residence is owned and occupied by two or more persons other than husband and wife and one or more of the owners qualifies for this exclusion, each qualifying owner is entitled to the full amount of the exclusion not to exceed his or her proportionate share of the valuation of the property. No part of an exclusion available to one co-owner may be claimed by any other co-owner and in no event may the total exclusion allowed for a permanent residence exceed the exclusion amount provided in this section. (1971, c. 932, s. 1; 1973, c. 448, s. 1; 1975, c. 881, s. 2; 1977, c. 666, s. 1; 1979, c. 356, s. 1; c. 846, s. 1; 1981, c. 54, s. 1; c. 1052, s. 1; 1985, c. 656, ss. 44, 45; 1985 (Reg. Sess., 1986), c. 982, ss. 19, 20; 1987, c. 45, s. 1; 1993, c. 360, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 15.1(a); 2001-308, s. 1; 2007-484, s. 43.7T(a); 2007-497, s. 1.1; 2008-35, s. 3.)

Section Set Out Twice. — The section above is effective for taxes imposed for taxable years beginning before July 1, 2009. For the section effective for taxes imposed for taxable years beginning on or after July 1, 2009, see the following section, also numbered G.S. 105-277.1.

Subsections (a), (a2) and Subdivision (b)(1a) Set Out Twice. — The first versions of subsections (a) and (a2) and subdivision (b)(1a) set out above are effective for taxes imposed for taxable years beginning before July 1, 2008. The second versions of subsections (a) and (a2) and subdivision (b)(1a) set out above are effective for taxes imposed for taxable years beginning on or after July 1, 2008 and before July 1, 2009.

Effect of Amendments. —

Session Laws 2008-35, s. 3, effective for taxes imposed for taxable years beginning on or after July 1, 2008, in subsection (a2), substituted "For the taxable year beginning on July 1, 2008" for "Until July 1, 2008" in the first sentence, and substituted "July 1, 2009" for "July 1, 2008" in the second sentence.

§ 105-277.1. (Effective for taxes imposed for taxable years beginning on or after July 1, 2009) Elderly or disabled property tax homestead exclusion.

(a) Exclusion. — A permanent residence owned and occupied by a qualifying owner is designated a special class of property under Article V, Sec. 2(2) of the North Carolina Constitution and is taxable in accordance with this section. The amount of the appraised value of the residence equal to the exclusion amount is excluded from taxation. The exclusion amount is the greater of twenty five thousand dollars ($25,000) or fifty percent (50%) of the appraised value of the residence. An owner who receives an exclusion under this section may not receive other property tax relief.

A qualifying owner is an owner who meets all of the following requirements as of January 1 preceding the taxable year for which the benefit is claimed:

(1) Is at least 65 years of age or totally and permanently disabled.

(2) Has an income for the preceding calendar year of not more than the income eligibility limit.

(3) Is a North Carolina resident.

(a1) Temporary Absence. — An otherwise qualifying owner does not lose the benefit of this exclusion because of a temporary absence from his or her permanent residence for reasons of health, or because of an extended absence while confined to a rest home or nursing home, so long as the residence is unoccupied or occupied by the owner's spouse or other dependent.

(a2) Income Eligibility Limit. — For the taxable year beginning on July 1, 2008, the income eligibility limit is twenty-five thousand dollars ($25,000). For taxable years beginning on or after July 1, 2009, the income eligibility limit is the amount for the preceding year, adjusted by the same percentage of this amount as the percentage of any cost-of-living adjustment made to the benefits under Titles II and XVI of the Social Security Act for the preceding calendar year, rounded to the nearest one hundred dollars ($100.00). On or before July 1 of each year, the Department of Revenue must determine the income eligibility amount to be in effect for the taxable year beginning the following July 1 and must notify the assessor of each county of the amount to be in effect for that taxable year.

(b) Definitions. — The following definitions apply in this section:

(1) Code. — The Internal Revenue Code, as defined in G.S. 105-228.90.

(1a) Income. — All moneys received from every source other than gifts or inheritances received from a spouse, lineal ancestor, or lineal descendant. For married applicants residing with their spouses, the income of both spouses must be included, whether or not the property is in both names.

(1b) Owner. — A person who holds legal or equitable title, whether individually, as a tenant by the entirety, a joint tenant, or a tenant in common, or as the holder of a life estate or an estate for the life of another. A manufactured home jointly owned by husband and wife is considered property held by the entirety.

(2) Repealed by Session Laws 1993, c. 360, s. 1.

(2a) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 20.

(3) Permanent residence. — A person's legal residence. It includes the dwelling, the dwelling site, not to exceed one acre, and related improvements. The dwelling may be a single family residence, a unit in a multi-family residential complex, or a manufactured home.

(3a) Property tax relief. — The property tax homestead exclusion provided in this section, the property tax homestead circuit breaker provided in G.S. 105-277.1B, or the disabled veteran property tax homestead exclusion provided in G.S. 105-277.1C.

(4) Totally and permanently disabled. — A person is totally and permanently disabled if the person has a physical or mental impairment that substantially precludes him or her from obtaining gainful employment and appears reasonably certain to continue without substantial improvement throughout his or her life.

(c) Application. — An application for the exclusion provided by this section should be filed during the regular listing period, but may be filed and must be accepted at any time up to and through June 1 preceding the tax year for which the exclusion is claimed. When property is owned by two or more persons other than husband and wife and one or more of them qualifies for this exclusion, each owner must apply separately for his or her proportionate share of the exclusion.

(1) Elderly Applicants. — Persons 65 years of age or older may apply for this exclusion by entering the appropriate information on a form made available by the assessor under G.S. 105-282.1.

(2) Disabled Applicants. — Persons who are totally and permanently disabled may apply for this exclusion by (i) entering the appropriate information on a form made available by the assessor under G.S. 105-282.1 and (ii) furnishing acceptable proof of their disability. The proof must be in the form of a certificate from a physician licensed to practice medicine in North Carolina or from a governmental agency authorized to determine qualification for disability benefits. After a disabled applicant has qualified for this classification, the applicant is not required to furnish an additional certificate unless the applicant's disability is reduced to the extent that the applicant could no longer be certified for the taxation at reduced valuation.

(d) Ownership by Spouses. — A permanent residence owned and occupied by husband and wife as tenants by the entirety is entitled to the full benefit of this exclusion notwithstanding that only one of them meets the age or disability requirements of this section.

(e) Other Multiple Owners. — This subsection applies to co-owners who are not husband and wife. Each co-owner of a permanent residence must apply separately for the exclusion allowed under this section.

When one or more co-owners of a permanent residence qualify for the exclusion allowed under this section and none of the co-owners qualifies for the exclusion allowed under G.S. 105-277.1C, each co-owner is entitled to the full amount of the exclusion allowed under this section. The exclusion allowed to one co-owner may not exceed the co-owner's proportionate share of the valuation of the property, and the amount of the exclusion allowed to all the co-owners may not exceed the exclusion allowed under this section.

When one or more co-owners of a permanent residence qualify for the exclusion allowed under this section and one or more of the co-owners qualify for the exclusion allowed under G.S. 105-277.1C, each co-owner who qualifies for the exclusion under this section is entitled to the full amount of the exclusion. The exclusion allowed to one co-owner may not exceed the co-owner's proportionate share of the valuation of the property, and the amount of the exclusion allowed to all the co-owners may not exceed the greater of the exclusion allowed under this section and the exclusion allowed under G.S. 105-277.1C. (1971, c. 932, s. 1; 1973, c. 448, s. 1; 1975, c. 881, s. 2; 1977, c. 666, s. 1; 1979, c. 356, s. 1; c. 846, s. 1; 1981, c. 54, s. 1; c. 1052, s. 1; 1985, c. 656, ss. 44, 45; 1985 (Reg. Sess., 1986), c. 982, ss. 19, 20; 1987, c. 45, s. 1; 1993, c. 360, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 15.1(a); 2001-308, s. 1; 2007-484, s. 43.7T(a), (b); 2007-497, ss. 1.1, 2.1, 2.2; 2008-35, s. 3; 2008-107, s. 28.11(c)-(f), (i).)

Section Set Out Twice. — The section above is effective for taxes imposed for taxable years beginning on or after July 1, 2009. For the section as in effect for taxable years beginning before July 1, 2009, see the preceding section, also numbered G.S. 105-277.1.

Editor's Note. —

Session Laws 2008-146, s. 6, provides: "The Revenue Laws Study Committee must study the following:

"(1) the effect of PART I of this act and determine whether new positions are needed to perform sales assessment ratio studies in additional counties each year and to perform other functions related to this act.

"(2) The definition of income as it applies to the homestead exclusion."

Effect of Amendments. —

Session Laws 2008-35, s. 3, effective for taxes imposed for taxable years beginning on or after July 1, 2008, in subsection (a2), substituted "For the taxable year beginning on July 1, 2008" for "Until July 1, 2008" in the first sentence, and substituted "July 1, 2009" for

"July 1, 2008" in the second sentence.

Session Laws 2008-107, s. 28.11(c)-(f) and (i), effective for taxes imposed for taxable years beginning on or after July 1, 2009, substituted "Elderly of disabled property" for "Property" in the section heading; in subsection (a), added the last sentence of the first paragraph; in subdivision (b)(3a), substituted "section, the property tax homestead circuit breaker provided in G.S. 105-277.1B, or the disabled veteran property tax homestead exclusion provided in G.S. 105-277.1" for "section or the property tax homestead circuit breaker provided in G.S. 105-277.1B"; and rewrote subsections (d) and (e).

§ 105-277.1B. (Effective for taxes imposed for taxable years beginning on or after July 1, 2009) Property tax homestead circuit breaker.

(a) Classification. — A permanent residence owned and occupied by a qualifying owner is designated a special class of property under Article V, Section 2(2) of the North Carolina Constitution and is taxable in accordance with this section.

(b) Definitions. — The definitions provided in G.S. 105-277.1 apply to this section.

(c) Income Eligibility Limit. — The income eligibility limit provided in G.S. 105-277.1(a2) applies to this section.

(d) Qualifying Owner. — For the purpose of qualifying for the property tax homestead circuit breaker under this section, a qualifying owner is an owner who meets all of the following requirements as of January 1 preceding the taxable year for which the benefit is claimed:

(1) The owner has an income for the preceding calendar year of not more than one hundred fifty percent (150%) of the income eligibility limit specified in subsection (c) of this section.

(2) The owner has owned and occupied the property as a permanent residence for at least five years.

(3) The owner is at least 65 years of age or totally and permanently disabled.

(4) The owner is a North Carolina resident.

(e) Multiple Owners. — A permanent residence owned and occupied by husband and wife as tenants by the entirety is entitled to the full benefit of the property tax homestead circuit breaker notwithstanding that only one of them meets the occupation requirement and the age or disability requirement of this section. When a permanent residence is owned and occupied by two or more persons other than husband and wife, no property tax homestead circuit breaker is allowed unless all of the owners qualify and elect to defer taxes under this section.

(f) Tax Limitation. — A qualifying owner may defer the portion of tax imposed on his or her permanent residence if it exceeds the percentage of the qualifying owner's income set out in the table in this subsection. If a permanent residence is subject to tax by more than one taxing unit and the total tax liability exceeds the tax limit imposed by this section, then both the taxes due under this section and the taxes deferred under this section must be apportioned among the taxing units based upon the ratio each taxing unit's tax rate bears to the total tax rate of all units.

Income Over	**Income Up To**	**Percentage**
-0-	Income Eligibility Limit	4.0%
Income Eligibility Limit	150% of Income Eligibility Limit	5.0%

(g) Temporary Absence. — An otherwise qualifying owner does not lose the benefit of this circuit breaker because of a temporary absence from his or her permanent residence for reasons of health, or because of an extended absence while confined to a rest home or nursing home, so long as the residence is unoccupied or occupied by the owner's spouse or other dependent.

(h) Deferred Taxes. — The difference between the taxes due under this section and the taxes that would have been payable in the absence of this section are a lien on the real property of the taxpayer as provided in G.S. 105-355(a). The difference in taxes for the three fiscal years preceding the current tax year shall be carried forward in the records of the taxing unit or units as deferred taxes. The deferred taxes are due and payable in accordance with G.S. 105-277.1F when the property loses its eligibility for deferral because of the occurrence of a disqualifying event as provided in subsection (i) of this section. On or before September 1 of each year, the collector shall notify each residence owner to whom a tax deferral has previously been granted of the accumulated sum of deferred taxes and interest.

(i) Disqualifying Events. — Each of the following constitutes a disqualifying event:

(1) The owner transfers the residence. Transfer of the residence is not a disqualifying event if (i) the owner transfers the residence to a co-owner of the residence or, as part of a divorce proceeding, to his or her spouse and (ii) that individual occupies or continues to occupy the property as his or her permanent residence.

(2) The owner dies. Death of the owner is not a disqualifying event if (i) the owner's share passes to a co-owner of the residence or to his or her spouse residence and (ii) that individual occupies or continues to occupy the property as his or her permanent residence.

(3) The owner ceases to use the property as a permanent residence.

(j) Gap in Deferral. — If an owner of a residence on which taxes have been deferred under this section is not eligible for continued deferral for a tax year, the taxes deferred from the prior tax years are not due and payable but are carried forward until a disqualifying event occurs. If the owner of the residence qualifies for deferral after one or more years in which he or she did not qualify for deferral, the years in which the owner did not qualify are disregarded in determining the three years for which the deferred taxes are carried forward.

(k) **(Repealed effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Prepayment. — All or part of the deferred taxes and accrued interest may be paid to the tax collector at any time. Any partial payment is applied first to accrued interest. A residence owner to whom a tax deferral has previously been granted may revoke the application for deferral at any time by notifying the assessor in writing.

(*l*) Creditor Limitations. — A mortgagee or trustee that elects to pay any tax deferred by the owner of a residence subject to a mortgage or deed of trust does not acquire a right to foreclose as a result of the election. Except for requirements dictated by federal law or regulation, any provision in a mortgage, deed of trust, or other agreement that prohibits the owner from deferring taxes on property under this section is void.

(m) Construction. — This section does not affect the attachment of a lien for personal property taxes against a tax-deferred residence.

(n) Application. — An application for property tax relief provided by this section should be filed during the regular listing period, but may be filed and must be accepted at any time up to and through June 1 preceding the tax year for which the relief is claimed. Persons may apply for this property tax relief by entering the appropriate information on a form made available by the assessor under G.S. 105-282.1. (2007-484, s. 43.7T(b); 2007-497, s. 2.3; 2008-35, s. 1.2.)

Editor's Note. —

This section was amended by Session Laws 2008-35 in the coded bill drafting format set out in G.S. 120-20.1. In subdivision (i)(2), in the second numbered clause, the word "residence" was apparently inadvertently reinserted. This section has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2008-107, s. 28.11(h), provides, in part, that the Revisor of Statutes is authorized to correct any reference or citation in the General Statutes to any portion of Session Laws 2008-35 that is recodified or amended by Session Laws 2008-107, s. 28.11(h) by deleting incorrect references and substituting correct references. The reference in subsection (h) to G.S. 105-277.1C has been changed to G.S. 105-277.1F.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008 2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008 2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-35, s. 1.2, effective for taxes imposed for taxable years beginning on or after July 1, 2008, rewrote the section.

§ 105-277.1C. (Effective for taxes imposed for taxable years beginning on or after July 1, 2009) Disabled veteran property tax homestead exclusion.

(a) Exclusion. — A permanent residence owned and occupied by an owner who is a North Carolina resident and who is an honorably discharged disabled veteran or the unmarried surviving spouse of an honorably discharged disabled veteran is designated a special class of property under Article V, Section 2(2) of the North Carolina Constitution and is taxable in accordance with this section. The first forty-five thousand dollars ($45,000) of appraised value of the residence is excluded from taxation. An owner who receives an exclusion under this section may not receive other property tax relief.

(b) Definitions. — The following definitions apply in this section:

(1) Disabled veteran. — A veteran who, as of January 1 preceding the taxable year for which the exclusion allowed by this section is claimed, receives benefits under 38 U.S.C. § 2101 or has a veteran's disability certification.

(2) Owner. — Defined in G.S. 105-277.1.

(3) Permanent residence. — Defined in G.S. 105-277.1.

(4) Property tax relief. — Defined in G.S. 105-277.1.

(5) Veteran. — A veteran of any branch of the Armed Forces of the United States.

(6) Veteran's disability certification. — A certification by the United States Department of Veterans Affairs or another federal agency that a veteran has a permanent total disability that is service-connected.

(c) Temporary Absence. — An owner does not lose the benefit of this exclusion because of a temporary absence from his or her permanent residence for reasons of health or because of an extended absence while confined to a rest home or nursing home, so long as the residence is unoccupied or occupied by the owner's spouse or other dependent.

(d) Ownership by Spouses. — A permanent residence owned and occupied by husband and wife as tenants by the entirety is entitled to the full benefit of this exclusion notwithstanding that only one of them meets the requirements of this section.

(e) Other Multiple Owners. — This subsection applies to co-owners who are not husband and wife. Each co-owner of a permanent residence must apply separately for the exclusion allowed under this section.

When one or more co-owners of a permanent residence qualify for the exclusion allowed under this section and none of the co-owners qualifies for the exclusion allowed under G.S. 105-277.1, each co-owner is entitled to the full amount of the exclusion allowed under this section. The exclusion allowed to one co-owner may not exceed the co-owner's proportionate share of the valuation of the property, and the amount of the exclusion allowed to all the co-owners may not exceed the exclusion allowed under this section.

When one or more co-owners of a permanent residence qualify for the exclusion allowed under this section and one or more of the co-owners qualify for the exclusion allowed under G.S. 105-277.1, each co-owner who qualifies for the exclusion allowed under this section is entitled to the full amount of the exclusion. The exclusion allowed to one co-owner may not exceed the co-owner's proportionate share of the valuation of the property, and the amount of the exclusion allowed to all the co-owners may not exceed the greater of the exclusion allowed under this section and the exclusion allowed under G.S. 105-277.1.

(f) Application. — An application for the exclusion allowed under this section should be filed during the regular listing period, but may be filed and must be accepted at any time up to and through June 1 preceding the tax year for which the exclusion is claimed. An applicant for an exclusion under this section must establish eligibility for the exclusion by providing a copy of the veteran's disability certification or evidence of benefits received under 38 U.S.C. § 2101. (2008-107, s. 28.11(b).)

Editor's Note. — Session Laws 2008-107, s. 28.11(j), made this section effective for taxes imposed for taxable years beginning on or July 1, 2009.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

§§ 105-277.1D, 105-277.1E: Reserved for future codification purposes.

§ 105-277.1F. Uniform provisions for payment of deferred taxes.

(a) Scope. — This section applies to the following deferred tax programs:

(1) G.S. 105-275(29a), historic district property held as future site of historic structure.

(2) G.S. 105-277.1B, the property tax homestead circuit breaker.

(3) G.S. 105-277.4(c), present-use value property.

(4) G.S. 105-277.14, working waterfront property.

(4a) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2010)** G.S. 105-277.15, wildlife conservation land.

(5) G.S. 105-278(b), historic property.

(6) G.S. 105-278.6(e), nonprofit property held as future site of low- or moderate-income housing.

(b) Payment. — Taxes deferred on property under a deferral program listed in subsection (a) of this section are due and payable on the day the property loses its eligibility for the deferral program as a result of a disqualifying event. If only a part of property for which taxes are deferred loses its eligibility for deferral, the assessor must determine the amount of deferred taxes that apply to that part and that amount is due and payable. Interest accrues on deferred taxes as if they had been payable on the dates on which they would have originally become due.

The tax for the fiscal year that begins in the calendar year in which the deferred taxes are due and payable is computed as if the property had not been classified for that year. A lien for deferred taxes is extinguished when the taxes are paid.

All or part of the deferred taxes that are not due and payable may be paid to the tax collector at any time without affecting the property's eligibility for deferral. A partial payment is applied first to accrued interest. (2008-35, s. 2.2; 2008-107, s. 28.11(h); 2008-171, s. 2.)

Editor's Note. — Session Laws 2008-35, s. 4, made this section effective for taxes imposed for taxable years beginning on or after July 1, 2008.

This section was enacted as G.S. 105-277.1C by Session Laws 2008-35, s. 2.2, recodified as G.S. 105-277.1D by Session Laws 2008-107, s. 28.11(h), and subsequently codified as G.S. 105-277.1F at the direction of the Revisor of Statutes.

Subdivision (a)(5), as added by Session Laws 2008-171, s. 2, has been redesignated as subdivision (a)(4a), and subsection (a) is set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2008-107, s. 28.11(h), provides, in part, that the Revisor of Statutes is authorized to correct any reference or citation in the General Statutes to any portion of Session Laws 2008-35 that is recodified or amended by Session Laws 2008-107, s. 28.11(h) by deleting incorrect references and substituting correct references.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-171, s. 2, effective for taxes imposed for taxable years beginning on or after July 1, 2010, redesignated former subdivisions (a)(5) and (a)(6) as present subdivisions (a)(6) and (a)(7), respectively; and added subdivision (a)(5). See Editor's note.

§ 105-277.2. Agricultural, horticultural, and forestland — Definitions.

The following definitions apply in G.S. 105-277.3 through G.S. 105-277.7:

(1) Agricultural land. — Land that is a part of a farm unit that is actively engaged in the commercial production or growing of crops, plants, or animals under a sound management program. Agricultural land includes woodland and wasteland that is a part of the farm unit, but the woodland and wasteland included in the unit must be appraised under the use-value schedules as woodland or wasteland. A farm unit may consist of more than one tract of agricultural land, but at least one of the tracts must meet the requirements in G.S. 105-277.3(a)(1), and each tract must be under a sound management program. If the agricultural land includes less than 20 acres of woodland, then the woodland portion is not required to be under a sound management program. Also, woodland is not required to be under a sound management program if it is determined that the highest and best use of the woodland is to diminish wind erosion of adjacent agricultural land, protect water quality of adjacent agricultural land, or serve as buffers for adjacent livestock or poultry operations.

(1a) Business entity. — A corporation, a general partnership, a limited partnership, or a limited liability company.

(2) Forestland. — Land that is a part of a forest unit that is actively engaged in the commercial growing of trees under a sound management program. Forestland includes wasteland that is a part of the forest unit, but the wasteland included in the unit must be appraised under the use-value schedules as wasteland. A forest unit may consist of more than one tract of forestland, but at least one of the tracts must meet the requirements in G.S. 105-277.3(a)(3), and each tract must be under a sound management program.

Subdivisions (4) and (5a) are set out twice. See note.

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(3) Horticultural land. — Land that is a part of a horticultural unit that is actively engaged in the commercial production or growing of fruits or vegetables or nursery or floral products under a sound management program. Horticultural land includes woodland and wasteland that is a part of the horticultural unit, but the woodland and wasteland included in the unit must be appraised under the use-value schedules as woodland or wasteland. A horticultural unit may consist of more than one tract of horticultural land, but at least one of the tracts must meet the requirements in G.S. 105-277.3(a)(2), and each tract must be under a sound management program. If the horticultural land includes less than 20 acres of woodland, then the woodland portion is not required to be under a sound management program. Also, woodland is not required to be under a sound management program if it is determined that the highest and best use of the woodland is to diminish wind erosion of adjacent horticultural land or protect water quality of adjacent horticultural land. Land used to grow horticultural and agricultural crops on a rotating basis or where the horticultural crop is set out or planted and harvested within one growing season, may be treated as agricultural land as described in subdivision (1) of this section when there is determined to be no significant difference in the cash rental rates for the land.

(4) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Individually owned. — Owned by one of the following:

a. A natural person. For the purpose of this section, a natural person who is an income beneficiary of a trust that owns land may elect to treat the person's beneficial share of the land as owned by that person. If the person's beneficial interest is not an identifiable share of land but can be established as a proportional interest in the trust income, the person's beneficial share of land is a percentage of the land owned by the trust that corresponds to the beneficiary's proportional interest in the trust income. For the purpose of this section, a natural person who is a member of a business entity, other than a corporation, that owns land may elect to treat the person's share of the land as owned by that person. The person's share is a percentage of the land owned by the business entity that corresponds to the person's percentage of ownership in the entity.

b. A business entity having as its principal business one of the activities described in subdivisions (1), (2), and (3) and whose members are all natural persons who meet one or more of the conditions listed in this sub-subdivision. For the purpose of this sub-subdivision, the terms "having as its principal business" and "actively engaged in the business of the entity" include the leasing of the land for one of the activities described in subdivisions (1), (2), and (3) only if all members of the business entity are relatives.

1. The member is actively engaged in the business of the entity.
2. The member is a relative of a member who is actively engaged in the business of the entity.
3. The member is a relative of, and inherited the membership interest from, a decedent who met one or both of the preceding conditions after the land qualified for classification in the hands of the business entity.

c. A trust that was created by a natural person who transferred the land to the trust and each of whose beneficiaries who is currently

entitled to receive income or principal meets one of the following conditions:
    1. Is the creator of the trust or the creator's relative.
    2. Is a second trust whose beneficiaries who are currently entitled to receive income or principal are all either the creator of the first trust or the creator's relatives.
  d. A testamentary trust that meets all of the following conditions:
    1. It was created by a natural person who transferred to the trust land that qualified in that person's hands for classification under G.S. 105-277.3.
    2. At the time of the creator's death, the creator had no relatives as defined in this section as of the date of death.
    3. The trust income, less reasonable administrative expenses, is used exclusively for educational, scientific, literary, cultural, charitable, or religious purposes as defined in G.S. 105-278.3(d).
  e. Tenants in common, if each tenant is either a natural person or a business entity described in sub-subdivision b. of this subdivision. Tenants in common may elect to treat their individual shares as owned by them individually in accordance with G.S. 105-302(c)(9). The ownership requirements of G.S. 105-277.3(b) apply to each tenant in common who is a natural person, and the ownership requirements of G.S. 105-277.3(b1) apply to each tenant in common who is a business entity.

(4) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Individually owned. — Owned by one of the following:
  a. An individual.
  b. A business entity that meets all of the following conditions:
    1. Its principal business is farming agricultural land, horticultural land, or forestland.
    2. All of its members are, directly or indirectly, individuals who are actively engaged in farming agricultural land, horticultural land, or forestland or a relative of one of the individuals who is actively engaged. An individual is indirectly a member of a business entity that owns the land if the individual is a member of a business entity or a beneficiary of a trust that is part of the ownership structure of the business entity that owns the land.
    3. It is not a corporation whose shares are publicly traded, and none of its members are corporations whose shares are publicly traded.
    4. If it leases the land, all of its members are individuals and are relatives. Under this condition, "principal business" and "actively engaged" include leasing.
  c. A trust that meets all of the following conditions:
    1. It was created by an individual who owned the land and transferred the land to the trust.
    2. All of its beneficiaries are, directly or indirectly, individuals who are the creator of the trust or a relative of the creator. An individual is indirectly a beneficiary of a trust that owns the land if the individual is a beneficiary of another trust or a member of a business entity that has a beneficial interest in the trust that owns the land.

d. A testamentary trust that meets all of the following conditions:
    1. It was created by an individual who transferred to the trust land that qualified in that individual's hands for classification under G.S. 105-277.3.
    2. At the date of the creator's death, the creator had no relatives.
    3. The trust income, less reasonable administrative expenses, is used exclusively for educational, scientific, literary, cultural, charitable, or religious purposes as defined in G.S. 105-278.3(d).

e. Tenants in common, if each tenant would qualify as an owner if the tenant were the sole owner. Tenants in common may elect to treat their individual shares as owned by them individually in accordance with G.S. 105-302(c)(9). The ownership requirements of G.S. 105-277.3(b) apply to each tenant in common who is an individual, and the ownership requirements of G.S. 105-277.3(b1) apply to each tenant in common who is a business entity or a trust.

(4a) Member. — A shareholder of a corporation, a partner of a general or limited partnership, or a member of a limited liability company.

(5) Present-use value. — The value of land in its current use as agricultural land, horticultural land, or forestland, based solely on its ability to produce income and assuming an average level of management. A rate of nine percent (9%) shall be used to capitalize the expected net income of forestland. The capitalization rate for agricultural land and horticultural land is to be determined by the Use-Value Advisory Board as provided in G.S. 105-277.7.

(5a) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Relative. — Any of the following:

a. A spouse or the spouse's lineal ancestor or descendant.

b. A lineal ancestor or a lineal descendant.

c. A brother or sister, or the lineal descendant of a brother or sister. For the purposes of this sub-subdivision, the term brother or sister includes stepbrother or stepsister.

d. An aunt or an uncle.

e. A spouse of a person listed in paragraphs a. through d. For the purpose of this subdivision, an adoptive or adopted relative is a relative and the term "spouse" includes a surviving spouse.

(5a) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Relative. — Any of the following:

a. A spouse or the spouse's lineal ancestor or descendant.

b. A lineal ancestor or a lineal descendant.

c. A brother or sister, or the lineal descendant of a brother or sister. For the purposes of this sub-subdivision, the term brother or sister includes stepbrother or stepsister.

d. An aunt or an uncle.

e. A spouse of an individual listed in paragraphs a. through d. For the purpose of this subdivision, an adoptive or adopted relative is a relative and the term "spouse" includes a surviving spouse.

(6) Sound management program. — A program of production designed to obtain the greatest net return from the land consistent with its conservation and long-term improvement.

(7) Unit. — One or more tracts of agricultural land, horticultural land, or forestland. Multiple tracts must be under the same ownership and be of the same type of classification. If the multiple tracts are located within different counties, they must be within 50 miles of a tract qualifying under G.S. 105-277.3(a). (1973, c. 709, s. 1; 1975, c. 746, s.

1; 1985, c. 628, s. 1; c. 667, ss. 1, 4; 1987, c. 698, s. 1; 1995, c. 454, s. 1; 1995 (Reg. Sess., 1996), c. 646, s. 17; 1998-98, s. 24; 2002-184, s. 1; 2004-8, s. 1; 2005-313, ss. 1, 2; 2008-146, s. 2.1.)

Subdivisions (4) and (5a) Set Out Twice. — The first versions of subdivisions (4) and (5a) set out above are effective for taxes imposed for taxable years beginning before July 1, 2008. The second versions of subdivisions (4) and (5a) set out above are effective for taxes imposed for taxable years beginning on or after July 1, 2008.

Editor's Note. —

Session Laws 2008-146, s. 2.3 provides: "This section is effective for taxes imposed for taxable years beginning on or after July 1, 2008."

Effect of Amendments. —

Session Laws 2008-146, s. 2.1, effective for taxes imposed for taxable years beginning on or after July 1, 2008, rewrote subdivision (4); and in subdivision (5a)e, substituted "an individual" for "a person."

CASE NOTES

Applied in In re Appeal of Parker, — N.C. App. —, 664 S.E.2d 1, 2008 N.C. App. LEXIS 1338 (2008).

§ 105-277.3. Agricultural, horticultural, and forestland — Classifications.

(a) Classes Defined. — The following classes of property are designated special classes of property under authority of Section 2(2) of Article V of the North Carolina Constitution and must be appraised, assessed, and taxed as provided in G.S. 105-277.2 through G.S. 105-277.7.

(1) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Agricultural land. — Individually owned agricultural land consisting of one or more tracts, one of which consists of at least 10 acres that are in actual production and that, for the three years preceding January 1 of the year for which the benefit of this section is claimed, have produced an average gross income of at least one thousand dollars ($1,000). Gross income includes income from the sale of the agricultural products produced from the land, any payments received under a governmental soil conservation or land retirement program, and the amount paid to the taxpayer during the taxable year pursuant to P.L. 108-357, Title VI, Fair and Equitable Tobacco Reform Act of 2004. Land in actual production includes land under improvements used in the commercial production or growing of crops, plants, or animals.

(1) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Agricultural land. — Individually owned agricultural land consisting of one or more tracts, one of which satisfies the requirements of this subdivision. For agricultural land used as a farm for aquatic species, as defined in G.S. 106-758, the tract must meet the income requirement for agricultural land and must consist of at least five acres in actual production or produce at least 20,000 pounds of aquatic species for commercial sale annually, regardless of acreage. For all other agricultural land, the tract must meet the income requirement for agricultural land and must consist of at least 10 acres that are in actual production. Land in actual production includes land under improvements used in the commercial production or growing of crops, plants, or animals.

To meet the income requirement, agricultural land must, for the three years preceding January 1 of the year for which the benefit of this section is claimed, have produced an average gross income of at least one thousand dollars ($1,000). Gross income includes income from the sale of the agricultural products produced from the land, any payments received under a governmental soil conservation or land retirement program, and the amount paid to the taxpayer during the taxable year pursuant to P.L. 108-357, Title VI, Fair and Equitable Tobacco Reform Act of 2004.

(2) Horticultural land. — Individually owned horticultural land consisting of one or more tracts, one of which consists of at least five acres that are in actual production and that, for the three years preceding January 1 of the year for which the benefit of this section is claimed, have met the applicable minimum gross income requirement. Land in actual production includes land under improvements used in the commercial production or growing of fruits or vegetables or nursery or floral products. Land that has been used to produce evergreens intended for use as Christmas trees must have met the minimum gross income requirements established by the Department of Revenue for the land. All other horticultural land must have produced an average gross income of at least one thousand dollars ($1,000). Gross income includes income from the sale of the horticultural products produced from the land and any payments received under a governmental soil conservation or land retirement program.

(3) Forestland. — Individually owned forestland consisting of one or more tracts, one of which consists of at least 20 acres that are in actual production and are not included in a farm unit.

(b) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Natural Person Ownership Requirements. — In order to come within a classification described in subsection (a) of this section, the land must, if owned by a natural person, also satisfy one of the following conditions:

(1) It is the owner's place of residence.

(2) It has been owned by the current owner or a relative of the current owner for the four years preceding January 1 of the year for which the benefit of this section is claimed.

(3) At the time of transfer to the current owner, it qualified for classification in the hands of a business entity or trust that transferred the land to the current owner who was a member of the business entity or a beneficiary of the trust, as appropriate.

(b) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Individual Ownership Requirements. — In order to come within a classification described in subsection (a) of this section, land owned by an individual must also satisfy one of the following conditions:

(1) It is the owner's place of residence.

(2) It has been owned by the current owner or a relative of the current owner for the four years preceding January 1 of the year for which the benefit of this section is claimed.

(3) At the time of transfer to the current owner, it qualified for classification in the hands of a business entity or trust that transferred the land to the current owner who was a member of the business entity or a beneficiary of the trust, as appropriate.

(b1) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Entity Ownership Requirements. — In order to come within a classification described in subsection (a) of this section, the land must, if owned by a business entity or trust, have been owned by the business entity or trust or by one or more of its members or creators, respectively, for the four years immediately preceding January 1 of the year for which the benefit of this section is claimed.

(b1) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Entity Ownership Requirements. — In order to come within a classification described in subsection (a) of this section, land owned by a business entity or trust must have been owned by the business entity or trust or by one or more of its members or creators, respectively, for the four years immediately preceding January 1 of the year for which the benefit of this section is claimed.

(b2) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Exception to Ownership Requirements. — Notwithstanding the provisions of subsections (b) and (b1) of this section, land may qualify for classification in the hands of the new owner if all of the conditions listed in either subdivision of this subsection are met, even if the new owner does not meet all of the ownership requirements of subsections (b) and (b1) of this section with respect to the land.

(1) Exception for assumption of deferred liability. — If the land qualifies for classification in the hands of the new owner under the provisions of this subdivision, then the deferred taxes remain a lien on the land under G.S. 105-277.4(c), the new owner becomes liable for the deferred taxes, and the deferred taxes become payable if the land fails to meet any other condition or requirement for classification. Land qualifies for classification in the hands of the new owner if all of the following conditions are met:

a. The land was appraised at its present use value at the time title to the land passed to the new owner.

b. At the time title to the land passed to the new owner, the new owner acquires the land for the purposes of and continues to use the land for the purposes it was classified under subsection (a) of this section while under previous ownership.

c. The new owner has timely filed an application as required by G.S. 105-277.4(a) and has certified that the new owner accepts liability for the deferred taxes and intends to continue the present use of the land.

(2) Exception for expansion of existing unit. — If deferred liability is not assumed under subdivision (1) of this subsection, the land qualifies for classification in the hands of the new owner if, at the time title passed to the new owner, the land was being used for the same purpose and was eligible for appraisal at its present-use value as other land already owned by the new owner and classified under subsection (a) of this section. The new owner must timely file an application as required by G.S. 105-277.4(a).

(b2) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Exceptions to Ownership Requirements. — Notwithstanding the provisions of subsections (b) and (b1) of this section, land may qualify for classification in the hands of the new owner if all of the conditions listed in either subdivision of this subsection are met, even if the new owner does not meet all of the ownership requirements of subsections (b) and (b1) of this section with respect to the land.

(1) Continued use. — If the land qualifies for classification in the hands of the new owner under the provisions of this subdivision, then any deferred taxes remain a lien on the land under G.S. 105-277.4(c), the new owner becomes liable for the deferred taxes, and the deferred

G.S. 105-277.3(a)(1), (b), (b1), (b2), and (d1) are set out twice. See note.

taxes become payable if the land fails to meet any other condition or requirement for classification. Land qualifies for classification in the hands of the new owner if all of the following conditions are met:

a. The land was appraised at its present use value at the time title to the land passed to the new owner.

b. The new owner acquires the land and continues to use the land for the purpose for which it was classified under subsection (a) of this section while under previous ownership.

c. The new owner has timely filed an application as required by G.S. 105-277.4(a) and has certified that the new owner accepts liability for any deferred taxes and intends to continue the present use of the land.

(2) Expansion of existing unit. — Land qualifies for classification in the hands of the new owner if, at the time title passed to the new owner, the land was not appraised at its present-use value but was being used for the same purpose and was eligible for appraisal at its present-use value as other land already owned by the new owner and classified under subsection (a) of this section. The new owner must timely file an application as required by G.S. 105-277.4(a).

(c) Repealed by Session Laws 1995, c. 454, s. 2.

(d) Exception for Conservation Reserve Program. — Land enrolled in the federal Conservation Reserve Program authorized by 16 U.S.C. Chapter 58 is considered to be in actual production, and income derived from participation in the federal Conservation Reserve Program may be used in meeting the minimum gross income requirements of this section either separately or in combination with income from actual production. Land enrolled in the federal Conservation Reserve Program must be assessed as agricultural land if it is planted in vegetation other than trees, or as forestland if it is planted in trees.

(d1) **(Effective for taxes imposed for taxable years beginning before July 1, 2010)** Exception for Easements on Qualified Conservation Lands Previously Appraised at Use Value. — Property that is appraised at its present-use value under G.S. 105-277.4(b) shall continue to qualify for appraisal, assessment, and taxation as provided in G.S. 105-277.2 through G.S. 105-277.7 as long as the property is subject to an enforceable conservation easement that would qualify for the conservation tax credit provided in G.S. 105-130.34 and G.S. 105-151.12, without regard to actual production or income requirements of this section. Notwithstanding G.S. 105-277.3(b) and (b1), subsequent transfer of the property does not extinguish its present-use value eligibility as long as the property remains subject to an enforceable conservation easement that qualifies for the conservation tax credit provided in G.S. 105-130.34 and G.S. 105-151.12. The exception provided in this subsection applies only to that part of the property that is subject to the easement.

(d1) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2010)** Exception for Easements on Qualified Conservation Lands Previously Appraised at Use Value. — Property that is appraised at its present-use value under G.S. 105-277.4(b) shall continue to qualify for appraisal, assessment, and taxation as provided in G.S. 105-277.2 through G.S. 105-277.7 as long as (i) the property is subject to an enforceable conservation easement that would qualify for the conservation tax credit provided in G.S. 105-130.34 and G.S. 105-151.12, without regard to actual production or income requirements of this section; and (ii) the taxpayer received no more than seventy-five percent (75%) of the fair market value of the donated property interest in compensation. Notwithstanding G.S. 105-277.3(b) and (b1), subsequent transfer of the property does not extinguish its present-use value eligibility as long as the property remains subject to an enforceable conservation easement that qualifies for the conservation tax credit provided in G.S. 105-130.34 and G.S. 105-151.12. The exception provided in this subsection applies only to that part of the property that is subject to the easement.

(d2) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2010)** Wildlife Exception. — When an owner of land classified under this section does not transfer the land and the land becomes eligible for classification under G.S. 105-277.15, no deferred taxes are due. The deferred taxes remain a lien on the land and are payable in accordance with G.S. 105-277.15.

(e) Exception for Turkey Disease. — Agricultural land that meets all of the following conditions is considered to be in actual production and to meet the minimum gross income requirements:

(1) The land was in actual production in turkey growing within the preceding two years and qualified for present use value treatment while it was in actual production.
(2) The land was taken out of actual production in turkey growing solely for health and safety considerations due to the presence of Poult Enteritis Mortality Syndrome among turkeys in the same county or a neighboring county.
(3) The land is otherwise eligible for present use value treatment.

(f) Sound Management Program for Agricultural Land and Horticultural Land. — If the property owner demonstrates any one of the following factors with respect to agricultural land or horticultural land, then the land is operated under a sound management program:

(1) Enrollment in and compliance with an agency-administered and approved farm management plan.
(2) Compliance with a set of best management practices.
(3) Compliance with a minimum gross income per acre test.
(4) Evidence of net income from the farm operation.
(5) Evidence that farming is the farm operator's principal source of income.
(6) Certification by a recognized agricultural or horticultural agency within the county that the land is operated under a sound management program.

Operation under a sound management program may also be demonstrated by evidence of other similar factors. As long as a farm operator meets the sound management requirements, it is irrelevant whether the property owner received income or rent from the farm operator.

(g) Sound Management Program for Forestland. — If the owner of forestland demonstrates that the forestland complies with a written sound forest management plan for the production and sale of forest products, then the forestland is operated under a sound management program. (1973, c. 709, s. 1; 1975, c. 746, s. 2; 1983, c. 821; c. 826; 1985, c. 667, ss. 2, 3, 6.1; 1987, c. 698, ss. 2-5; 1987 (Reg. Sess., 1988), c. 1044, s. 13.1; 1989, cc. 99, 736, s. 1; 1989 (Reg. Sess., 1990), c. 814, s. 29; 1995, c. 454, s. 2; 1997-272, s. 1; 1998-98, s. 22; 2001-499, s. 1; 2002-184, s. 2; 2005-293, s. 1; 2005-313, s. 3; 2007-484, s. 43.7T(c); 2007-497, s. 3.1; 2008-146, s. 2.2; 2008-171, ss. 4, 5.)

Subdivision (a)(1) and Subsections (b), (b1), (b2), and (d1) Set Out Twice. — The first versions of subdivision (a)(1) and subsections (b), (b1), and (b2) set out above are effective for taxes imposed for taxable years beginning before July 1, 2008. The first version of subsection (d1) set out above is effective for taxes imposed for taxable years beginning before July 1, 2010. The second versions of subdivision (a)(1) and subsections (b), (b1), and (b2) set out above are effective for taxes imposed for taxable years beginning on or after July 1, 2008. The second version of subsection (d1) set out above is effective for taxes imposed for taxable years beginning on or after July 1, 2010.

Editor's Note. — Session Laws 2008-146, s. 2.3 provides: "This section is effective for taxes imposed for taxable years beginning on or after July 1, 2008."

Effect of Amendments. —

Session Laws 2008-146, s. 2.2, effective for taxes imposed for taxable years beginning on or after July 1, 2008, in subsection (b), substituted "land owned by a business entity or trust must" for "the land must, if owned by a business entity or trust"; in subsection (b2), substituted "Exceptions" for "Exception"; in subdivision (b2)(1), substituted "Continued use" for "Exception for assumption of deferred liability" and "then any deferred" for "then the deferred"; rewrote subdivision (b2)(1)b; in subdivision (b2)(1)c, substituted "any deferred" for "the deferred"; and in subdivision (b2)(2), substituted "Expansion of existing unit" for "Exception for expansion of existing unit," substituted "Land qualifies" for "If deferred liability is not assumed under subdivision (1) of this subsection, the land qualifies," and inserted "not appraised at its present-use value but was."

Session Laws 2008-171, ss. 4 and 5, effective for taxes imposed for taxable years beginning on or after July 1, 2010, in subsection (d1), added the clause (i) designator, and added clause (ii); and added subsection (d2).

§ 105-277.4. Agricultural, horticultural and forestland — Application; appraisal at use value; appeal; deferred taxes.

(a) Application. — Property coming within one of the classes defined in G.S. 105-277.3 is eligible for taxation on the basis of the value of the property in its present use if a timely and proper application is filed with the assessor of the county in which the property is located. The application must clearly show that the property comes within one of the classes and must also contain any other relevant information required by the assessor to properly appraise the property at its present-use value. An initial application must be filed during the regular listing period of the year for which the benefit of this classification is first claimed, or within 30 days of the date shown on a notice of a change in valuation made pursuant to G.S. 105-286 or G.S. 105-287. A new application is not required to be submitted unless the property is transferred or becomes ineligible for use-value appraisal because of a change in use or acreage. An application required due to transfer of the land may be submitted at any time during the calendar year but must be submitted within 60 days of the date of the property's transfer.

(a1) Late Application. — Upon a showing of good cause by the applicant for failure to make a timely application as required by subsection (a) of this section, an application may be approved by the board of equalization and review or, if that board is not in session, by the board of county commissioners. An untimely application approved under this subsection applies only to property taxes levied by the county or municipality in the calendar year in which the untimely application is filed. Decisions of the county board may be appealed to the Property Tax Commission.

(b) Appraisal at Present-use Value. — Upon receipt of a properly executed application, the assessor must appraise the property at its present-use value as established in the schedule prepared pursuant to G.S. 105-317. In appraising the property at its present-use value, the assessor must appraise the improvements located on qualifying land according to the schedules and standards used in appraising other similar improvements in the county. If all or any part of a qualifying tract of land is located within the limits of an incorporated city or town, or is property annexed subject to G.S. 160A-37(f1) or G.S. 160A-49(f1), the assessor must furnish a copy of the property record showing both the present-use appraisal and the valuation upon which the property would have been taxed in the absence of this classification to the collector of the city or town. The assessor must also notify the tax collector of any changes in the appraisals or in the eligibility of the property for the benefit of this classification. Upon a request for a certification pursuant to G.S. 160A-37(f1) or G.S.160A-49(f1), or any change in the certification, the assessor for the county where the land subject to the annexation is located must, within 30 days, determine if the land meets the requirements of G.S. 160A-37(f1)(2) or G.S. 160A-49(f1)(2) and report the results of its findings to the city.

(b1) Appeal. — Decisions of the assessor regarding the qualification or appraisal of property under this section may be appealed to the county board of equalization and review or, if that board is not in session, to the board of county commissioners. An appeal must be made within 60 days after the decision of the assessor. If an owner submits additional information to the assessor pursuant to G.S. 105-296(j), the appeal must be made within 60 days after the assessor's decision based on the additional information. Decisions of the county board may be appealed to the Property Tax Commission.

(c) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Deferred Taxes. — Land meeting the conditions for classification under G.S. 105-277.3 must be taxed on the basis of the value of the land for its present use. The difference between the taxes due on the present-use basis and the taxes that would have been payable in the absence of this classification, together with any interest, penalties, or costs that may accrue thereon, are a lien on the real property of the taxpayer as provided in G.S. 105-355(a). The difference in taxes must be carried forward in the records of the taxing unit or units as deferred taxes. The taxes become due and payable when the land fails to meet any condition or requirement for classification. Failure to have an application approved is ground for disqualification. The tax for the fiscal year that opens in the calendar year in which deferred taxes become due is computed as if the land had not been classified for that year, and taxes for the preceding three fiscal years that have been deferred are immediately payable, together with interest as provided in G.S. 105-360 for unpaid taxes. Interest accrues on the deferred taxes due as if they had been payable on the dates on which they originally became due. If only a part of the qualifying tract of land fails to meet a condition or requirement for classification, the assessor must determine the amount of deferred taxes applicable to that part and that amount becomes payable with interest as provided above. Upon the payment of any taxes deferred in accordance with this section for the three years immediately preceding a disqualification, all liens arising under this subsection are extinguished. The deferred taxes for any given year may be paid in that year without the qualifying tract of land becoming ineligible for deferred status.

(c) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Deferred Taxes. — Land meeting the conditions for classification under G.S. 105-277.3 must be taxed on the basis of the value of the land for its present use. The difference between the taxes due on the present-use basis and the taxes that would have been payable in the absence of this classification, together with any interest, penalties, or costs that may accrue thereon, are a lien on the real property of the taxpayer as provided in G.S. 105-355(a). The difference in taxes must be carried forward in the records of the taxing unit or units as deferred taxes. The deferred taxes for the preceding three fiscal years are due and payable in accordance with G.S. 105-277.1F when the property loses its eligibility for deferral as a result of a disqualifying event. A disqualifying event occurs when the land fails to meet any condition or requirement for classification or when an application is not approved.

(d) Exceptions. — Notwithstanding the provisions of subsection (c) of this section, if property loses its eligibility for present use value classification solely due to one of the following reasons, no deferred taxes are due and the lien for the deferred taxes is extinguished:

(1) There is a change in income caused by enrollment of the property in the federal conservation reserve program established under 16 U.S.C. Chapter 58.

(2) The property is conveyed by gift to a nonprofit organization and qualifies for exclusion from the tax base pursuant to G.S. 105-275(12) or G.S. 105-275(29).

(3) The property is conveyed by gift to the State, a political subdivision of the State, or the United States.

(e) Repealed by Session Laws 1997-270, s. 3, effective July 3, 1997. (1973, c. 709, s. 1; c. 905; c. 906, ss. 1, 2; 1975, c. 62; c. 746, ss. 3-7; 1981, c. 835; 1985, c. 518, s. 1; c. 667, ss. 5, 6; 1987, c. 45, s. 1; c. 295, s. 5; c. 698, s. 6; 1987 (Reg. Sess., 1988), c. 1044, s. 13.2; 1995, c. 443, s. 4; c. 454, s. 3; 1997-270, s. 3; 1998-98, s. 23; 1998-150, s. 1; 2001-499, s. 2; 2002-184, s. 3; 2005-313, s. 4; 2006-30, s. 4; 2008-35, s. 2.3.)

Subsection (c) Set Out Twice. — The first version of subsection (c) set out above is effective for taxes imposed for taxable years beginning before July 1, 2008. The second version of subsection (c) set out above is effective for taxes imposed for taxable years beginning on or after July 1, 2008.

Editor's Note. — Session Laws 2008-107, s. 28.11(h), provides, in part, that the Revisor of Statutes is authorized to correct any reference or citation in the General Statutes to any portion of Session Laws 2008-35 that is recodified or amended by Session Laws 2008-107, s. 28.11(h) by deleting incorrect references and substituting correct references. The reference to G.S. 105-277.1C in subsection (c) has been changed to G.S. 105-277.1F.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-35, s. 2.3, effective for taxes imposed for taxable years beginning on or after July 1, 2008, rewrote subsection (c).

CASE NOTES

Burden on the Taxpayer. — Burden was on the taxpayer under G.S. 105-277.4(a) to show the class of agricultural, horticultural, or forested land in which the taxpayer's property fit, and to obtain the soil values for the taxpayer's particular land from the North Carolina Department of Agriculture. In re Appeal of Parker, — N.C. App. —, 664 S.E.2d 1, 2008 N.C. App. LEXIS 1338 (2008).

§ 105-277.14. (Effective for taxes imposed for taxable years beginning on or after July 1, 2009) Taxation of working waterfront property.

(a) Definitions. — The following definitions apply in this section:

(1) Coastal fishing waters. — Defined in G.S. 113-129.

(2) Commercial fishing operation. — Defined in G.S. 113-168.

(3) Fish processing. — Processing fish, as defined in G.S. 113-129, for sale.

(4) Working waterfront property. — Any of the following property that has, for the most recent three-year period, produced an average gross income of at least one thousand dollars ($1,000):

a. A pier that extends into coastal fishing waters and limits access to those who pay a fee.

b. Real property that is adjacent to coastal fishing waters and is primarily used for a commercial fishing operation or fish processing, including adjacent land that is under improvements used for one of these purposes.

(b) Classification. — Working waterfront property is designated a special class of property under Section 2(2) of Article V of the North Carolina Constitution and must be appraised, assessed, and taxed on the basis of the value of the property in its present use rather than on its true value. Working waterfront property includes land reasonably necessary for the convenient use of the property.

(c) Deferred Taxes. — The difference between the taxes that are due on working waterfront property taxed on the basis of its present use and that would be due if the property were taxed on the basis of its true value is a lien on the property. The difference in taxes must be carried forward in the records of each taxing unit as deferred taxes. The deferred taxes for the preceding three fiscal years are due and payable in accordance with G.S. 105-277.1F when the property loses its eligibility for deferral as a result of a disqualifying event. A disqualifying event occurs when the property no longer qualifies as working waterfront property.

(d) Application. — To obtain the benefit of this section, the owner of working waterfront property must submit an application for classification and exclusion to the assessor of the county in which the property is located, and the assessor must approve the application. An application must contain the information and be in the form required by the assessor. An initial application must be filed during the regular listing period of the year for which the benefit of this classification is first claimed or within 30 days of the date shown on a notice of change in valuation made pursuant to G.S. 105-286 or G.S. 105-287. A new application is not required to be submitted unless the property is transferred or becomes ineligible for classification under this section. (2007-485, s. 1; 2008-35, s. 2.4.)

Editor's Note. —

Session Laws 2008-107, s. 28.11(h), provides, in part, that the Revisor of Statutes is authorized to correct any reference or citation in the General Statutes to any portion of Session Laws 2008-35 that is recodified or amended by Session Laws 2008-107, s. 28.11(h) by deleting incorrect references and substituting correct references. The reference to G.S. 105-277.1C in subsection (c) has been changed to G.S. 105-277.1F.

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Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-35, s. 2.4, effective for taxes imposed for taxable years beginning on or after July 1, 2008, rewrote subsection (c).

§ 105-277.15. (Effective for taxes imposed for taxable years beginning on or after July 1, 2010) Taxation of wildlife conservation land.

(a) Definitions. — The following definitions apply in this section:

(1) Business entity. — Defined in G.S. 105-277.2.

(2) Family business entity. — A business entity whose members are, directly or indirectly, individuals and are relatives. An individual is indirectly a member of a business entity if the individual is a member of a business entity or a beneficiary of a trust that is part of the ownership structure of the business entity.

(3) Family trust. — A trust that was created by an individual and whose beneficiaries are, directly or indirectly, individuals who are the creator of the trust or a relative of the creator. An individual is indirectly a beneficiary of a trust if the individual is a beneficiary of another trust or a member of a business entity that has a beneficial interest in the trust.

(4) Member. — Defined in G.S. 105-277.2.

(5) Relative. — Defined in G.S. 105-277.2.

(b) Classification. — Wildlife conservation land is designated a special class of property under Article V, Section 2(2) of the North Carolina Constitution and must be appraised, assessed, and taxed in accordance with this section. Wildlife conservation land classified under this section must be appraised and assessed as if it were classified under G.S. 105-277.3 as agricultural land.

(c) Requirements. — Land qualifies as wildlife conservation land if it meets the following size, ownership, and use requirements:

(1) Size. — The land must consist of at least 20 contiguous acres.

(2) Ownership. — The land must be owned by an individual, a family business entity, or a family trust and must have been owned by the same owner for the previous five years, except as follows:

a. If the land is owned by a family business entity, the land meets the ownership requirement if the land was owned by one or more members of the family business entity for the required time.

b. If the land is owned by a family trust, the land meets the ownership requirement if the land was owned by one or more beneficiaries of the family trust for the required time.

c. If an owner acquires land that was classified as wildlife conservation land under this section when it was acquired and the owner continues to use the land as wildlife conservation land, then the land meets the ownership requirement if the new owner files an application and signs the wildlife habitat conservation agreement in effect for the property within 60 days after acquiring the property.

(3) Use. — The land must meet all of the following requirements:

a. The land must be managed under a written wildlife habitat conservation agreement with the North Carolina Wildlife Resources Commission that is in effect as of January 1 of the year for which the benefit of this section is claimed and that requires the owner to do one or more of the following:

1. Protect an animal species that lives on the land and, as of January 1 of the year for which the benefit of this section is claimed, is on a North Carolina protected animal list published by the Commission under G.S. 113-333.

2. Conserve any of the following priority animal wildlife habitats: longleaf pine forest, early successional habitat, small wetland community, stream and riparian zone, rock outcrop, or bat cave.

b. It must have been classified under G.S. 105-277.3 when the wildlife habitat conservation agreement was signed or the owner must demonstrate to both the Wildlife Resources Commission and the assessor that the owner used the land for a purpose specified in the signed wildlife habitat conservation agreement for three years preceding the January 1 of the year for which the benefit of this section is claimed.

(d) Restrictions. — The following restrictions apply to the classification allowed under this section:

(1) No more than 100 acres of an owner's land in a county may be classified under this section.

(2) Land owned by a business entity is not eligible for classification under this section if the business entity is a corporation whose shares are publicly traded or one of its members is a corporation whose shares are publicly traded.

(e) Deferred Taxes. — The difference between the taxes that are due on wildlife conservation land classified under this section and that would be due if the land were taxed on the basis of its true value is a lien on the property. The difference in taxes must be carried forward in the records of each taxing unit as deferred taxes. The deferred taxes for the preceding three fiscal years are due and payable in accordance with G.S. 105-277.1F when the land loses its eligibility for deferral as a result of a disqualifying event. A disqualifying event occurs when the property no longer qualifies as wildlife conservation land.

(f) Exceptions to Payment. — No deferred taxes are due in the following circumstances and the deferred taxes remain a lien on the land:

(1) When the owner of wildlife conservation land that was previously classified under G.S. 105-277.3 before the wildlife habitat conservation agreement was signed does not transfer the land and the land again becomes eligible for classification under G.S. 105-277.3. In this circumstance, the deferred taxes are payable in accordance with G.S. 105-277.3.

(2) When land that is classified under this section is transferred to an owner who signed the wildlife habitat conservation agreement in effect for the land at the time of the transfer and the land remains classified under this section. In this circumstance, the deferred taxes are payable in accordance with this section.

(g) Exceptions to Payment and Lien. — Notwithstanding subsection (e) of this section, if land loses its eligibility for deferral solely due to one of the following reasons, no deferred taxes are due and the lien for the deferred taxes is extinguished:

(1) The property is conveyed by gift to a nonprofit organization and qualifies for exclusion from the tax base under G.S. 105-275(12) or G.S. 105-275(29).

(2) The property is conveyed by gift to the State, a political subdivision of the State, or the United States.

(h) Administration. — An owner who applies for the classification allowed under this section must attach a copy of the owner's written wildlife habitat agreement required under subsection (c) of this section. An owner who fails to notify the county assessor when land classified under this section loses its eligibility for classification is subject to a penalty in the amount set in G.S. 105-277.5. (2008-171, s. 1.)

Editor's Note. — Session Laws 2008-171, s. 8, makes this section effective for taxes imposed for taxable years beginning on or after July 1, 2010.

Session Laws 2008-107, s. 28.11(h), provides, in part, that the Revisor of Statutes is authorized to correct any reference or citation in the General Statutes to any portion of Session Laws 2008-35 that is recodified or amended by Session Laws 2008-107, s. 28.11(h) by deleting incorrect references and substituting correct references. The reference to G.S. 105-277.1D in subsection (e) has been changed to G.S. 105-277.1F.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Session Laws 2008-171, s. 6, provides: "The Revenue Laws Study Committee is directed to study the three-year impact of classifying land as wildlife conservation land for property tax purposes. The study must include a review of the amount of property classified as wildlife conservation land, the fiscal impact on local governments, and any other impact.

"The Revenue Laws Study Committee must include its findings in the 2015 report."

§ 105-277.16. (Effective for taxes imposed for taxable years beginning on or after July 1, 2009) Taxation of low-income housing property.

A North Carolina low-income housing development to which the North Carolina Housing Finance Agency allocated a federal tax credit under section 42 of the Code is designated a special class of property under Article V, Section 2(2) of the North Carolina Constitution and must be appraised, assessed, and taxed in accordance with this section. The assessor must use the income approach as the method of valuation for property classified under this section and must take rent restrictions that apply to the property into consideration in determining the income attributable to the property. The assessor may not consider income tax credits received under section 42 of the Code or under G.S. 105-129.42 in determining the income attributable to the property. (2008-146, s. 3.1; 2008-187, s. 47.6.)

Editor's Note. — Session Laws 2008-146, s. 3.2, provides: "This section is effective for taxes imposed for taxable years beginning on or after July 1, 2009."

This section was enacted by Session Laws 2008-146, s. 3.1 as G.S. 105-277.15. It was recodified as G.S. 105-277.16 by Session Laws 2008-187, s. 47.6.

Session Laws 2008-187, s. 47.6, provides: "If House Bill 1889 and Senate Bill 1878, 2007 Regular Session, both become law, then G.S. 105-277.15 as enacted by Senate Bill 1878 is recodified as G.S. 105-277.16." House Bill 1889 was enacted as Session Laws 2008-171, and Senate Bill 1878 was enacted as Session Laws 2008-146.

§ 105-278. Historic properties.

(a) Real property designated as a historic property by a local ordinance adopted pursuant to former G.S. 160A-399.4 or designated as a historic landmark by a local ordinance adopted pursuant to G.S. 160A-400.5 is designated a special class of property under authority of Article V, Sec. 2(2) of the North Carolina Constitution. Property so classified shall be taxed uniformly as a class in each local taxing unit on the basis of fifty percent (50%) of the true value of the property as determined pursuant to G.S. 105-285 and 105-286, or 105-287.

(b) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** The difference between the taxes due on the basis of fifty percent (50%) of the true value of the property and the taxes that would have been payable in the absence of the classification provided for in subsection (a) shall be a lien on the property of the taxpayer as provided in G.S. 105-355(a) and shall be carried forward in the records of the taxing unit or units as deferred taxes, but shall not be payable until the property loses its eligibility for the benefit of this classification because of a change in an ordinance designating a historic property or a change in the property, except by fire or other natural disaster, which causes its historical significance to be lost or substantially impaired. The tax for the fiscal year that opens in the calendar year in which a disqualification occurs shall be computed as if the property had not been classified for that year, and taxes for the preceding three fiscal years that have been deferred as provided herein shall be payable immediately, together with interest thereon as provided in G.S. 105-360 for unpaid taxes, which shall accrue on the deferred taxes as if they had been payable on the dates on which they originally became due. If only a part of the historic property loses its eligibility for the classification, a determination shall be made of the amount of

G.S. 105-278(b) is set out twice. See note.

deferred taxes applicable to that part, and the amount shall be payable with interest as provided above.

(b) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** The difference between the taxes due on the basis of fifty percent (50%) of the true value of the property and the taxes that would have been payable in the absence of the classification provided for in subsection (a) shall be a lien on the property of the taxpayer as provided in G.S. 105-355(a). The taxes shall be carried forward in the records of the taxing unit or units as deferred taxes. The deferred taxes for the preceding three fiscal years are due and payable in accordance with G.S. 105-277.1F when the property loses the benefit of this classification as a result of a disqualifying event. A disqualifying event occurs when there is a change in an ordinance designating a historic property or a change in the property, other than by fire or other natural disaster, that causes the property's historical significance to be lost or substantially impaired. (1977, c. 869, s. 2; 1981, c. 501; 1989, c. 706, s. 3.1; 2005-435, s. 38; 2006-162, s. 28; 2008-35, s. 2.5.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective for taxable years beginning before July 1, 2008. The second version of subsection (b) set out above is effective for taxable years beginning on or after July 1, 2008.

Editor's Note. —

Session Laws 2008-107, s. 28.11(h), provides, in part, that the Revisor of Statutes is authorized to correct any reference or citation in the General Statutes to any portion of Session Laws 2008-35 that is recodified or amended by Session Laws 2008-107, s. 28.11(h) by deleting incorrect references and substituting correct references. The reference to G.S. 105-277.1C in subsection (b) has been changed to G.S. 105-277.1F.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-35, s. 2.5, effective for taxes imposed for taxable years beginning on or after July 1, 2008, rewrote subsection (b).

§ 105-278.4. Real and personal property used for educational purposes.

CASE NOTES

Exemption Upheld. —

North Carolina Tax Commission's decision that spiritual center where meditation was taught and practiced was not entitled to a tax exemption on property it owned, pursuant to G.S. 105-278.4, was not supported by substantial evidence in view of the entire record. In re Maharishi Spiritual Ctr. of Am., 152 N.C. App. 269, 569 S.E.2d 3, 2002 N.C. App. LEXIS 918 (2002), cert. denied, 356 N.C. 436, 572 S.E.2d 785 (2002), reversed by In re Maharishi Spiritual Ctr. of Am., 357 N.C. 152, 579 S.E.2d 249, 2003 N.C. LEXIS 424 (2003).

§ 105-278.6. Real and personal property used for charitable purposes.

(a) Real and personal property owned by:
  (1) A Young Men's Christian Association or similar organization;
  (2) A home for the aged, sick, or infirm;
  (3) An orphanage or similar home;

G.S. 105-278.6(e) is set out twice. See note.

(4) A Society for the Prevention of Cruelty to Animals;
(5) A reformatory or correctional institution;
(6) A monastery, convent, or nunnery;
(7) A nonprofit, life-saving, first aid, or rescue squad organization;
(8) A nonprofit organization providing housing for individuals or families with low or moderate incomes

shall be exempted from taxation if: (i) As to real property, it is actually and exclusively occupied and used, and as to personal property, it is entirely and completely used, by the owner for charitable purposes; and (ii) the owner is not organized or operated for profit.

(b) A charitable purpose within the meaning of this section is one that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward. The humane treatment of animals is also a charitable purpose.

(c) The fact that a building or facility is incidentally available to and patronized by the general public, so long as there is no material amount of business or patronage with the general public, shall not defeat the exemption granted by this section.

(d) Notwithstanding the exclusive-use requirements of this section, if part of a property that otherwise meets the section's requirements is used for a purpose that would require exemption under subsection (a), above, if the entire property were so used, the valuation of the part so used shall be exempted from taxation.

(e) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Real property held by an organization described in subdivision (a)(8) is held for a charitable purpose under this section if it is held for no more than five years as a future site for housing for individuals or families with low or moderate incomes. The taxes that would otherwise be due on real property exempt under this subsection shall be a lien on the property as provided in G.S. 105-355(a). The taxes shall be carried forward in the records of the taxing unit as deferred taxes and shall be payable five years after the tax year the exemption is first claimed unless the organization has constructed low- or moderate-income housing on the site. If this condition has not been met, the deferred taxes for the preceding five fiscal years shall be payable immediately, together with interest as provided in G.S. 105-360 for unpaid taxes that accrues on the deferred taxes as if they had been payable on the dates they would have originally become due. All liens arising under this subsection are extinguished upon one of the following:

(1) Payment of all deferred taxes under this subsection.
(2) Construction by the organization of low- or moderate-income housing on the site within five years after the tax year the exemption is first claimed.

(e) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Real property held by an organization described in subdivision (a)(8) for a charitable purpose under this section as a future site for housing for individuals or families with low or moderate incomes may be classified under this section for no more than five years. The taxes that would otherwise be due on real property exempt under this subsection shall be a lien on the property as provided in G.S. 105-355(a). The taxes shall be carried forward in the records of the taxing unit as deferred taxes. The deferred taxes are due and payable in accordance with G.S. 105-277.1F when the property loses its eligibility for deferral as a result of a disqualifying event. A disqualifying event occurs when the organization fails to construct low- or

G.S. 105-278.6(e) is set out twice. See note.

moderate-income housing on the site within five years from the first day of the fiscal year the property was classified under this subsection. (1973, c. 695, s. 4; 1975, c. 808; 1993, c. 230, s. 1; 2008-35, s. 2.6.)

Subsection (e) Set Out Twice. — The first version of subsection (e) set out above is effective for taxes imposed for taxable years beginning before July 1, 2008. The second version of subsection (e) set out above is effective for taxes imposed for taxable years beginning on or after July 1, 2008.

Editor's Note. — Session Laws 2008-107, s. 28.11(h), provides, in part, that the Revisor of Statutes is authorized to correct any reference or citation in the General Statutes to any portion of Session Laws 2008-35 that is recodified or amended by Session Laws 2008-107, s. 28.11(h) by deleting incorrect references and substituting correct references. The reference to G.S. 105-277.1C in subsection (e) has been changed to G.S. 105-277.1F.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-35, s. 2.6, effective for taxes imposed for taxable years beginning on or after July 1, 2008, rewrote subsection (e).

§ 105-282.1. Applications for property tax exemption or exclusion; annual review of property exempted or excluded from property tax.

(a) Application. — Every owner of property claiming exemption or exclusion from property taxes under the provisions of this Subchapter has the burden of establishing that the property is entitled to it. If the property for which the exemption or exclusion is claimed is appraised by the Department of Revenue, the application shall be filed with the Department. Otherwise, the application shall be filed with the assessor of the county in which the property is situated. An application must contain a complete and accurate statement of the facts that entitle the property to the exemption or exclusion and must indicate the municipality, if any, in which the property is located. Each application filed with the Department of Revenue or an assessor shall be submitted on a form approved by the Department. Application forms shall be made available by the assessor and the Department, as appropriate.

Except as provided below, an owner claiming an exemption or exclusion from property taxes must file an application for the exemption or exclusion annually during the listing period.

(1) No application required. — Owners of the following exempt or excluded property do not need to file an application for the exemption or exclusion to be entitled to receive it:
  a. Property exempt from taxation under G.S. 105-278.1 or G.S. 105-278.2.
  b. Special classes of property excluded from taxation under G.S. 105-275(15), (16), (26), (31), (32a), (33), (34), (37), (40), or (42).
  c. Property classified for taxation at a reduced valuation under G.S. 105-277(g) or G.S. 105-277.9.

(2) **(Effective for taxes imposed for taxable years beginning before July 1, 2009)** Single application required. — An owner of one or more of the following properties eligible to be exempted or excluded from taxation must file an application for exemption or exclusion to receive it. Once the application has been approved, the owner does not need

G.S. 105-282.1(a)(2) is set out three times. See notes.

to file an application in subsequent years unless new or additional property is acquired or improvements are added or removed, necessitating a change in the valuation of the property, or there is a change in the use of the property or the qualifications or eligibility of the taxpayer necessitating a review of the exemption or exclusion:

a. Property exempted from taxation under G.S. 105-278.3, 105-278.4, 105-278.5, 105- 278.6, 105-278.7, or 105-278.8.

b. Special classes of property excluded from taxation under G.S. 105-275(3), (7), (8), (12), (17), (18), (19), (20), (21), (31e), (35), (36), (38), (39), or (41) or under G.S. 131A-21.

c. Special classes of property classified for taxation at a reduced valuation under G.S. 105-277(h), 105-277.1, 105-277.10, 105-277.13, 105-278.

d. Property owned by a nonprofit homeowners' association but where the value of the property is included in the appraisals of property owned by members of the association under G.S. 105-277.8.

(2) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2009 and before July 1, 2010)** Single application required. — An owner of one or more of the following properties eligible for a property tax benefit must file an application for the benefit to receive it. Once the application has been approved, the owner does not need to file an application in subsequent years unless new or additional property is acquired or improvements are added or removed, necessitating a change in the valuation of the property, or there is a change in the use of the property or the qualifications or eligibility of the taxpayer necessitating a review of the benefit.

a. Property exempted from taxation under G.S. 105-278.3, 105-278.4, 105-278.5, 105-278.6, 105-278.7, or 105-278.8.

b. Special classes of property excluded from taxation under G.S. 105-275(3), (7), (8), (12), (17), (18), (19), (20), (21), (31e), (35), (36), (38), (39), or (41) or under G.S. 131A-21.

c. Special classes of property classified for taxation at a reduced valuation under G.S. 105-277(h), 105-277.1, 105-277.1C, 105-277.10, 105-277.13, 105-278.

d. Property owned by a nonprofit homeowners' association but where the value of the property is included in the appraisals of property owned by members of the association under G.S. 105-277.8.

e. Repealed by Session Laws 2008-35, s. 1.2, effective for taxes imposed for taxable years beginning on or after July 1, 2008.

(2) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2010)** Single application required. — An owner of one or more of the following properties eligible for a property tax benefit must file an application for the benefit to receive it. Once the application has been approved, the owner does not need to file an application in subsequent years unless new or additional property is acquired or improvements are added or removed, necessitating a change in the valuation of the property, or there is a change in the use of the property or the qualifications or eligibility of the taxpayer necessitating a review of the benefit.

a. Property exempted from taxation under G.S. 105-278.3, 105-278.4, 105-278.5, 105-278.6, 105-278.7, or 105-278.8.

b. Special classes of property excluded from taxation under G.S. 105-275(3), (7), (8), (12), (17), (18), (19), (20), (21), (31e), (35), (36), (38), (39), or (41) or under G.S. 131A-21.

G.S. 105-282.1(a)(2) is set out three times. See notes.

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c. Special classes of property classified for taxation at a reduced valuation under G.S. 105-277(h), 105-277.1, 105-277.1C, 105-277.10, 105-277.13, 105-278, or 105-277.15.

d. Property owned by a nonprofit homeowners' association but where the value of the property is included in the appraisals of property owned by members of the association under G.S. 105-277.8.

e. Repealed by Session Laws 2008-35, s. 1.2, effective for taxes imposed for taxable years beginning on or after July 1, 2008.

(a1) Late Application. — Upon a showing of good cause by the applicant for failure to make a timely application, an application for exemption or exclusion filed after the close of the listing period may be approved by the Department of Revenue, the board of equalization and review, the board of county commissioners, or the governing body of a municipality, as appropriate. An untimely application for exemption or exclusion approved under this subsection applies only to property taxes levied by the county or municipality in the calendar year in which the untimely application is filed.

(b) Approval and Appeal Process. — The Department of Revenue or the assessor to whom an application for exemption or exclusion is submitted must review the application and either approve or deny the application. Approved applications shall be filed and made available to all taxing units in which the exempted or excluded property is situated. If the Department denies an application for exemption or exclusion, it shall notify the taxpayer, who may appeal the denial to the Property Tax Commission.

If an assessor denies an application for exemption or exclusion, the assessor must notify the owner of the decision and the owner may appeal the decision to the board of equalization and review or the board of county commissioners, as appropriate, and from the county board to the Property Tax Commission. If the notice of denial covers property located within a municipality, the assessor shall send a copy of the notice and a copy of the application to the governing body of the municipality. The municipal governing body shall then advise the owner whether it will adopt the decision of the county board or require the owner to file a separate appeal with the municipal governing body. In the event the owner is required to appeal to the municipal governing body and that body renders an adverse decision, the owner may appeal to the Property Tax Commission. Nothing in this subsection shall prevent the governing body of a municipality from denying an application which has been approved by the assessor or by the county board provided the owner's rights to notice and hearing are not abridged. Applications handled separately by a municipality shall be filed in the office of the person designated by the governing body, or in the absence of such designation, in the office of the chief fiscal officer of the municipality.

(c) Discovery of Property. — When an owner of property that may be eligible for exemption or exclusion neither lists the property nor files an application for exemption or exclusion, the assessor or the Department of Revenue, as appropriate, shall proceed to discover the property. If, upon appeal, the owner demonstrates that the property meets the conditions for exemption or exclusion, the body hearing the appeal may approve the exemption or exclusion. Discovery of the property by the Department or the county shall automatically constitute a discovery by any taxing unit in which the property has a taxable situs.

(d) Roster of Exempted and Excluded Property. — The assessor shall prepare and maintain a roster of all property in the county that is granted tax relief through classification or exemption. On or before November 1 of each year, the assessor must send a report to the Department of Revenue summarizing the information contained in the roster. The report must be in the format required by the Department. The assessor must also send the Department a copy of the roster upon the request of the Department. As to affected real and personal property, the roster shall set forth:

(1) The name of the owner of the property.
(2) A brief description of the property.
(3) A statement of the use to which the property is put.
(4) A statement of the value of the property.
(5) The total value of exempt property in the county and in each municipality therein.

(e) Annual Review of Exempted or Excluded Property. — Pursuant to G.S. 105-296(l), the assessor must annually review at least one-eighth of the parcels in the county exempted or excluded from taxation to verify that the parcels qualify for the exemption or exclusion. (1973, c. 695, s. 8; c. 1252; 1981, c. 54, ss. 2, 3; c. 86, s. 2; c. 915; 1985 (Reg. Sess., 1986), c. 982, s. 22; 1987, c. 45, s. 1; c. 295, ss. 5, 6; c. 680, ss. 1-3; c. 813, s. 13; 1989, c. 674, s. 2; c. 723, s. 2; 1991, c. 34, s. 1; 1991 (Reg. Sess., 1992), c. 975, s. 3; 1993, c. 459, s. 3; 1995, c. 41, s. 7; 1995 (Reg. Sess., 1996), c. 646, s. 16; 1997-23, s. 4; 2000-140, s. 72(b); 2001-139, s. 1; 2007-484, s. 43.7T(b); 2007-497, s. 2.4; 2008-35, s. 1.3; 2008-107, s. 28.11(g); 2008-171, ss. 3, 7(c).)

Subdivision (a)(2) Set Out Three Times. — The first version of subdivision (a)(2) is effective for taxes imposed for taxable years beginning before July 1, 2009. The second version of subdivision (a)(2) is effective for taxes imposed for taxable years beginning on or after July 1, 2009, and before July 1, 2010. The third version of subdivision (a)(2) is effective for taxes imposed for taxable years beginning on or after July 1, 2010.

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Session Laws 2008-171, s. 8, provides in part: "Notwithstanding G.S. 105-282.1, an application for the exclusion in G.S. 105-275(31e), as enacted by this act, is timely if filed on or before September 1, 2008."

Effect of Amendments. —

Session Laws 2008-35, s. 1.3, effective for taxes imposed for taxable years beginning on or after July 1, 2008, deleted subdivision (a)(2)e.

Session Laws 2008-107, s. 28.11(g), effective for taxes imposed for taxable years beginning on or after July 1, 2009, inserted "105-277.1C" in subdivision (a)(2)c.

Session Laws 2008-171, s. 3, effective for taxes imposed for taxable years beginning on or after July 1, 2010, added "or 105-277.15" at the end of subdivision (a)(2)c.

Session Laws 2008-171, s. 7(c), effective for taxes imposed for taxable years beginning on or after July 1, 2008, inserted "(31e)" in subdivision (a)(2)b. See Editor's note for applicability.

ARTICLE 13.

Standards for Appraisal and Assessment.

§ 105-283. Uniform appraisal standards.

CASE NOTES

Ad valorem tax assessments are presumed to be correct, etc. —

Ad valorem tax value assessed by a county is allowed as evidence of the value of real property. Clay v. Monroe, — N.C. App. —, 658 S.E.2d 532, 2008 N.C. App. LEXIS 645 (Apr. 1, 2008).

Privilege "Belonging" or "Appertaining" to Real Property. — Non-refundable membership fee in a continuing care retirement community was a right and privilege "belonging" or "appertaining to" the taxpayers' real property and was properly included in its tax appraisal value; the estimated amount of money, which would change hands between the taxpayers and a subsequent purchaser, was directly tied to the purchase price of the unit and included the value of the non-refundable membership fee. In re Appeal of Tillman, — N.C. App. —, 653 S.E.2d 911, 2007 N.C. App. LEXIS 2563 (2007).

Applied in In re Appeal of Parker, — N.C. App. —, 664 S.E.2d 1, 2008 N.C. App. LEXIS 1338 (2008).

Cited in In re Appeal of IBM Credit Corp., 186 N.C. App. 223, 650 S.E.2d 828, 2007 N.C. App. LEXIS 2111 (2007).

ARTICLE 14.

Time for Listing and Appraising Property for Taxation.

§ 105-286. (Effective July 1, 2009; for applicability, see note) Time for general reappraisal of real property.

(a) Octennial Cycle. — Each county must reappraise all real property in accordance with the provisions of G.S. 105-283 and G.S. 105-317 as of January 1 of the year set out in the following schedule and every eighth year thereafter, unless the county is required to advance the date under subdivision (2) of this section or chooses to advance the date under subdivision (3) of this section.

(1) Schedule of Initial Reappraisals.

Division One — 1972: Avery, Camden, Cherokee, Cleveland, Cumberland, Guilford, Harnett, Haywood, Lee, Montgomery, Northampton, and Robeson.

Division Two — 1973: Caldwell, Carteret, Columbus, Currituck, Davidson, Gaston, Greene, Hyde, Lenoir, Madison, Orange, Pamlico, Pitt, Richmond, Swain, Transylvania, and Washington.

Division Three — 1974: Ashe, Buncombe, Chowan, Franklin, Henderson, Hoke, Jones, Pasquotank, Rowan, and Stokes.

Division Four — 1975: Alleghany, Bladen, Brunswick, Cabarrus, Catawba, Dare, Halifax, Macon, New Hanover, Surry, Tyrrell, and Yadkin.

Division Five — 1976: Bertie, Caswell, Forsyth, Iredell, Jackson, Lincoln, Onslow, Person, Perquimans, Rutherford, Union, Vance, Wake, Wilson, and Yancey.

Division Six — 1977: Alamance, Durham, Edgecombe, Gates, Martin, Mitchell, Nash, Polk, Randolph, Stanly, Warren, and Wilkes.

Division Seven — 1978: Alexander, Anson, Beaufort, Clay, Craven, Davie, Duplin, and Granville.

Division Eight — 1979: Burke, Chatham, Graham, Hertford, Johnston, McDowell, Mecklenburg, Moore, Pender, Rockingham, Sampson, Scotland, Watauga, and Wayne.

(2) Mandatory Advancement. — A county whose population is 75,000 or greater according to the most recent annual population estimates certified to the Secretary by the State Budget Officer must conduct a reappraisal of real property when the county's sales assessment ratio determined under G.S. 105-289(h) is less than .85 or greater than 1.15, as indicated on the notice the county receives under G.S. 105-284. A reappraisal required under this subdivision must become effective no later than January 1 of the earlier of the following years:

a. The third year following the year the county received the notice.

b. The eighth year following the year of the county's last reappraisal.

(3) Optional Advancement. — A county may conduct a reappraisal of real property earlier than required by subdivision (1) or (2) of this subsection if the board of county commissioners adopts a resolution providing for advancement of the reappraisal. The resolution must

designate the effective date of the advanced reappraisal and may designate a new reappraisal cycle that is more frequent than the octennial cycle set in subdivision (1) of this subsection. The board of county commissioners must promptly forward a copy of the resolution adopted under this subdivision to the Department of Revenue. A more frequent reappraisal cycle designated in a resolution adopted under this subdivision continues in effect after a mandatory reappraisal required under subdivision (2) of this subsection unless the board of county commissioners adopts another resolution that designates a different date for the county's next reappraisal.

(b), (c) Repealed by Session Laws 2008-146, s. 1.1, effective July 1, 2009. (1939, c. 310, s. 300; 1941, c. 282, ss. 1, 11/2; 1943, c. 634, s. 1; 1945, c. 5; 1947, c. 50; 1949, c. 109; 1951, c. 847; 1953, c. 395; 1955, c. 1273; 1957, c. 1453, s. 1; 1959, c. 704, s. 1; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1987, c. 45, s. 1; 2008-146, s. 1.1.)

Section Set Out Twice. — The section above is effective July 1, 2009. For the section as in effect until July 1, 2009, see the main volume.

Editor's Note. — Session Laws 2008-146, s. 1.1, deleted the subsection (a) designation. The subsection (a) designation has been re-inserted and the section set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2008-146, s. 1.4, provides: "This section becomes effective July 1, 2009, and mandatory advancements in G.S. 105-286(a)(2), as amended by this section, apply to notices sent under G.S. 105-284(c) on or after that date."

Session Laws 2008-146, s. 6, provides: "The Revenue Laws Study Committee must study the following:

"(1) the effect of PART I of this act and determine whether new positions are needed to perform sales assessment ratio studies in additional counties each year and to perform other functions related to this act.

"(2) The definition of income as it applies to the homestead exclusion."

Effect of Amendments. — Session Laws 2008-146, s. 1.1, rewrote the section. For effective date and applicability, see Editor's note.

§ 105-287. (Effective July 1, 2009) Changing appraised value of real property in years in which general reappraisal is not made.

(a) In a year in which a general reappraisal of real property in the county is not made under G.S. 105-286, the property shall be listed at the value assigned when last appraised unless the value is changed in accordance with this section. The assessor shall increase or decrease the appraised value of real property, as determined under G.S. 105-286, to recognize a change in the property's value resulting from one or more of the following reasons:

(1) Correct a clerical or mathematical error.

(2) Correct an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal.

(2a) Recognize an increase or decrease in the value of the property resulting from a conservation or preservation agreement subject to Article 4 of Chapter 121 of the General Statutes, the Conservation and Historic Preservation Agreements Act.

(2b) Recognize an increase or decrease in the value of the property resulting from a physical change to the land or to the improvements on the land, other than a change listed in subsection (b) of this section.

(2c) Recognize an increase or decrease in the value of the property resulting from a change in the legally permitted use of the property.

G.S. 105-287 is set out twice. See notes.

(3) Recognize an increase or decrease in the value of the property resulting from a factor other than one listed in subsection (b).

(b) In a year in which a general reappraisal of real property in the county is not made, the assessor may not increase or decrease the appraised value of real property, as determined under G.S. 105-286, to recognize a change in value caused by:

(1) Normal, physical depreciation of improvements;

(2) Inflation, deflation, or other economic changes affecting the county in general; or

(3) Betterments to the property made by:
  a. Repainting buildings or other structures;
  b. Terracing or other methods of soil conservation;
  c. Landscape gardening;
  d. Protecting forests against fire; or
  e. Impounding water on marshland for non-commercial purposes to preserve or enhance the natural habitat of wildlife.

(c) An increase or decrease in the appraised value of real property authorized by this section shall be made in accordance with the schedules, standards, and rules used in the county's most recent general reappraisal. An increase or decrease in appraised value made under this section is effective as of January 1 of the year in which it is made and is not retroactive. The reason for an increase or decrease in appraised value made under this section need not be under the control of or at the request of the owner of the affected property. This section does not modify or restrict the provisions of G.S. 105-312 concerning the appraisal of discovered property.

(d) Notwithstanding subsection (a), if a tract of land has been subdivided into lots and more than five acres of the tract remain unsold by the owner of the tract, the assessor may appraise the unsold portion as land acreage rather than as lots. A tract is considered subdivided into lots when the lots are located on streets laid out and open for travel and the lots have been sold or offered for sale as lots since the last appraisal of the property. (1939, c. 310, ss. 301, 500; 1953, c. 970, s. 5; 1955, c. 901; c. 1100, s. 2; 1959, c. 682; c. 704, s. 2; 1963, c. 414; 1967, c. 892, s. 7; 1969, c. 945, s. 1; 1971, c. 806, s. 1; 1973, c. 695, s. 10; c. 790, s. 2; 1987, c. 655; 1997-226, s. 4; 2001-139, s. 2; 2008-146, s. 1.2.)

Section Set Out Twice. — The section above is effective July 1, 2009. For the section as in effect until July 1, 2009, see the main volume.

Editor's Note. — Session Laws 2008-146, s. 1.4, provides: "This section becomes effective July 1, 2009, and mandatory advancements in G.S. 105-286(a)(2), as amended by this section, apply to notices sent under G.S. 105-284(c) on or after that date."

Session Laws 2008-146, s. 6, provides: "The Revenue Laws Study Committee must study the following:

"(1) the effect of PART I of this act and determine whether new positions are needed to perform sales assessment ratio studies in additional counties each year and to perform other functions related to this act.

"(2) The definition of income as it applies to the homestead exclusion."

Effect of Amendments. — Session Laws 2008-146, s. 1.2, effective July 1, 2009, deleted "or horizontal adjustment" following "reappraisal" in the section catchline; in subsection (a), rewrote the introductory paragraph, and deleted "or horizontal adjustment" following "reappraisal" in subdivision (a)(2); in subsection (b), deleted "or horizontal adjustment" following "reappraisal"; and in subsection (c), deleted "or horizontal adjustment" following "reappraisal" in the first sentence, and inserted the third sentence.

Article 15.

Duties of Department and Property Tax Commission as to Assessments.

§ 105-290. Appeals to Property Tax Commission.

CASE NOTES

Availability of Judicial Review. — Although it was difficult from individual property records for a property owner to ascertain the standard of value by which each individual parcel of land was valued, that was not a proper subject of an appeal under G.S. 105-290(c)(1). In re Appeal of Parker, — N.C. App. —, 664 S.E.2d 1, 2008 N.C. App. LEXIS 1338 (2008).

Standard of Review. — Because a taxpayer's appeal to the North Carolina Property Tax Commission challenged only the sufficiency of a county schedule of values as a matter of law pursuant to G.S. 105-290(c), an appellate court reviewed the Commission's decision de novo. In re Appeal of Parker, — N.C. App. —, 664 S.E.2d 1, 2008 N.C. App. LEXIS 1338 (2008).

Article 19.

Administration of Real and Personal Property Appraisal.

§ 105-317. Appraisal of real property; adoption of schedules, standards, and rules.

CASE NOTES

Privilege "Belonging" or "Appertaining" to Real Property. — Non-refundable membership fee in a continuing care retirement community was a right and privilege "belonging" or "appertaining to" the taxpayers' real property and was properly included in its tax appraisal value. In re Appeal of Tillman, — N.C. App. —, 653 S.E.2d 911, 2007 N.C. App. LEXIS 2563 (2007).

Schedule of Values Sufficient. — When a county's schedule of values, standards, and rules included a general reference to legal restrictions on land use, it did not need to list every type of restriction to be sufficiently detailed to enable those making appraisals to adhere to the schedule in appraising real property. In re Appeal of Parker, — N.C. App. —, 664 S.E.2d 1, 2008 N.C. App. LEXIS 1338 (2008).

Detail contained in a county schedule of values was sufficient to enable those making appraisals to adhere to those valuation amounts for each neighborhood to appraise the real property to be valued because the schedule contained a list of neighborhoods with valuation amounts for residential, commercial/industrial, and agricultural properties. G.S. 105-317(a) did not require a table of incremental and decremental values to be included in a county's schedule of values, standards, and rules. In re Appeal of Parker, — N.C. App. —, 664 S.E.2d 1, 2008 N.C. App. LEXIS 1338 (2008).

Article 22A.

Motor Vehicles.

§ 105-330. Definitions.

The following definitions apply in this Article:

(1) Classified motor vehicle. — A motor vehicle classified under this Article.

(1a) **(For effective date, see note)** Collecting authority. — The Division of Motor Vehicles or an agent contracting with the Division of Motor Vehicles.

(2) Motor vehicle. — Defined in G.S. 20-4.01(23).

(2a) **(For effective date, see note)** Municipal corporation. — Defined in G.S. 105-273(11).

(3) Public service company. — Defined in G.S. 105-333(14). (1991, c. 624, s. 1; 2005-294, s. 1; 2006-259, s. 31.5; 2007-527, s. 22(b); 2008-134, s. 65.)

Editor's Note. — Subdivisions (3) and (4), as added by Session Laws 2005-294, s. 1, were redesignated as subdivisions (1a) and (2a) at the direction of the Revisor of Statutes to maintain alphabetical order.

Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, as amended by Session Laws 2007-527, s. 22(b), and as amended by Session Laws 2008-134, s. 65, provides: "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 10 and 11 of this act become effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007."

Effect of Amendments. — Session Laws 2005-294, s. 1, effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first, added subdivisions (1a) and (2a).

§ 105-330.2. Appraisal, ownership, and situs.

(a) Date Determined. — The value of a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) (registered vehicles) shall be determined as of January 1 of the year the taxes are due. If the value of a new motor vehicle cannot be determined as of that date, the value of that vehicle shall be determined for that year as of the date that model vehicle is first offered for sale at retail in this State.

The ownership, situs, and taxability of a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) (registered vehicles) shall be determined annually as of the day on which a new registration is applied for or the day on which the current vehicle registration is renewed, regardless of whether the registration is renewed after it has expired.

The value of a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(2) (unregistered vehicles) shall be determined as of January 1 of the year in which the motor vehicle is required to be listed pursuant to G.S. 105-330.3(a)(2). The ownership, situs, and taxability of a classified motor vehicle listed or discovered pursuant to G.S. 105-330.3(a)(2) (unregistered vehicles) shall be determined as of January 1 of the year in which the motor vehicle is required to be listed.

(b) **(Effective until July 1, 2011, see note)** Value; Appeal. — A classified motor vehicle shall be appraised by the assessor at its true value in money as prescribed by G.S. 105-283. If the assessor considers the sales price of the motor vehicle in determining the true value of the motor vehicle, the assessor must not include any amount for which the taxpayer is liable under Article 5A of this Chapter. The owner of a classified motor vehicle may appeal the appraised value of the vehicle in the manner provided by G.S. 105-312(d) for appeals in the case of discovered property and may appeal the situs or taxability of the vehicle in the manner provided by G.S. 105-381. The owner of a classified motor vehicle must file an appeal of appraised value with the assessor within 30 days after the date of the tax notice prepared pursuant to

G.S. 105-330.2(b) is set out twice. See note.

G.S. 105-330.5. Notwithstanding G.S. 105-312(d), an owner who appeals the appraised value of a classified motor vehicle shall pay the tax on the vehicle when due, subject to a full or partial refund if the appeal is decided in the owner's favor.

(b) **(Effective July 1, 2011, see note)** Value; Appeal. — A classified motor vehicle shall be appraised by the assessor at its true value in money as prescribed by G.S. 105-283. If the assessor considers the sales price of the motor vehicle in determining the true value of the motor vehicle, the assessor must not include any amount for which the taxpayer is liable under Article 5A of this Chapter. The Property Tax Division of the Department of Revenue shall annually adopt a schedule of values, standards, and rules to be used in the valuation of motor vehicles to ensure equitable statewide valuations, taking into account local market conditions and allowing adjustments for mileage and the condition of the vehicles. The owner of a classified motor vehicle may appeal the appraised value of the vehicle in the manner provided by G.S. 105-312(d) for appeals in the case of discovered property and may appeal the situs or taxability of the vehicle in the manner provided by G.S. 105-381. The owner of a classified motor vehicle must file an appeal of appraised value with the assessor before the taxes become delinquent pursuant to G.S. 105-330.4. Notwithstanding G.S. 105-312(d), an owner who appeals the appraised value of a classified motor vehicle shall pay the tax on the vehicle when due, subject to a full or partial refund if the appeal is decided in the owner's favor.

(c) Repealed by Session Laws 2008-134, s. 61, effective July 28, 2008. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 4; 1995, c. 510, s. 1; 1995 (Reg. Sess., 1996), c. 646, s. 24; 1997-6, s. 10; 1999-353, s. 1; 2005-294, s. 2; 2005-303, s. 1; 2006-259, s. 31.5; 2007-527, s. 22(b); 2008-134, ss. 61, 65.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until July 1, 2011, or until the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. The second version of subsection (b) set out above is effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first.

Editor's Note. — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, as amended by Session Laws 2007-527, s. 22(b), and as amended by Session Laws 2008-134, s. 65, provides: "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 10 and 11 of this act become effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007."

Effect of Amendments. — Session Laws 2005-294, s. 2, effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first, rewrote subsection (b); and added the last sentence in subsection (c).

Session Laws 2008-134, s. 61, effective July 28, 2008, deleted subsection (c), regarding the administration of a memorandum of understanding for the administration of the listing, appraisal, and assessment of classified motor vehicles.

§ 105-330.3. Assessor's duty to list classified motor vehicles; application for exempt status.

(a)(1) Registered Vehicles. The assessor shall list, appraise, and assess all taxable classified motor vehicles for county, municipal, and special district taxes each year in the name of the record owner as of the day on which the current vehicle registration is renewed or the day on which a new registration is applied for. The owner of a classified motor vehicle listed pursuant to this subdivision need not list the vehicle as provided in G.S. 105-306; G.S. 105-312 does not apply to classified motor vehicles listed pursuant to this subdivision.

(2) Unregistered Vehicles. The owner of a classified motor vehicle who does not register the vehicle or does not renew the registration of the vehicle on or before the expiration date of the current registration shall list the vehicle for taxes by filing an abstract with the assessor of the county in which the vehicle is located on or before January 31 following the date the unregistered vehicle is acquired or, in the case of a registration that is not renewed, January 31 following the date the registration expires, and on or before January 31 of each succeeding year that the vehicle is unregistered. If a classified motor vehicle listed pursuant to this section is registered during the calendar year in which it was listed, it shall be taxed for the fiscal year that opens in the calendar year of listing as an unregistered vehicle. A vehicle required to be listed pursuant to this subdivision that is not listed by January 31 shall be subject to discovery pursuant to G.S. 105-312, unless the vehicle has been taxed as a registered vehicle for the current year.

(b) The owner of a classified motor vehicle who claims an exemption or exclusion from tax under this Subchapter has the burden of establishing that the vehicle is entitled to the exemption or exclusion. The owner may establish prima facie entitlement to exemption or exclusion of the classified motor vehicle by filing an application for exempt status with the assessor. When an approved application is on file, the assessor shall omit from the tax records classified motor vehicles described in the application. An application is not required for vehicles qualifying for exemptions or exclusions listed in G.S. 105-282.1(a)(1).

(c) The owner of a classified motor vehicle that has been omitted from the tax records as provided in subsection (b) shall report to the assessor any classified motor vehicle registered in the owner's name or owned by him that does not qualify for exemption or exclusion for the current year. This report shall be made within 30 days after the renewal of registration or initial registration of the vehicle or, for an unregistered vehicle, on or before January 31 of the year in which the vehicle is required to be listed by subdivision (a)(2). A classified motor vehicle that does not qualify for exemption or exclusion but has been omitted from the tax records as provided in subsection (b) is subject to discovery under the provisions of G.S. 105-312, except that in lieu of the penalties prescribed by G.S. 105-312(h) there shall be assessed a penalty of one hundred dollars ($100.00) for each registration period that elapsed before the disqualification was discovered.

(d) The provisions of G.S. 105-282.1 do not apply to classified motor vehicles. (1991, c. 624, s. 1; 2008-134, s. 62.)

Effect of Amendments. — Session Laws 2008-134, s. 62, effective July 28, 2008, in subdivision (a)(2), added "unless the vehicle has been taxed as a registered vehicle for the current year" to the end; and in subsection (b), added the last sentence.

§ 105-330.4. Due date, interest, and enforcement remedies.

(a) **(Effective until July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of**

Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first) Taxes on a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(2) shall be due on September 1 following the date by which the vehicle was required to be listed. Taxes on a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) shall be due each year on the following dates:

(1) For a vehicle registered under the staggered system, taxes shall be due on the first day of the fourth month following the date the registration expires or on the first day of the fourth month following the last day of the month in which the new registration is applied for.

(2) For a vehicle newly registered under the annual system, taxes shall be due on the first day of the fourth month following the date the new registration is applied for. For a vehicle whose registration is renewed under the annual system, taxes shall be due on May 1 following the date the registration expired.

(a) **(Effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first)** Taxes on a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(2) are due on September 1 following the date by which the vehicle was required to be listed. Taxes on a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) are due each year on the date a new registration is applied for or the fifteenth day of the month following the month in which the registration renewal sticker expired pursuant to G.S. 20-66(g).

(a1) **(Effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first)** Notwithstanding subsection (a) of this section, taxes on a classified motor vehicle for which the registration fees have been paid pursuant to G.S. 20-79.1 or subsection (a) of G.S. 20-79.1A, are due on the last day of the second month following the date on which the limited registration is applied for.

(b) **(Effective until July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first)** Subject to the provisions of G.S. 105-395.1, interest on unpaid taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) accrues at the rate of five percent (5%) for the first month following the date the taxes were due and three-fourths percent (¾ %) for each month thereafter until the taxes are paid, unless the notice required by G.S. 105-330.5 is prepared after the date the taxes are due. In that circumstance, the interest accrues beginning the second month following the date of the notice until the taxes are paid. Subject to the provisions of G.S. 105-395.1, interest on delinquent taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2) accrues as provided in G.S. 105-360(a) and discounts shall be allowed as provided in G.S. 105-360(c).

(b) **(Effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first)** Subject to the provisions of G.S. 105-395.1, interest on unpaid taxes and registration fees on classified motor vehicles listed pursuant

G.S. 105-330.4(a) and (b) are set out twice. See note.

to G.S. 105-330.3(a)(1) accrues at the rate of five percent (5%) for the remainder of the month following the month in which the registration renewal sticker expired pursuant to G.S. 20-66(g). Interest accrues at the rate of three-fourths percent (3/4 %) for each month thereafter until the taxes and fees are paid, unless the notice required by G.S. 105-330.5 is prepared after the date the taxes and fees are due. In that circumstance, the interest accrues beginning the second month following the date of the notice until the taxes and fees are paid. Subject to the provisions of G.S. 105-395.1, interest on delinquent taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2) accrues as provided in G.S. 105-360(a) and discounts shall be allowed as provided in G.S. 105-360(c).

(c) Unpaid taxes on classified motor vehicles may be collected by levying on the motor vehicle taxed or on any other personal property of the taxpayer pursuant to G.S. 105-366 and G.S. 105-367, or by garnishment of the taxpayer's property pursuant to G.S. 105-368. Notwithstanding the provisions of G.S. 105-366(b), the enforcement measures of levy, attachment, and garnishment may be used to collect unpaid taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) at any time after interest accrues. Notwithstanding the provisions of G.S. 105-355, taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) do not become a lien on real property owned by the taxpayer. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 5; 1995, c. 510, s. 2; 2001-139, s. 8; 2005-294, ss. 3, 4, 5; 2006-259, s. 31.5; 2007-471, s. 3; 2007-527, s. 22(b); 2008-134, s. 65.)

Subsections (a) and (b) Set Out Twice. — The first versions of subsections (a) and (b) set out above are effective until July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. The second versions of subsections (a) and (b) set out above are effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first.

Editor's Note. — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, as amended by Session Laws 2007-527, s. 22(b), and as amended by Session Laws 2008-134, s. 65, provides: "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 10, and 11 of this act become effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007."

Effect of Amendments. — Session Laws 2005-294, ss. 3 and 5, effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first, rewrote subsection (a); and rewrote the first two sentences in subsection (b).

§ 105-330.5. (For effective date, see note) Listing and collecting procedures.

(a) For classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1), upon receiving the registration lists from the Division of Motor Vehicles each month, the assessor shall prepare a tax notice for each vehicle; the tax notice shall contain all county, municipal, and special district taxes due on the motor vehicle. In computing the taxes, the assessor shall appraise the motor vehicle in accordance with G.S. 105-330.2 and shall use the tax rates of the various taxing units in effect on the first day of the month in which the current vehicle registration expired or the new registration was applied for. The tax on the motor vehicle is the product of a fraction and the number of months in the motor vehicle tax year. The numerator of the fraction is the product of the appraised value of the motor vehicle and the tax rate of the various taxing units. The denominator of the fraction is 12. This procedure shall constitute the listing and assessment of each classified motor vehicle for taxation. The tax notice shall contain:

(1) The date of the tax notice.
(2) The appraised value of the motor vehicle.
(3) The tax rate of the taxing units.
(4) A statement that the appraised value of the motor vehicle may be appealed to the assessor within 30 days after the date of the notice.

(a1) When a new registration is obtained for a vehicle registered under the annual system in a month other than December, the assessor shall prorate the taxes due for the remainder of the calendar year. The amount of prorated taxes due is the product of the proration fraction and the taxes computed according to subsection (a). The numerator of the proration fraction is the number of full months remaining in the calendar year following the date the registration is applied for and the denominator of the fraction is 12.

(b) When the tax notice required by subsection (a) is prepared, the county tax collector shall mail a copy of the notice, with appropriate instructions for payment, to the motor vehicle owner. The county may retain the actual cost of collecting municipal and special district taxes collected pursuant to this Article, not to exceed one and one-half percent (1 ½%) of the amount of taxes collected. The county finance officer shall establish procedures to ensure that tax payments received pursuant to this Article are properly accounted for and taxes due other taxing units are remitted to the units to which they are due at least once each month. Each month, a county shall provide reasonable information to the municipalities and special districts located in it to enable them to account for the tax payments remitted to them.

(b1) Repealed by Session Laws 1995, c. 329, s. 2.

(c) For classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2), the assessor shall appraise each vehicle in accordance with G.S. 105-330.2. The assessor shall prepare a tax notice for each vehicle before September 1 following the January 31 listing date; the tax notice shall include all county and special district taxes due on the motor vehicle. In computing the taxes, the assessor shall use the tax rates of the taxing units in effect for the fiscal year that begins on July 1 following the January 31 listing date. Municipalities shall list, assess, and tax classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2) as provided in G.S. 105-326, 105-327, and 105-328 and shall send tax notices as provided in this section.

(d) The county shall include taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) in the tax levy for the fiscal year in which the taxes become due and shall charge the taxes to the tax collector for that year, unless the tax notice required by subsection (a) is prepared after the date the taxes are due. If that occurs, the county shall include the taxes from that notice in the tax levy for the current fiscal year and shall charge the taxes to the tax collector for that year. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 6; 1995, c. 24, s. 1; c. 329, s. 2; c. 510, s. 3; 2005-313, s. 8.)

Section Set Out Twice. — The section above is effective until July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. For the section as amended effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first, see the following section, also numbered G.S. 105-330.5. See Editor's Note.

§ 105-330.5. (For effective date, see note) Listing and collecting procedures.

(a) For classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1), upon receiving the registration lists from the Division of Motor Vehicles each month, the assessor shall prepare a tax notice for each vehicle; the tax notice shall contain all county, municipal, and special district taxes due on the motor vehicle. In computing the taxes, the assessor shall appraise the motor vehicle in accordance with G.S. 105-330.2 and shall use the tax rates of the various taxing units in effect on the first day of the month in which the current vehicle registration expired or the new registration was applied for. The tax on the motor vehicle is the product of a fraction and the number of months in the motor vehicle tax year. The numerator of the fraction is the product of the appraised value of the motor vehicle and the tax rate of the various taxing units. The denominator of the fraction is 12. This procedure shall constitute the listing and assessment of each classified motor vehicle for taxation. The tax notice shall contain:

(1) The date of the tax notice.
(2) The appraised value of the motor vehicle.
(3) The tax rate of the taxing units.
(4) A statement that the appraised value of the motor vehicle may be appealed to the assessor within 30 days after the date of the notice.

(a1) When a new registration is obtained for a vehicle registered under the annual system in a month other than December, the assessor shall prorate the taxes due for the remainder of the calendar year. The amount of prorated taxes due is the product of the proration fraction and the taxes computed according to subsection (a). The numerator of the proration fraction is the number of full months remaining in the calendar year following the date the registration is applied for and the denominator of the fraction is 12.

(b) When the tax notice required by subsection (a) is prepared, the county tax collector shall mail a copy of the notice, with appropriate instructions for payment, to the motor vehicle owner. The county may retain the actual cost of collecting municipal and special district taxes collected pursuant to this Article, not to exceed one and one-half percent (1 ½%) of the amount of taxes collected. The county finance officer shall establish procedures to ensure that tax payments received pursuant to this Article are properly accounted for and taxes due other taxing units are remitted to the units to which they are due at least once each month. Each month, a county shall provide reasonable information to the municipalities and special districts located in it to enable them to account for the tax payments remitted to them.

(b1) Repealed by Session Laws 1995, c. 329, s. 2.

(c) For classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2), the assessor shall appraise each vehicle in accordance with G.S. 105-330.2. The assessor shall prepare a tax notice for each vehicle before September 1 following the January 31 listing date; the tax notice shall include all county and special district taxes due on the motor vehicle. In computing the taxes, the assessor shall use the tax rates of the taxing units in effect for the fiscal year that begins on July 1 following the January 31 listing date. Municipalities shall list, assess, and tax classified motor vehicles listed pursuant to G.S.

G.S. 105-330.5 is set out twice. See notes.

105-330.3(a)(2) as provided in G.S. 105-326, 105-327, and 105-328 and shall send tax notices as provided in this section.

(d) The county shall include taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) in the tax levy for the fiscal year in which the taxes become due and shall charge the taxes to the tax collector for that year, unless the tax notice required by subsection (a) is prepared after the date the taxes are due. If that occurs, the county shall include the taxes from that notice in the tax levy for the current fiscal year and shall charge the taxes to the tax collector for that year. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 6; 1995, c. 24, s. 1; c. 329, s. 2; c. 510, s. 3; 2005-294, s. 6; 2005-313, s. 8; 2006-259, s. 31.5; 2007-471, ss. 4, 5; 2007-527, s. 22(b); 2008-134, s. 65.)

Section Set Out Twice. — The section above is effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue. For the section as in effect until July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first, see the preceding section, also numbered G.S. 105-330.5.

Editor's Note. — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, as amended by Session Laws 2007-527, s. 22, and as amended by Session Laws 2008-134, s. 65, provides, in part, that s. 6 of the act becomes effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007.

§ 105-330.7. (For repeal, see note) List of delinquents sent to Division of Motor Vehicles.

On the tenth day of each month the county tax collector shall prepare a list with the name and address of the owner and the vehicle identification number of every classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) on which taxes remain unpaid on that date and on which taxes became due on the first day of the fourth month preceding that date. The tax collector shall mail that list to the Division of Motor Vehicles. The list shall be in the form and contain the information required by the Division of Motor Vehicles. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 8; 2005-294, s. 7; 2006-259, s. 31.5; 2007-527, s. 22(b); 2008-134, s. 65.)

Delayed repeal of this section. — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, as amended by Session Laws 2007-527, s. 22, and as amended by Session Laws 2008-134, s. 65, provides, in part, that this section is repealed effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007.

§ 105-330.10. (Effective until January 1, 2011) Combined Motor Vehicle and Registration Account.

(a) Account. — The Combined Motor Vehicle and Registration Account is established as a nonreverting account within the Department of State Treasurer. A taxing unit must remit to the Department of State Treasurer for deposit into the Account sixty percent (60%) of the first month's interest collected under G.S. 105-330.4 on unpaid property taxes on classified and registered motor vehicles. The taxing unit must make the remittance on a monthly basis. Interest earned by the Account accrues to the Account.

(b) Use. — Funds in the Account may be used only to develop and implement an integrated computer system within the Division of Motor Vehicles of the Department of Transportation that provides the functions needed for the assessment, billing, and collection of both the property taxes and the vehicle registration fees due on motor vehicles. The funds may not be transferred to the Division and expended for this purpose until the Department of Transportation and the North Carolina Association of County Commissioners agree on the project plan for the integrated system and the General Assembly appropriates the funds to the Division. If funds remain in the Account after the operation of the integrated system is certified, the remaining funds must be distributed to local governments on a pro rata basis determined on the amount of revenue each local government transferred to the Account.

(c) Report. — The Treasurer must make an annual report on the Account to the Revenue Laws Study Committee. The report must be submitted by November 1 of each year and must state the total amount of revenue transferred by local governments to the Account during the preceding fiscal year, the amount expended from the Account during the preceding fiscal year, and any other information requested by the Committee. (2005-294, s. 8; 2006-30, s. 3; 2006-259, s. 31.5; 2007-471, s. 7(a); 2007-527, s. 22(b); 2008-134, s. 63.)

Section Set Out Twice. — The section above is effective until January 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. For the section as amended effective January 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first, see the following section, also numbered G.S. 105-330.10.

Editor's Note. —

Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, as amended by Session Laws 2007-527, s. 22(b), and as amended by Session Laws 2008-134, s. 65, provides: "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 10, and 11 of this act become effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007." Section 9 of Session Laws 2005-294, which rewrote G.S. 105-330.10, effective July 1, 2010, was repealed by Session Laws 2007-527, s. 22(a), effective August 31, 2007.

Session Laws 2007-527, s. 22(d), as amended by Session Laws 2008-134, s. 66, provides, in part: "Subsection (c) of this section becomes effective January 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first."

Effect of Amendments. —

Session Laws 2008-134, s. 63, effective July 28, 2008, rewrote the section.

§ 105-330.10. (Effective January 1, 2011 — See Editor's note) Disposition of interest.

The interest collected on unpaid registration fees pursuant to G.S. 105-330.4 shall be transferred on a monthly basis to the North Carolina Highway Fund for technology improvements within the Division of Motor Vehicles. (2005-294, ss. 8, 9; 2006-30, s. 3; 2006-259, s. 31.5; 2007-471, s. 7(a); 2007-527, s. 22(a)-(c); 2008-134, ss. 63, 65, 66.)

Section Set Out Twice. — The section above is effective January 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. For the section as in effect until January 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first, see the preceding section, also numbered G.S. 105-330.10.

Editor's Note. — This section was amended by Session Laws 2007-572, s. 22(c), effective January 1, 2010, in the coded bill drafting format prescribed by G.S. 120-20.1. The section was subsequently completely rewritten by Session Laws 2008-134, s. 63, effective July 28, 2008. Session Laws 2008-134, in s. 66, also postponed the effective date of the 2007 amendment by providing, in part: "Subsection (c) of this section becomes effective January 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first." If G.S. 120-20.1 is applied, on the effective date of the 2007 amendment, this section will read as follows:

"**§ 105-330.10. Combined Motor Vehicle and Registration Account.**

"(a) Account. — is established as a nonreverting account within the Department of State Treasurer. A taxing unit must remit to the Department of State Treasurer for deposit.

"The under G.S. 105-330.4 property registration fees North Carolina Highway Fund for technology improvements within the Division of Motor Vehicles. registered.

"The taxing unit must make remittance on monthly basis.

"earned Account accrues

"(b) Use. — may used only

"develop and implement an integrated computer system within the Division of Motor Vehicles of the Department of Transportation that provides functions needed for the assessment, billing, and collection

"both the property taxes and the vehicle registration fees on motor vehicles. The funds may

"to the Division and expended for this purpose

"agree the appropriates the Division. If remain of is funds must on amount of revenue transferred to the Account.

"(c) Report. — must make an annual on the Account must submitted November 1 of each year and must state total

"revenue local governments during preceding fiscal year, the amount expended during preceding fiscal year, other information requested the Committee."

Due to the apparent conflict, the Revisor of Statutes has directed that the version of the section that is effective January 1, 2011, be set out as shown above.

Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, as amended by Session Laws 2007-527, s. 22(b), and as amended by Session Laws 2008-134, s. 65, provides: "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 10, and 11 of this act become effective July 1, 2011, or when the Division of Motor Vehicles of the Department of Transportation and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007." Section 9 of Session Laws 2005-294, which rewrote G.S. 105-330.10, effective July 1, 2010, was repealed by Session Laws 2007-527, s. 22(a), effective August 31, 2007.

Effect of Amendments. — Session Laws 2007-527, s. 22(c), as amended by Session Laws 2008-134, s. 66, effective January 1, 2011, rewrote the section.

Session Laws 2008-134, s. 63, effective July 28, 2008, rewrote the section.

§ 105-330.11. Memorandum of understanding.

The Department of Revenue, acting through the Property Tax Division, and the Department of Transportation, acting through the Division of Motor Vehicles are directed to enter into a memorandum of understanding concerning the administration of this Article. The memorandum of understanding must include the following:

(1) A procedure for the administration of the listing, appraisal, and assessment of classified motor vehicles.

(2) Information concerning vehicle identification, identification of a vehicle owner by name and address, and other information that will be

required on a motor vehicle registration form to implement the tax listing and collection provisions of this Article.

(3) A procedure for the business practices, accounting, and costs of carrying out the integrated computer system for registration renewal and property tax collection for motor vehicles once the system has been certified to be in operation by the Department of Revenue and the Department of Transportation. The Departments must consult with the North Carolina Association of County Commissioners, acting on behalf of the counties, and the North Carolina League of Municipalities, acting on behalf of the municipalities, in developing the procedures under this subdivision and obtain their signed endorsements before any part of this procedure is implemented. (2008-134, s. 64.)

Editor's Note. — Session Laws 2008-134, s. 79, made this section effective July 28, 2008.

Article 24.

Review and Enforcement of Orders.

§ 105-345. Right of appeal; filing of exceptions.

CASE NOTES

Applied in In re Appeal of Parker, — N.C. App. —, 664 S.E.2d 1, 2008 N.C. App. LEXIS 1338 (2008).

§ 105-345.2. Record on appeal; extent of review.

CASE NOTES

Applied in In re Appeal of Parker, — N.C. App. —, 664 S.E.2d 1, 2008 N.C. App. LEXIS 1338 (2008).

Cited in In re Appeal of IBM Credit Corp., 186 N.C. App. 223, 650 S.E.2d 828, 2007 N.C. App. LEXIS 2111 (2007).

Article 26.

Collection and Foreclosure of Taxes.

§ 105-360. Due date; interest for nonpayment of taxes; discounts for prepayment.

(a) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Taxes levied under this Subchapter by a taxing unit are due and payable on September 1 of the fiscal year for which the taxes are levied. Taxes are payable at par or face amount if paid before January 6 following the due date. Taxes paid on or after January 6 following the due date are delinquent and are subject to interest charges. Interest accrues on taxes paid on or after January 6 as follows:

(1) For the period January 6 to February 1, interest accrues at the rate of two percent (2%); and

G.S. 105-360(a) is set out twice. See note.

(2) For the period February 1 until the principal amount of the taxes, the accrued interest, and any penalties are paid, interest accrues at the rate of three-fourths of one percent (¾%) a month or fraction thereof.

(a) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Taxes levied under this Subchapter by a taxing unit are due and payable on September 1 of the fiscal year for which the taxes are levied. Taxes are payable at par or face amount if paid before January 6 following the due date. Taxes paid on or after January 6 following the due date are subject to interest charges. Interest accrues on taxes paid on or after January 6 as follows:

(1) For the period January 6 to February 1, interest accrues at the rate of two percent (2%).

(2) For the period February 1 until the principal amount of the taxes, the accrued interest, and any penalties are paid, interest accrues at the rate of three-fourths of one percent (¾%) a month or fraction thereof.

(b) Repealed by Session Laws 1987, c. 93, s. 2.

(c) Under the conditions established by this subsection (c), the governing body of any county or municipality levying taxes under the provisions of this Subchapter shall have authority to establish a schedule of discounts to be applied to taxes paid prior to the due date prescribed in subsection (a) above. To exercise this authority, the governing body shall:

(1) Not later than the first day of May preceding the due date of the taxes to which it first applies, adopt a resolution or ordinance specifying the amounts of the discounts and the periods of time during which they are to be applicable.

(2) Submit the resolution or ordinance to the Department of Revenue for approval.

(3) Upon approval by the Department of Revenue, publish the discount schedule at least once in some newspaper having general circulation in the taxing unit.

When such a resolution or ordinance is submitted to the Department of Revenue, the Department may approve it or disapprove it in whole or in part if, in the opinion of the Department, the discounts or the periods of time for which discounts are allowed are excessive or unreasonable. Such a resolution or ordinance, once adopted and approved by the Department of Revenue, shall continue in effect until repealed. Nothing in this subsection (c) shall prevent the governing body of any taxing unit from providing by resolution that the schedule of discounts for prepayment of taxes in effect in the taxing unit on June 30, 1971, shall continue in effect through November 1, 1971, but no longer.

(d) For the purposes of computing discounts and interest, tax payments submitted by mail shall be deemed to be received as of the date shown on the postmark affixed by the United States Postal Service. If no date is shown on the postmark or if the postmark is not affixed by the United States Postal Service, the tax payment shall be deemed to be received when the payment is received in the office of the tax collector. In any dispute arising under this subsection, the burden of proof shall be on the taxpayer to show that the payment was timely made. (1939, c. 310, s. 1403; 1943, c. 667; 1945, c. 247, s. 3; c. 1041; 1947, c. 888, s. 1; 1969, c. 921, s. 1; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1977, c. 327, s. 2; c. 630; 1979, c. 233, ss. 1, 2; 1987, c. 93, ss. 1, 2; 2008-35, s. 2.7.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective for taxes imposed for taxable years beginning before July 1, 2008. The second version of subsection (a) set out above is effective for taxes imposed for taxable years beginning on or after July 1, 2008.

Effect of Amendments. — Session Laws 2008-35, s. 2.7, effective for taxes imposed for taxable years beginning on or after July 1, 2008, in subsection (a), deleted "are delinquent and" preceding "are subject to" in the second sentence of the introductory paragraph, and deleted "and" at the end of subdivision (a)(2).

§ 105-365.1. When and against whom collection remedies may be used.

(a) Date of Delinquency. — A tax collector may collect a tax using the remedies provided in G.S. 105-366 through G.S. 105-375 on or after the date the tax is delinquent. A tax is delinquent on the following date:

(1) For a tax that is not a deferred tax, the date the tax accrues interest.
(2) For a deferred tax, other than a tax described in subdivision (3) of this subsection, the date a disqualifying event occurs.
(3) For a deferred tax under G.S. 105-277.1B that lost its eligibility for deferral due to the death of the owner, the first day of the ninth month following the date of death.

(b) Enforced Collection. — For purposes of using the collection remedies provided in G.S. 105-366 through G.S. 105-375 to collect delinquent taxes, the taxing unit shall proceed against property of the following taxpayer:

(1) To collect delinquent taxes assessed on real property, the owner of record of property on which tax is due as of the date of delinquency and any subsequent owner of record of the property.
(2) To collect delinquent taxes assessed on personal property, the owner of record as of January 1 of the calendar year in which the fiscal year of taxation begins.
(3) To collect delinquent taxes assessed on a registered motor vehicle, the owner of record as of the date on which the current vehicle registration is renewed or the date on which a new registration is applied for. (2008-35, s. 2.8.)

Editor's Note. — Session Laws 2008-35, s. 4, made this section effective for taxes imposed for taxable years beginning on or after July 1, 2008.

ARTICLE 30.

General Provisions.

§ 105-394. Immaterial irregularities.

CASE NOTES

Failure to List Taxpayer's Residence in Tax Bills Not "Immaterial Irregularity." — As a county tax assessor could have obtained valuations for a taxpayer's residence in the 11 years before the county first asserted a claim for back taxes, the county's failure to include the residence on the taxpayer's tax bills for those years was not an "immaterial irregularity" or a clerical error under G.S. 105-394; therefore, the county was barred from collecting the back taxes. In re Appeal of Morgan, — N.C. App. —, 652 S.E.2d 655, 2007 N.C. App. LEXIS 2315 (2007).

SUBCHAPTER V. MOTOR FUEL TAXES.

Article 36B.

Tax on Carriers Using Fuel Purchased Outside State.

§ 105-449.37. Definitions; tax liability.

(a) **(Effective until January 1, 2009)** Definitions. — The following definitions apply in this Article:

(1) Motor carrier. — A person who operates or causes to be operated on any highway in this State a motor vehicle that is a qualified motor vehicle under the International Fuel Tax Agreement. The term does not include the United States, the State, or a political subdivision of the State.

(1a) Motor vehicle. — A motor vehicle as defined in G.S. 105-164.3 other than special mobile equipment as defined in G.S. 105-164.3.

(2) Operations. — Operations of all motor vehicles described in subdivision (1), whether loaded or empty and whether or not operated for compensation.

(2a) Person. — Defined in G.S. 105-228.90.

(3) Secretary. — The Secretary of Revenue.

(a) **(Effective January 1, 2009)** Definitions. — The following definitions apply in this Article:

(1) International Fuel Tax Agreement. — The Articles of Agreement adopted by the International Fuel Tax Association, Inc., as amended as of June 1, 2008.

(2) Motor carrier. — A person who operates or causes to be operated on any highway in this State a motor vehicle that is a qualified motor vehicle. The term does not include the United States, a state, or a political subdivision of a state.

(3) Motor vehicle. — Defined in G.S. 20-4.01.

(4) Operations. — The movement of a qualified motor vehicle by a motor carrier, whether loaded or empty and whether or not operated for compensation.

(5) Person. — Defined in G.S. 105-228.90.

(6) Qualified motor vehicle. — Defined in the International Fuel Tax Agreement.

(7) Secretary. — Defined in G.S. 105-228.90.

(b) Liability. — A motor carrier who operates on one or more days of a reporting period is liable for the tax imposed by this Article for that reporting period and is entitled to the credits allowed for that reporting period. (1955, c. 823, s. 1; 1973, c. 476, s. 193; 1983, c. 713, s. 55; 1989, c. 7, s. 1; 1991, c. 182, s. 2; c. 487, s. 2; 1991 (Reg. Sess., 1992), c. 913, s. 8; 1993, c. 354, s. 28; 1999-337, s. 36; 2000-140, s. 74; 2008-134, s. 16.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until January 1, 2009. The second version of subsection (a) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 16, effective January 1, 2009, rewrote subsection (a).

§ 105-449.38. (Effective January 1, 2009) Tax levied.

A road tax for the privilege of using the streets and highways of this State is imposed upon every motor carrier on the amount of motor fuel or alternative fuel used by the carrier in its operations within this State. The tax shall be at the rate established by the Secretary pursuant to G.S. 105-449.80 or G.S. 105-449.136, as appropriate. This tax is in addition to any other taxes imposed on motor carriers. (1955, c. 823, s. 2; 1969, c. 600, s. 22; 1981, c. 690, s. 3; 1985 (Reg. Sess., 1986), c. 982, s. 16; 1995, c. 390, s. 16; 2001-205, s. 2; 2008-134, s. 17.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-134, s. 17, effective January 1, 2009, made a minor punctuation change.

§ 105-449.44. (Effective January 1, 2009) How to determine the amount of fuel used in the State; presumption of amount used.

(a) Calculation. — The amount of motor fuel or alternative fuel a motor carrier uses in its operations in this State for a reporting period is the number of miles the motor carrier travels in this State during that period divided by the calculated miles per gallon for the motor carrier for all qualified motor vehicles during that period.

(b) Presumption. — The Secretary must check reports filed under this Article against the weigh station records and other records of the Division of Motor Vehicles of the Department of Transportation and the State Highway Patrol of the Department of Crime Control and Public Safety concerning motor carriers to determine if motor carriers that are operating in this State are filing the reports required by this Article. If the records indicate that a motor carrier operated in this State in a quarter and either did not file a report for that quarter or understated its mileage in this State on a report filed for that quarter by at least twenty-five percent (25%), the Secretary may assess the motor carrier for an amount based on the motor carrier's presumed operations. The motor carrier is presumed to have mileage in this State equal to 10 trips of 450 miles each for each of the motor carrier's qualified motor vehicles and to have fuel usage of four miles per gallon.

(c) Vehicles. — The number of qualified motor vehicles of a motor carrier that is registered under this Article is the number of sets of decals issued to the carrier. The number of qualified motor vehicles of a carrier that is not registered under this Article is the number of qualified motor vehicles registered by the motor carrier in the carrier's base state under the International Registration Plan. (1955, c. 823, s. 8; 1995, c. 390, s. 35; 1999-337, s. 39; 2000-173, s. 12; 2005-435, s. 4; 2008-134, s. 18.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. —

Session Laws 2008-134, s. 18, effective January 1, 2009, in subsection (a), substituted "motor vehicles" for "vehicles" near the end; rewrote subsection (b); and in subsection (c), substituted "qualified motor vehicles" for "vehicles" all three times it appears, and substituted "sets of decals" for "identification markers" near the end of the first sentence.

§ 105-449.47. (Effective January 1, 2009) Registration of vehicles.

(a) Requirement. — A motor carrier that is subject to the International Fuel Tax Agreement may not operate or cause to be operated in this State a qualified motor vehicle unless both the motor carrier and at least one qualified motor vehicle are registered with the motor carrier's base state jurisdiction. A motor carrier that is not subject to the International Fuel Tax Agreement may not operate or cause to be operated in this State a qualified motor vehicle unless both the motor carrier and at least one qualified motor vehicle are registered with the Secretary for purposes of the tax imposed by this Article. This subsection applies to a motor carrier that operates a recreational vehicle that is considered a qualified motor vehicle.

(a1) Registration and Decal. — When the Secretary registers a motor carrier, the Secretary must issue a registration card for the motor carrier and a set of decals for each qualified motor vehicle the motor carrier registers. A motor carrier must keep records of decals issued to it and must be able to account for all decals it receives from the Secretary. Registrations and decals issued by the Secretary are for a calendar year. All decals issued by the Secretary remain the property of the State. The Secretary may revoke a registration or a decal when a motor carrier fails to comply with this Article or Article 36C or 36D of this Subchapter.

A motor carrier must carry a copy of its registration in each motor vehicle operated by the motor carrier when the vehicle is in this State. A motor vehicle must clearly display one decal on each side of the vehicle at all times. A decal must be affixed to the qualified motor vehicle for which it was issued in the place and manner designated by the authority that issued it.

(b) Exemption. — This section does not apply to the operation of a qualified motor vehicle that is registered in another state and is operated temporarily in this State by a public utility, a governmental or cooperative provider of utility services, or a contractor for one of these entities for the purpose of restoring utility services in an emergency outage. (1955, c. 823, s. 11; 1973, c. 746, s. 193; 1983, c. 713, s. 56; 1985 (Reg. Sess., 1986), c. 937, s. 20; 1989, c. 692, s. 6.2; 1991, c. 487, s. 6; 1995, c. 50, s. 5; c. 390, s. 18; 1999-337, s. 41; 2002-108, s. 3; 2004-170, s. 24; 2005-435, s. 6; 2008-134, s. 19.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. —

Session Laws 2008-134, s. 19, effective January 1, 2009, rewrote the section.

§ 105-449.47A. (Effective January 1, 2009) Reasons why the Secretary can deny an application for a registration and decals.

The Secretary may refuse to register and issue a decal to an applicant that has done any of the following:

(1) Had a registration issued under Chapter 105 or Chapter 119 of the General Statutes cancelled by the Secretary for cause.
(2) Had a registration issued by another jurisdiction, pursuant [to] the International Fuel Tax Agreement, cancelled for cause.
(3) Been convicted of fraud or misrepresentation.
(4) Been convicted of any other offense that indicates that the applicant may not comply with this Article if registered and issued a decal.

(5) Failed to remit payment for a tax debt under Chapter 105 or Chapter 119 of the General Statutes. The term "tax debt" has the same meaning as defined in G.S. 105-243.1.

(6) Failed to file a return due under Chapter 105 or Chapter 119 of the General Statutes. (2005-435, s. 7; 2008-134, s. 20.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Editor's Note. —

Session Laws 2008-134, s. 20, amended this section in the coded bill drafting format provided by G.S. 120-20.1. The word "to" was inadvertently stricken from subdivision (2). The word "to" in brackets has been inserted at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2008-134, s. 20, effective January 1, 2009, in the section heading, substituted "decals" for "identification markers"; in the introductory language, substituted "a decal" for "an identification marker"; in subdivision (2), substituted "the International Fuel Tax Agreement" for "to G.S. 105-449.57"; and in subdivision (4), substituted "a decal" for "an identification marker."

§ 105-449.50. (Repealed effective January 1, 2009) Application blanks.

Section Repealed Effective January 1, 2009. — This section is repealed effective January 1, 2009, by Session Laws 2008-134, s. 21.

§ 105-449.51. (Effective January 1, 2009) Violations declared to be misdemeanors.

Any person who operates or causes to be operated on a highway in this State a qualified motor vehicle that does not carry a registration card as required by this Article, does not properly display a decal as required by this Article, or is not registered in accordance with this Article commits a Class 3 misdemeanor and is punishable by a fine of two hundred dollars ($200.00). Each day's operation in violation of this section constitutes a separate offense. (1955, c. 823, s. 15; 1973, c. 476, s. 193; 1983, c. 713, s. 59; 1993, c. 539, s. 734; 1994, Ex. Sess., c. 24, s. 14(c); 2005-435, s. 8; 2008-134, s. 22.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. —

Session Laws 2008-134, s. 22, effective January 1, 2009, inserted "qualified" preceding "motor vehicle," substituted "a decal" for "an identification marker," "Article commits" for "Article is guilty of," and "and is punishable by a fine of" for "and, upon conviction thereof, shall be fined," deleted "of any provision" following "operation in violation," and substituted "constitutes a separate" for "shall constitute a separate."

§ 105-449.52. (Effective until January 1, 2009) Civil penalties applicable to motor carriers.

(a) Penalty. — A motor carrier who does any of the following is subject to a civil penalty:

(1) Operates in this State or causes to be operated in this State a motor vehicle that either fails to carry the registration card required by this Article or fails to display an identification marker in accordance with this Article. The amount of the penalty is one hundred dollars ($100.00).

G.S. 105-449.52 is set out twice. See notes.

(2) Is unable to account for identification markers the Secretary issues the motor carrier, as required by G.S. 105-449.47. The amount of the penalty is one hundred dollars ($100.00) for each identification marker the carrier is unable to account for.

(3) Displays an identification marker on a motor vehicle operated by a motor carrier that was not issued to the carrier by the Secretary under G.S. 105-449.47. The amount of the penalty is one thousand dollars ($1,000) for each identification marker unlawfully obtained. Both the licensed motor carrier to whom the Secretary issued the identification marker and the motor carrier displaying the unlawfully obtained identification marker are jointly and severally liable for the penalty under this subdivision.

(a1) Payment. — A penalty imposed under this section is payable to the agency that assessed the penalty. When a motor vehicle is found to be operating without a registration card or an identification marker or with an identification marker the Secretary did not issue for the vehicle, the motor vehicle may not be driven for a purpose other than to park the motor vehicle until the penalty imposed under this section is paid unless the officer that imposes the penalty determines that operation of the motor vehicle will not jeopardize collection of the penalty.

(b) Review. — The procedure set out in G.S. 105-449.119 for reviewing a penalty imposed under Article 36C, Part 6, of this Chapter applies to a penalty imposed under this section. (1955, c. 823, s. 16; 1957, c. 948; 1973, c. 476, s. 193; 1975, c. 716, s. 5; 1981, c. 690, s. 18; 1983, c. 713, s. 60; 1991, c. 42, s. 14; 1991 (Reg. Sess., 1992), c. 913, s. 11; 1998-146, s. 2; 1999-337, s. 43; 2002-108, s. 4; 2004-170, s. 25; 2007-527, s. 16(a); 2008-134, s. 8.)

Section Set Out Twice. — The section above is effective until January 1, 2009. For the section as amended January 1, 2009, see the following section, also numbered G.S. 105-449.52.

Effect of Amendments. — Session Laws 2008-134, s. 8, effective July 28, 2008, in subsection (b), substituted "Review." for "Hearing." at the beginning, and substituted "reviewing a penalty" for "protesting a penalty."

§ 105-449.52. (Effective January 1, 2009) Civil penalties applicable to motor carriers.

(a) Penalty. — A motor carrier who does any of the following is subject to a civil penalty:

(1) Operates in this State or causes to be operated in this State a qualified motor vehicle that either fails to carry the registration card required by this Article or fails to display a decal in accordance with this Article. The amount of the penalty is one hundred dollars ($100.00).

(2) Is unable to account for a decal the Secretary issues the motor carrier, as required by G.S. 105-449.47. The amount of the penalty is one hundred dollars ($100.00) for each decal for which the carrier is unable to account.

(3) Displays a decal on a qualified motor vehicle operated by a motor carrier that was not issued to the carrier by the Secretary under G.S. 105-449.47. The amount of the penalty is one thousand dollars ($1,000) for each decal unlawfully obtained. Both the licensed motor carrier to whom the Secretary issued the decal and the motor carrier displaying the unlawfully obtained decal are jointly and severally liable for the penalty under this subdivision.

G.S. 105-449.52 is set out twice. See notes.

(a1) Payment. — A penalty imposed under this section is payable to the agency that assessed the penalty. When a qualified motor vehicle is found to be operating without a registration card or a decal or with a decal the Secretary did not issue for the vehicle, the qualified motor vehicle may not be driven for a purpose other than to park it until the penalty imposed under this section is paid unless the officer that imposes the penalty determines that operating it will not jeopardize collection of the penalty.

(b) Review. — The procedure set out in G.S. 105-449.119 for reviewing a penalty imposed under Article 36C, Part 6, of this Chapter applies to a penalty imposed under this section. (1955, c. 823, s. 16; 1957, c. 948; 1973, c. 476, s. 193; 1975, c. 716, s. 5; 1981, c. 690, s. 18; 1983, c. 713, s. 60; 1991, c. 42, s. 14; 1991 (Reg. Sess., 1992), c. 913, s. 11; 1998-146, s. 2; 1999-337, s. 43; 2002-108, s. 4; 2004-170, s. 25; 2007-527, s. 16(a); 2008-134, ss. 8, 23.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the preceding section, also numbered G.S. 105-449.52.

Effect of Amendments. — Session Laws 2008-134, s. 8, effective July 28, 2008, in subsection (b), substituted "Review." for "Hearing." at the beginning, and substituted "reviewing a penalty" for "protesting a penalty."

Session Laws 2008-134, s. 23, effective January 1, 2009, in subdivision (a)(1), substituted "a qualified motor vehicle" for "a motor vehicle" and "a decal" for "an identification marker"; in subdivision (a)(2), substituted "a decal" for "identification markers," "decal for which" for "identification marker," and "account" for "account for"; in subdivision (a)(3), substituted "a decal on a qualified" for "an identification marker on a," and substituted "decal" for "an identification marker" three times; and in subsection (a1), substituted "qualified motor vehicle" for "motor vehicle" twice, "a decal" for "an identification marker" twice, "park it until" for "park the motor vehicle until," and "operating it" for "operation of the motor vehicle."

ARTICLE 36C.

Gasoline, Diesel, and Blends.

Part 1. General Provisions.

§ 105-449.60. (Effective January 1, 2009) Definitions.

The following definitions apply in this Article:

(1) Additive. — A de minimus amount of product that is added or mixed with motor fuel. Examples of an additive include fuel system detergent, an oxidation inhibitor, gasoline antifreeze, or an octane enhancer.

(2) Aviation gasoline. — Fuel blended or produced specifically for use in an aircraft motor.

(3) Biodiesel. — Any fuel or mixture of fuels derived in whole or in part from agricultural products or animal fats or wastes from these products or fats.

(4) Biodiesel provider. — A person who does any of the following:
  a. Produces an average of no more than 500,000 gallons of biodiesel per month during a calendar year. A person who produces more than this amount is a refiner.
  b. Imports biodiesel outside the terminal transfer system by means of a transport truck, a railroad tank car, or a tank wagon.

(5) Blended fuel. — A mixture composed of gasoline or diesel fuel and another liquid, other than an additive, that can be used as a fuel in a highway vehicle.

G.S. 105-449.60 is set out twice. See notes.

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(6) Blender. — A person who produces blended fuel outside the terminal transfer system.

(7) Bonded importer. — A person, other than a supplier, who imports by transport truck or another means of transfer outside the terminal transfer system motor fuel removed from a terminal located in another state in one or more of the following circumstances:
  a. The state from which the fuel is imported does not require the seller of the fuel to collect motor fuel tax on the removal of the fuel at that state's rate or the rate of the destination state.
  b. The supplier of the fuel is not an elective supplier.
  c. The supplier of the fuel is not a permissive supplier.

(8) Bulk end-user. — A person who maintains storage facilities for motor fuel and uses part or all of the stored fuel to operate a highway vehicle.

(9) Bulk plant. — A motor fuel storage and distribution facility that is not a terminal and from which motor fuel may be removed at a rack.

(10) Code. — Defined in G.S. 105-228.90.

(11) Destination state. — The state, territory, or foreign country to which motor fuel is directed for delivery into a storage facility, a receptacle, a container, or a type of transportation equipment for the purpose of resale or use.

(12) Diesel fuel. — Any liquid, other than gasoline, that is suitable for use as a fuel in a diesel-powered highway vehicle. The term includes biodiesel, fuel oil, heating oil, high-sulfur dyed diesel fuel, and kerosene. The term does not include jet fuel.

(13) Distributor. — A person who does one or more of the activities listed in this subdivision. The term does not include a person who sells motor fuel only at retail.
  a. Produces, refines, blends, compounds, or manufactures motor fuel.
  b. Transports motor fuel into a state or exports motor fuel out of a state.
  c. Engages in the distribution of motor fuel primarily by tank car or tank truck or both.
  d. Operates a bulk plant where the person has active motor fuel bulk storage.

(14) Diversion. — The movement of motor fuel from a terminal to a state other than the destination state indicated on the original bill of lading.

(15) Dyed diesel fuel. — Diesel fuel that meets the dyeing and marking requirements as set out in 26 C.F.R. § 48.4082.1.

(16) Elective supplier. — A supplier that is required to be licensed in this State and that elects to collect the excise tax due this State on motor fuel that is removed by the supplier at a terminal located in another state and has this State as its destination state.

(17) Exempt card or code. — A credit card or an access code that enables the person to whom the card or code is issued to buy motor fuel at retail without paying the motor fuel excise tax on the fuel.

(18) Export. — To obtain motor fuel in this State for sale or other distribution in another state. In applying this definition, motor fuel delivered out-of-state by or for the seller constitutes an export by the seller and motor fuel delivered out-of-state by or for the purchaser constitutes an export by the purchaser.

(19) Fuel alcohol. — Alcohol, methanol, or fuel grade ethanol.

(20) Fuel alcohol provider. — A person who does any of the following:

G.S. 105-449.60 is set out twice. See notes.

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a. Produces an average of no more than 500,000 gallons of fuel alcohol per month during a calendar year. A person who produces more than this amount is a refiner.
b. Imports fuel alcohol outside the terminal transfer system by means of a transport truck, a railroad tank car, or a tank wagon.

(21) Gasohol. — A blended fuel composed of gasoline and fuel grade ethanol.

(22) Gasoline. — Any of the following:
a. All products that are commonly or commercially known or sold as gasoline and are suitable for use as a fuel in a highway vehicle, other than products that have an American Society for Testing Materials octane number of less than 75 as determined by the motor method. The term does not include aviation gasoline.
b. A petroleum product component of gasoline, such as naptha, reformate, or toluene.
c. Gasohol.
d. Fuel alcohol.

(23) Gross gallons. — The total amount of motor fuel measured in gallons, exclusive of any temperature, pressure, or other adjustments.

(24) Highway. — Defined in G.S. 20-4.01(13).

(25) Highway vehicle. — A self-propelled vehicle that is designed for use on a highway.

(26) Import. — To bring motor fuel into this State by any means of conveyance other than in the fuel supply tank of a highway vehicle. In applying this definition, motor fuel delivered into this State from out-of-state by or for the seller constitutes an import by the seller, and motor fuel delivered into this State from out-of-state by or for the purchaser constitutes an import by the purchaser.

(27) In-State supplier. — Either of the following:
a. A supplier that is required to have a license and elects not to collect the excise tax due this State on motor fuel that is removed by the supplier at a terminal located in another state and has this State as its destination state.
b. A supplier that does business only in this State.

(28) Jet fuel. — Kerosene that meets all of the following requirements:
a. Has a maximum distillation temperature of 400 degrees Fahrenheit at the ten percent (10%) recovery point and a final maximum boiling point of 572 degrees Fahrenheit.
b. Meets American Society Testing Materials Specification D 1655 and Military Specifications MIL-T-5624P and MIL-T-83133D, Grades JP-5 and JP-8.

(29) Kerosene. — Petroleum oil that is free from water, glue, and suspended matter and that meets the specifications and standards adopted under G.S. 119-26 by the Gasoline and Oil Inspection Board.

(30) Marine vessel. — A ship, boat, or other watercraft used or capable of being used to move in or through a waterway.

(31) Motor fuel. — Gasoline, diesel fuel, and blended fuel.

(32) Motor fuel rate. — The rate of tax set in G.S. 105-449.80.

(33) Motor fuel transporter. — A person who transports motor fuel by pipeline, transport truck, railroad tank car, or marine vessel.

(34) Net gallons. — The amount of motor fuel measured in gallons when corrected to a temperature of 60 degrees Fahrenheit and a pressure of 14 7/10 pounds per square inch.

(35) Occasional importer. — One or more of the following that imports motor fuel by any means outside the terminal transfer system:

G.S. 105-449.60 is set out twice. See notes.

- a. A distributor that imports motor fuel on an average basis of no more than once a month during a calendar year.
- b. A bulk end-user that acquires motor fuel for import from a bulk plant and is not required to be licensed as a bonded importer.
- c. A distributor that imports motor fuel for use in a race car.

(36) Permissive supplier. — An out-of-state supplier that elects, but is not required, to have a supplier's license under this Article.

(37) Person. — Defined in G.S. 105-228.90.

(38) Pipeline. — A fuel distribution system that moves motor fuel, in bulk, through a pipe either from a refinery to a terminal or from a terminal to another terminal.

(39) Position holder. — The person who holds the inventory position on the motor fuel in a terminal, as reflected on the records of the terminal operator. A person holds the inventory position on the motor fuel when that person has a contract with the terminal operator for the use of storage facilities and terminaling services for fuel at the terminal. The term includes a terminal operator who owns fuel in the terminal.

(40) Rack. — A mechanism for delivering motor fuel from a refinery, a terminal, or a bulk plant into a transport truck, a railroad tank car, or another means of transfer that is outside the terminal transfer system.

(41) Refiner. — A person who owns, operates, or controls a refinery. The term includes a person who produces an average of more than 500,000 gallons of fuel alcohol or biodiesel a month during a calendar year.

(42) Refinery. — A facility used to process crude oil, unfinished oils, natural gas liquids, or other hydrocarbons into motor fuel and from which fuel may be removed by pipeline or vessel or at a rack. The term does not include a facility that produces only blended fuel or gasohol.

(43) Removal. — A physical transfer other than by evaporation, loss, or destruction. A physical transfer to a transport truck or another means of conveyance outside the terminal transfer system is complete upon delivery into the means of conveyance.

(44) Retailer. — A person who maintains storage facilities for motor fuel and who sells the fuel at retail or dispenses the fuel at a retail location.

(45) Secretary. — Defined in G.S. 105-228.90.

(46) Supplier. — Any of the following:

- a. A position holder or a person who receives motor fuel pursuant to a two-party exchange.
- b. A fuel alcohol provider.
- c. A biodiesel provider.
- d. A refiner.

(47) System transfer. — Either of the following:

- a. A transfer of motor fuel within the terminal transfer system.
- b. A transfer, by transport truck or railroad tank car, of fuel grade ethanol.

(48) Tank wagon. — A truck that is not a transport truck and is designed or used to carry at least 1,000 gallons of motor fuel.

(49) Tank wagon importer. — A person who imports only by means of a tank wagon motor fuel that is removed from a terminal or a bulk plant located in another state.

(50) Tax. — An inspection or other excise tax on motor fuel and any other fee or charge imposed on motor fuel on a per-gallon basis.

(51) Terminal. — A motor fuel storage and distribution facility that has been assigned a terminal control number by the Internal Revenue

Service, is supplied by pipeline or marine vessel, and from which motor fuel, jet fuel, or aviation gasoline may be removed at a rack.

(52) Terminal operator. — A person who owns, operates, or otherwise controls a terminal.

(53) Terminal transfer system. — The motor fuel distribution system consisting of refineries, pipelines, marine vessels, and terminals. The term has the same meaning as "bulk transfer/terminal system" under 26 C.F.R. § 48.4081-1.

(54) Transmix. — Either of the following:
   a. The buffer or interface between two different products in a pipeline shipment.
   b. A mix of two different products within a refinery or terminal that results in an off-grade mixture.

(55) Transport truck. — A tractor trailer designed or used to transport loads of motor fuel over a highway.

(56) Trustee. — A person who is licensed as a supplier and who receives tax payments from and on behalf of a licensed distributor or licensed importer for remittance to the Secretary.

(57) Two-party exchange. — A transaction in which motor fuel is transferred from one licensed supplier to another licensed supplier pursuant to an exchange agreement under which the supplier that is the position holder agrees to deliver motor fuel to the other supplier or the other supplier's customer at the rack of the terminal at which the delivering supplier is the position holder.

(58) User. — A person who owns or operates a licensed highway vehicle that has a registered gross vehicle weight of at least 10,001 pounds and who does not maintain storage facilities for motor fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 1, 2; 1998-146, s. 3; 2000-173, ss. 13(a), 14(a); 2001-414, s. 27; 2002-108, ss. 5, 6; 2003-349, s. 10.2; 2004-170, s. 27; 2006-162, s. 14(a); 2008-134, s. 24.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. —

Session Laws 2008-134, s. 24, effective January 1, 2009, rewrote the section.

Part 2. Licensing.

§ 105-449.65. List of persons who must have a license.

(a) License. — A person may not engage in business in this State as any of the following unless the person has a license issued by the Secretary authorizing the person to engage in that business:

(1) A refiner.
(2) A supplier.
(3) A terminal operator.
(4) An importer.
(5) An exporter.
(6) A blender.
(7) **(Effective until January 1, 2009)** A motor fuel transporter.
(7) **(Effective January 1, 2009)** A motor fuel transporter who transports motor fuel for hire.
(8) Repealed by Session Laws 1999-438, s. 20, effective August 10, 1999.
(9) Repealed by Session Laws 1999-438, s. 21, effective August 10, 1999.

G.S. 105-449.65(a)(7) and (b) are set out twice. See note.

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(10) A distributor who purchases motor fuel from an elective or permissive supplier at an out-of-state terminal for import into this State.

(b) **(Effective until January 1, 2009)** Multiple Activity. — A person who is engaged in more than one activity for which a license is required must have a separate license for each activity, unless this subsection provides otherwise. A person who is licensed as a supplier is considered to have a license as a distributor. A person who is licensed as an occasional importer or a tank wagon importer is not required to obtain a separate license as a distributor unless the importer is also purchasing motor fuel, at the terminal rack, from an elective or permissive supplier who is authorized to collect and remit the tax to the State. A person who is licensed as a distributor is not required to obtain a separate license as an importer if the distributor acquires fuel for import only from an elective supplier or a permissive supplier and is not required to obtain a separate license as an exporter. A person who is licensed as a distributor or a blender and who transports fuel is considered to be licensed as a motor fuel transporter.

(b) **(Effective January 1, 2009)** Multiple Activity. — A person who is engaged in more than one activity for which a license is required must have a separate license for each activity, unless one of the following subdivisions provides otherwise.

(1) Supplier. — A person who is licensed as a supplier is considered to have a license as a distributor. A person who is licensed as a supplier and is a biodiesel provider is considered to have a license as a blender.

(2) Importer. — A person who is licensed as an occasional importer or a tank wagon importer is not required to obtain a separate license as a distributor unless the importer is also purchasing motor fuel, at the terminal rack, from an elective or permissive supplier who is authorized to collect and remit the tax to the State.

(3) Distributor. — A person who is licensed as a distributor is not required to obtain a separate license as an importer if the distributor acquires fuel for import only from an elective supplier or a permissive supplier and is not required to obtain a separate license as an exporter. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 3; 1997-60, s. 2; 1999-438, ss. 20, 21; 2003-349, s. 10.3; 2005-435, s. 9; 2006-162, s. 13(a); 2008-134, s. 25.)

Subdivision (a)(7) and Subsection (b) Set Out Twice. — The first versions of subdivision (a)(7) and subsection (b) set out above are effective until January 1, 2009. The second versions of subdivision (a)(7) and subsection (b) set out above is effective January 1, 2009.

Effect of Amendments. —

Session Laws 2008-134, s. 25, effective January 1, 2009, in subdivision (a)(7), added "who transports motor fuel for hire" at the end; restructured former subsection (b) to include present subdivision (b)(1) through (b)(3); and in subsection (b), substituted "one of the following subdivision" for "this subsection" in the introductory language, in subdivision (b)(1), inserted "Supplier. — A" at the beginning and added the last sentence, in subdivision (b)(2), inserted "Importer. —", and in subdivision (b)(3), inserted "Distributor. —" and deleted the former last sentence, which read: "A person who is licensed as a distributor or a blender and who transports fuel is considered to be licensed as a motor fuel transporter."

§ 105-449.66. (Effective January 1, 2009) Importer licensing.

An applicant for a license as an importer must indicate on the application the type of importer license sought. The types of importers are bonded importer, occasional importer, and tank wagon importer.

G.S. 105-449.66 is set out twice. See notes.

A person may not be licensed as more than one type of importer. A bulk end-user that imports motor fuel from a terminal of a supplier that is not an elective or a permissive supplier must be licensed as a bonded importer. A bulk end-user that imports motor fuel from a bulk plant and is not required to be licensed as a bonded importer must be licensed as an occasional importer. A bulk end-user that imports motor fuel only from a terminal of an elective or a permissive supplier is not required to be licensed as an importer. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 4; 1997-60, s. 3; 2008-134, s. 26.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-134, s. 26, effective January 1, 2009, rewrote the section.

§ 105-449.68. (Effective January 1, 2009) Restrictions on who can get a license as a distributor.

A bulk end-user of motor fuel may not be licensed as a distributor unless the bulk end-user also acquires motor fuel from a supplier or from another distributor for subsequent sale. This restriction does not apply to a bulk end-user that was licensed as a distributor on January 1, 1996. If a distributor license held by a bulk end-user on January 1, 1996, is subsequently cancelled, the bulk end-user is subject to the restriction set in this section. (1995, c. 390, s. 3; 2000-173, s. 14(b); 2008-134, s. 27.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-134, s. 27, effective January 1, 2009, substituted "bulk end-user" for "bulk-end user" throughout the section.

§ 105-449.69. How to apply for a license.

(a) General. — To obtain a license, an applicant must file an application with the Secretary on a form provided by the Secretary. An application must include the applicant's name, address, federal employer identification number, and any other information required by the Secretary.

(b) Most Licenses. — An applicant for a license as a refiner, a supplier, a terminal operator, an importer, a blender, or a distributor must meet the following requirements:

(1) If the applicant is a corporation, the applicant must either be incorporated in this State or be authorized to transact business in this State.

(2) If the applicant is a limited liability company, the applicant must either be organized in this State or be authorized to transact business in this State.

(3) If the applicant is a limited partnership, the applicant must either be formed in this State or be authorized to transact business in this State.

(4) If the applicant is an individual or a general partnership, the applicant must designate an agent for service of process and give the agent's name and address.

(c) **(Effective until January 1, 2009)** Federal Certificate. — An applicant for a license as a refiner, a supplier, a terminal operator, a blender, or a permissive supplier must have a federal Certificate of Registry that is issued under § 4101 of the Code and authorizes the applicant to enter into federal tax-free transactions in taxable motor fuel in the terminal transfer system. An applicant that is required to have a federal Certificate of Registry must include the registration number of the certificate on the application for a license under this section.

An applicant for a license as an importer, an exporter, or a distributor that has a federal Certificate of Registry issued under § 4101 of the Code must include the registration number of the certificate on the application for a license under this section.

(c) **(Effective January 1, 2009)** Federal Certificate. — An applicant for a license as a refiner, a supplier, a terminal operator, or a blender must have a federal Certificate of Registry that is issued under § 4101 of the Code and authorizes the applicant to enter into federal tax-free transactions in taxable motor fuel in the terminal transfer system. An applicant that is required to have a federal Certificate of Registry must include the registration number of the certificate on the application for a license under this section.

An applicant for a license as an importer, an exporter, or a distributor that has a federal Certificate of Registry issued under § 4101 of the Code must include the registration number of the certificate on the application for a license under this section.

(d) Import Activity. — An applicant for a license as an importer or as a distributor must list on the application each state from which the applicant intends to import motor fuel and, if required by a state listed, must be licensed or registered for motor fuel tax purposes in that state. If a state listed requires the applicant to be licensed or registered, the applicant must give the applicant's license or registration number in that state.

(e) Export Activity. — An applicant for a license as an exporter must designate an agent located in North Carolina for service of process and must give the agent's name and address. An applicant for a license as an exporter or as a distributor must list on the application each state to which the applicant intends to export motor fuel received in this State by means of a transfer that is outside the terminal transfer system and, if required by a state listed, must be licensed or registered for motor fuel tax purposes in that state. If a state listed requires the applicant to be licensed or registered, the applicant must give the applicant's license or registration number in that state. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 6; 2003-349, s. 10.5; 2005-435, s. 10; 2008-134, s. 28.)

Subsection (c) Set Out Twice. — The first version of subsection (c) set out above is effective until January 1, 2009. The second version of subsection (c) set out above is effective January 1, 2009.

Effect of Amendments. —

Session Laws 2008-134, s. 28, effective January 1, 2009, substituted "or a blender must" for "a blender, or a permissive supplier must" in the first sentence of subsection (c).

§ 105-449.70. Supplier election to collect tax on out-of-state removals.

(a) **(Effective until January 1, 2009)** Election. — An applicant for a license as a supplier may elect on the application to collect the excise tax due this State on motor fuel that is removed by the supplier at a terminal located in another state and has this State as its destination state. The Secretary must provide for this election on the application form. A supplier that makes the election allowed by this section is an elective supplier. A supplier that does not make the election allowed by this section is an in-State-only supplier.

G.S. 105-449.70(a) is set out twice. See note.

A supplier that does not make the election on the application for a supplier's license may make the election later by completing an election form provided by the Secretary. A supplier that does not make the election may not act as an elective supplier for motor fuel that is removed at a terminal in another state and has this State as its destination state.

(a) **(Effective January 1, 2009)** Election. — An applicant for a license as a supplier may elect on the application to collect the excise tax due this State on motor fuel that is removed by the supplier at a terminal located in another state and has this State as its destination state. The Secretary must provide for this election on the application form. A supplier that makes the election allowed by this section is an elective supplier. A supplier that does not make the election allowed by this section is an in-State supplier.

A supplier that does not make the election on the application for a supplier's license may make the election later by completing an election form provided by the Secretary. A supplier that does not make the election may not act as an elective supplier for motor fuel that is removed at a terminal in another state and has this State as its destination state.

(b) Effect. — A supplier that makes the election allowed by this section agrees to all of the following with respect to motor fuel that is removed by the supplier at a terminal located in another state and has this State as its destination state:

(1) To collect the excise tax due this State on the fuel and to waive any defense that the State lacks jurisdiction to require the supplier to collect the excise tax due this State under this Article on the fuel.
(2) To report and pay the tax due on the fuel in the same manner as if the removal had occurred at a terminal located in this State.
(3) To keep records of the removal of the fuel and submit to audits concerning the fuel as if the removal had occurred at a terminal located in this State.
(4) To report removals of fuel received by a person who is not licensed in the state where the removal occurred.

(c) Limited Jurisdiction. — A supplier that makes the election allowed by this section acknowledges that the State imposes the requirements listed in subsection (b) of this section on the supplier under its general police power set out in Article 3 of Chapter 119 of the General Statutes to regulate the quality of motor fuel and thereby promote public health and safety. A supplier that makes the election allowed by this section submits to the jurisdiction of the State only for the administration of this Article. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 7, 8; 2008-134, s. 29.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until January 1, 2009. The second version of subsection (a) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 29, effective January 1, 2009, substituted "in-State supplier" for "in-State-only supplier" at the end of the first paragraph of subsection (a).

§ 105-449.74. (Effective January 1, 2009) Issuance of license.

Upon approval of an application, the Secretary must issue a license to the applicant. A supplier's license must indicate the category of the supplier. An importer's license must indicate the category of the importer. A license holder must maintain and display a copy of the license issued under this Part in a conspicuous place at each place of business of the license holder. A license is

G.S. 105-449.74 is set out twice. See notes.

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not transferable and remains in effect until surrendered or cancelled. (1995, c. 390, s. 3; 2004-170, s. 29; 2008-134, s. 30.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-134, s. 30, effective January 1, 2009, added the third sentence.

§ 105-449.75. (Effective January 1, 2009) License holder must notify the Secretary of discontinuance of business.

A license holder that stops engaging in this State in the business for which the license was issued must give the Secretary written notice of the change and must surrender the license to the Secretary. The notice must give the date the change takes effect and, if the license holder has transferred the business to another by sale or otherwise, the date of the transfer and the name and address of the person to whom the business is transferred.

The license holder is responsible for all taxes for which the license holder is liable under this Article but are not yet due. If the license holder has transferred the business to another and does not give the notice required by this section, the person to whom the license holder has transferred the business is liable for the amount of any tax the license holder owed the State on the date the business was transferred. The liability of the person to whom the business is transferred is limited to the value of the property acquired from the license holder. (1995, c. 390, s. 3; 2008-134, s. 31.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-134, s. 31, effective January 1, 2009, in the second paragraph, substituted "license holder" for "supplier" throughout, substituted "The license holder is responsible for all taxes" for "If the license holder is a supplier, all taxes" at the beginning, and deleted "become due on the date of the change" from the end of the first sentence.

Part 3. Tax and Liability.

§ 105-449.81. Excise tax on motor fuel.

An excise tax at the motor fuel rate is imposed on motor fuel that is:

(1) Removed from a refinery or a terminal and, upon removal, is subject to the federal excise tax imposed by § 4081 of the Code.

(2) Imported by a system transfer to a refinery or a terminal and, upon importation, is subject to the federal excise tax imposed by § 4081 of the Code.

(3) Imported by a means of transfer outside the terminal transfer system for sale, use, or storage in this State and would have been subject to the federal excise tax imposed by § 4081 of the Code if it had been removed at a terminal or bulk plant rack in this State instead of imported.

(3a) Repealed by Session Laws 2007-527, s. 38(a), effective January 1, 2008.

(3b) **(Effective January 1, 2009)** Fuel grade ethanol that meets any of the following descriptions:

a. Is produced in this State, is removed from the storage facility at the production location, and is not delivered to a terminal in this State.
b. Is imported to this State outside the terminal transfer system and is not delivered to a terminal.
c. Is removed from a terminal.

(4) Blended fuel made in this State or imported to this State.

(5) **(Effective until January 1, 2009)** Transferred within the terminal transfer system and, upon transfer, is subject to the federal excise tax imposed by section 4081 of the Code.

(5) **(Effective January 1, 2009)** Transferred within the terminal transfer system and is subject, upon transfer, to the federal excise tax imposed by section 4081 of the Code or is transferred to a person who is not licensed under this Article as a supplier. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 13; 2004-170, s. 30; 2007-527, s. 38(a); 2008-134, s. 32.)

Subdivision (5) Set Out Twice. — The first version of subdivision (5) set out above is effective until January 1, 2009. The second version of subdivision (5) set out above is effective January 1, 2009.

Effect of Amendments. —

Session Laws 2008-134, s. 32, effective January 1, 2009, added subdivision (3)(b); and in subdivision (5), substituted "system and is subject, upon transfer" for "system and, upon transfer, is subject," and added "or is transferred to a person who is not licensed under this Article as a supplier."

§ 105-449.82. Liability for tax on removals from a refinery or terminal.

(a) Refinery Removal. — The excise tax imposed by G.S. 105-449.81(1) on motor fuel removed from a refinery in this State is payable by the refiner.

(b) Terminal System Removal. — The excise tax imposed by G.S. 105-449.81(1) on motor fuel removed by a system transfer from a terminal in this State is payable by the position holder for the fuel. If the position holder is not the terminal operator, the terminal operator is jointly and severally liable for the tax.

(c) **(Effective until January 1, 2009)** Terminal Rack Removal. — The excise tax imposed by G.S. 105-449.81(1) on motor fuel removed at a terminal rack in this State is payable by the person that first receives the fuel upon its removal from the terminal. If the motor fuel is removed by an unlicensed distributor, the supplier of the fuel is jointly and severally liable for the tax due on the fuel. If the motor fuel is sold by a person who is not licensed as a supplier, as required by this Article, the terminal operator, the person selling the fuel, and the person removing the fuel are jointly and severally liable for the tax due on the fuel. If the motor fuel removed is not dyed diesel fuel but the shipping document issued for the fuel states that the fuel is dyed diesel fuel, the terminal operator, the supplier, and the person removing the fuel are jointly and severally liable for the tax due on the fuel.

If the motor fuel is removed for export by an unlicensed exporter, the exporter is liable for tax on the fuel at the motor fuel rate and at the rate of the destination state. The liability for the tax at the motor fuel rate applies when the Department assesses the unlicensed exporter for the tax.

(c) **(Effective January 1, 2009)** Terminal Rack Removal. — The excise tax imposed by G.S. 105-449.81(1) on motor fuel removed at a terminal rack in this State is payable by the person that first receives the fuel upon its removal from the terminal. If the motor fuel is removed by an unlicensed distributor, the supplier of the fuel is jointly and severally liable for the tax due on the fuel. If the motor fuel is sold by a person who is not licensed as a supplier, as required by this Article, the terminal operator, the person selling the fuel, and the person removing the fuel are jointly and severally liable for the tax due on the fuel. If the motor fuel removed is not dyed diesel fuel but the shipping document issued for the fuel states that the fuel is dyed diesel fuel, the terminal operator, the supplier, and the person removing the fuel are jointly and severally liable for the tax due on the fuel.

If the motor fuel is removed for export by an unlicensed exporter, the exporter is liable for tax on the fuel at the motor fuel rate and at the rate of the destination state. A supplier who sells motor fuel to a unlicensed exporter is jointly and severally liable for the tax due on the fuel at the motor fuel rate. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 14; 1997-60, s. 7; 2008-134, s. 33.)

Section Set Out Twice. — The first version of subsection (c) set out above is effective until January 1, 2009. The second version of subsection (c) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 33, effective January 1, 2009, rewrote the last sentence of subsection (c), which formerly read: "The liability for the tax at the motor fuel rate applies when the Department assesses the unlicensed exporter for the tax."

§ 105-449.83A. (Effective January 1, 2009) Liability for tax on fuel grade ethanol.

The excise tax imposed by G.S. 105-449.81(3b) on fuel grade ethanol is payable by the fuel alcohol provider. (1995 (Reg. Sess., 1996), c. 647, s. 15; 2008-134, s. 34.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-134, s. 34, effective January 1, 2009, substituted "G.S. 105-449.81(3b)" for "G.S. 105-449.81(3a)" and "is payable by the fuel alcohol provider" for "removed from a storage facility is payable by the fuel alcohol provider. The excise tax imposed by that subdivision on fuel grade ethanol imported to this State is payable by the importer."

§ 105-449.84A. (Effective January 1, 2009) Liability for tax on behind-the-rack transfers.

The excise tax imposed by G.S. 105-449.81(5) on motor fuel that is transferred within the terminal transfer system and is subject to the federal excise tax is payable by the supplier of the fuel, the person receiving the fuel, and the terminal operator of the terminal at which the fuel was transferred, all of whom are jointly and severally liable for the tax. The excise tax imposed by that subdivision on motor fuel that is transferred within the terminal transfer system by a person that is not licensed under this Article as a supplier is payable by the person transferring the motor fuel, the person receiving the motor fuel, and the terminal operation of the terminal at which the fuel was transferred, all of whom are jointly and severally liable for the tax. (1995 (Reg. Sess., 1996), c. 647, s. 17; 2008-134, s. 35.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-134, s. 35, effective January 1, 2009, in the first sentence, substituted "fuel that is transferred" for "fuel transferred" near the beginning, and inserted "and is subject to the federal excise tax"; and added the last sentence.

§ 105-449.85. Compensating tax on and liability for unaccounted for motor fuel losses at a terminal.

(a) Tax. — An excise tax at the motor fuel rate is imposed annually on unaccounted for motor fuel losses at a terminal that exceed one-half of one percent (0.5%) of the number of net gallons removed from the terminal during the year by a system transfer or at a terminal rack. To determine if this tax applies, the terminal operator of the terminal must determine the difference between the following:

(1) The amount of motor fuel in inventory at the terminal at the beginning of the year plus the amount of motor fuel received by the terminal during the year.

(2) The amount of motor fuel in inventory at the terminal at the end of the year plus the amount of motor fuel removed from the terminal during the year.

(b) **(Effective until January 1, 2009)** Liability. — The terminal operator whose motor fuel is unaccounted for is liable for the tax imposed by this section and is liable for a penalty equal to the amount of tax payable. Motor fuel received by a terminal operator and not shown on an informational return filed by the terminal operator with the Secretary as having been removed from the terminal is presumed to be unaccounted for. A terminal operator may establish that motor fuel received at a terminal but not shown on an informational return as having been removed from the terminal was lost or part of a transmix and is therefore not unaccounted for.

(b) **(Effective January 1, 2009)** Liability. — The terminal operator whose motor fuel is unaccounted for is liable for the tax imposed by this section and is liable for a penalty equal to the amount of tax payable. Motor fuel received by a terminal operator and not shown on an informational return filed by the terminal operator with the Secretary as having been removed from the terminal is presumed to be unaccounted for motor fuel. A terminal operator may establish that it can account for motor fuel received at a terminal but not shown on an informational return as having been removed from the terminal if the motor fuel was lost or part of a transmix. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 18; 2008-134, s. 36.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until January 1, 2009. The second version of subsection (b) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 36, effective January 1, 2009, in subsection (b), added "motor fuel" to the end of the second sentence, and in the third sentence, inserted "it can account for" near the beginning and substituted "if the motor fuel was lost or part of a transmix" for "was lost or part of a transmix and is therefore not unaccounted for" at the end.

§ 105-449.86. Tax on and liability for dyed diesel fuel used to operate certain highway vehicles.

(a) Tax. — An excise tax at the motor fuel rate is imposed on dyed diesel fuel acquired to operate any of the following:

(1) Repealed by Session Laws 2003-349, s. 10.8, effective January 1, 2004.

(2) A local bus that is allowed by § 4082(b)(3) of the Code to use dyed diesel fuel.

(3) A highway vehicle that is owned by or leased to an educational organization that is not a public school and is allowed by § 4082(b)(1) or (b)(3) of the Code to use dyed diesel fuel.

(4) Repealed by Session Laws 2005-435, s. 12, effective September 27, 2005.

(b) Liability. — If the distributor of dyed diesel fuel that is taxable under this section is not liable for the tax imposed by this section, the person that acquires the fuel is liable for the tax. The distributor of dyed diesel fuel that is taxable under this section is liable for the tax imposed by this section in the following circumstances:

(1) **(Effective until January 1, 2009)** When the person acquiring the dyed diesel fuel has storage facilities for the fuel and is therefore a bulk-end user of the fuel.

(1) **(Effective January 1, 2009)** When the person acquiring the dyed diesel fuel has storage facilities for the fuel and is therefore a bulk end-user of the fuel.

(2) When the person acquired the dyed diesel fuel from a retail outlet of the distributor by using an access card or code indicating that the person's use of the fuel is taxable under this section. (1995, c. 390, s. 3; 2003-349, s. 10.8; 2005-435, s. 12; 2008-134, s. 37.)

Subdivision (b)(1) Set Out Twice. — The first version of subdivision (b)(1) set out above is effective until January 1, 2009. The second version of subdivision (b)(1) set out above is effective January 1, 2009.

Effect of Amendments. —

Session Laws 2008-134, s. 37, effective January 1, 2009, substituted "bulk end-user" for "bulk-end user" in subdivision (b)(1).

§ 105-449.87. Backup tax and liability for the tax.

(a) Tax. — An excise tax at the motor fuel rate is imposed on the following:

(1) Dyed diesel fuel that is used to operate a highway vehicle for a use that is not a nontaxable use under § 4082(b) of the Code.

(2) Motor fuel that was allowed an exemption from the motor fuel tax and was then used for a taxable purpose.

(3) Motor fuel that is used to operate a highway vehicle after an application for a refund of tax paid on the motor fuel is made or allowed under G.S. 105-449.107(a) on the basis that the motor fuel was used for an off-highway purpose.

(4) Repealed by Session Laws 1995 (Regular Session, 1996), c. 647, s. 19.

(5) Motor fuel that, based on its shipping document, is destined for delivery to another state and is then diverted and delivered in this State.

(b) **(Effective until January 1, 2009)** General Liability. — The operator of a highway vehicle that uses motor fuel that is taxable under subdivisions (a)(1) through (a)(3) of this section is liable for the tax. If the highway vehicle that uses the fuel is owned by or leased to a motor carrier, the motor carrier is jointly and severally liable for the tax. If the end seller of motor fuel taxable under this section knew or had reason to know that the motor fuel would be used for a purpose that is taxable under this section, the end seller is jointly and severally liable for the tax. If the Secretary determines that a bulk-end user or retailer used or sold untaxed dyed diesel fuel to operate a highway vehicle when the fuel is dispensed from a storage facility or through a meter marked for nonhighway use, all fuel delivered into that storage facility is presumed to have been used to operate a highway vehicle. An end seller of dyed diesel fuel is considered to have known or had reason to know that the fuel would be used for a purpose that is taxable under this section if the end seller delivered the fuel into a storage facility that was not marked as required by G.S. 105-449.123.

(b) **(Effective January 1, 2009)** General Liability. — The operator of a highway vehicle that uses motor fuel that is taxable under subdivisions (a)(1) through (a)(3) of this section is liable for the tax. If the highway vehicle that uses the fuel is owned by or leased to a motor carrier, the motor carrier is jointly and severally liable for the tax. If the end-seller of motor fuel taxable under this section knew or had reason to know that the motor fuel would be used for a purpose that is taxable under this section, the end-seller is jointly and severally liable for the tax. If the Secretary determines that a bulk end-user or retailer used or sold untaxed dyed diesel fuel to operate a highway vehicle when the fuel is dispensed from a storage facility or through a meter marked for nonhighway use, all fuel delivered into that storage facility is presumed to have been used to operate a highway vehicle. An end-seller of dyed diesel fuel is considered to have known or had reason to know that the fuel would be used for a purpose that is taxable under this section if the end-seller delivered the fuel into a storage facility that was not marked as required by G.S. 105-449.123.

(c) Diverted Fuel. — The person who authorizes a change in the destination state of motor fuel from the state given on the fuel's shipping document to North Carolina is liable for the tax due on the motor fuel. If motor fuel is diverted from North Carolina to another state, only the person who authorized the fuel to be diverted is eligible for a refund of the amount of tax paid on the fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 19; 1997-60, s. 8; 1998-146, s. 5; 1999-438, s. 22; 2002-108, s. 10; 2008-134, s. 38.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until January 1, 2009. The second version of subsection (b) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 38, effective January 1, 2009, in subsection (b), substituted "end-seller" for "end seller" throughout, and substituted "bulk end-user" for "bulk-end user" in the fourth sentence.

§ 105-449.89. (Effective January 1, 2009) Restrictions on removal of motor fuel from terminal.

(a) By Bulk End-User. — An out-of-state bulk end-user may not remove motor fuel from a terminal in this State for use in the state in which the bulk end-user is located unless the bulk end-user is licensed under this Article as an exporter. An out-of-state bulk end-user that is not licensed under this Article may remove motor fuel from a bulk plant in this State.

(b) To Marine Vessel. — A supplier may not transfer motor fuel from a terminal to a marine vessel unless the person to whom the supplier transfers the motor fuel is licensed as a supplier. (1995 (Reg. Sess., 1996), c. 647, s. 22; 1997-60, s. 10; 2008-134, s. 39.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-134, s. 39, effective January 1, 2009, rewrote the section heading which formerly read: "Removals by out-of-state bulk-end user"; designated the previously existing provisions as subsection (a); in subsection (a), inserted "By Bulk End-User. —" at the beginning, and substituted "bulk end-user" for "bulk-end user" throughout; and added subsection (b).

Part 4. Payment and Reporting.

§ 105-449.91. Remittance of tax to supplier.

(a) Distributor. — A distributor must remit tax due on motor fuel removed at a terminal rack to the supplier of the fuel. A licensed distributor has the right to defer the remittance of tax to the supplier, as trustee, until the date the trustee must pay the tax to this State or to another state. The time when an unlicensed distributor must remit tax to a supplier is governed by the terms of the contract between the supplier and the unlicensed distributor.

(b) **(Effective until January 1, 2009)** Exporter. — An exporter must remit tax due on motor fuel removed at a terminal rack to the supplier of the fuel. The time when an exporter must remit tax to a supplier is governed by the law of the destination state of the exported motor fuel.

(b) **(Effective January 1, 2009)** Exporter. — A licensed exporter must remit tax due on motor fuel removed at a terminal rack to the supplier of the fuel. The time when a licensed exporter must remit tax to a supplier is governed by the law of the destination state of the exported motor fuel.

(c) Importer. — A licensed importer must remit tax due on motor fuel removed at a terminal rack of a permissive or an elective supplier to the supplier of the fuel. A licensed importer that removes fuel from a terminal rack of a permissive or an elective supplier has the right to defer the remittance of tax to the supplier until the date the supplier must pay the tax to this State.

(d) **(Effective until January 1, 2009)** General. — The method by which a distributor, a licensed exporter, or a licensed importer must remit tax to a supplier is governed by the terms of the contract between the supplier and the distributor, exporter, or licensed importer and the supplier. G.S. 105-449.76 governs the cancellation of a license of a distributor, an exporter, and an importer.

(d) **(Effective January 1, 2009)** General. — A person who removes motor fuel at a terminal rack and is not subject to another subsection in this section must remit tax due on the motor fuel to the supplier of the fuel. The time the person must remit tax to a supplier is governed by the terms of the contract between the supplier and the person.

The method by which a person must remit tax to a supplier under this section is governed by the terms of the contract between the supplier and that person. G.S. 105-449.76 governs the cancellation of a license of a distributor, an exporter, and an importer. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 25; 1997-60, s. 12; 2008-134, s. 40.)

Subsections (b) and (d) Set Out Twice. — The first versions of subsections (b) and (d) set out above are effective until January 1, 2009. The second versions of subsections (b) and (d) set out above are effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 40, effective January 1, 2009, in subsection (b), substituted "a licensed exporter" for "an exporter" twice; in subsection (d), added the first paragraph, and rewrote the first sentence of the second paragraph, which formerly read: "The method by which a distributor, a licensed exporter, or a licensed importer must remit tax to a supplier is governed by the terms of the contract between the supplier and the distributor, exporter, or licensed importer and the supplier."

§ 105-449.96. (Effective January 1, 2009) Information required on return filed by supplier.

A return of a supplier must list all of the following information and any other information required by the Secretary:

G.S. 105-449.96 is set out twice. See notes.

(1) The number of gallons of tax-paid motor fuel received by the supplier during the month, sorted by type of fuel.
(2) The number of gallons of motor fuel removed at a terminal rack during the month from the account of the supplier, sorted by type of fuel.
(3) The number of gallons of motor fuel removed during the month for export, sorted by type of fuel.
(4) The number of gallons of motor fuel removed during the month at a terminal located in another state for destination to this State, as indicated on the shipping document for the fuel, sorted by type of fuel.
(5) The number of gallons of motor fuel the supplier sold during the month to a governmental unit whose use of fuel is exempt from tax, sorted by type of fuel.
(6) The amount of discounts allowed under G.S. 105-449.93(b) on motor fuel sold during the month to licensed distributors or licensed importers.
(7) The number of gallons of motor fuel the supplier exchanged during the month with another licensed supplier pursuant to a two-party exchange agreement, sorted by type of fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 30; 1997-60, s. 14; 2005-435, s. 14; 2008-134, s. 41.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. —

Session Laws 2008-134, s. 41, effective January 1, 2009, rewrote the section.

§ 105-449.97. Deductions and discounts allowed a supplier when filing a return.

(a) Taxes Not Remitted. — When a supplier files a return, the supplier may deduct from the amount of tax payable with the return the amount of tax any of the following license holders owes the supplier but failed to remit to the supplier:
(1) A licensed distributor.
(2) A licensed importer that removed the motor fuel on which the tax is due from a terminal of an elective or a permissive supplier.
(3) Repealed by Session Laws 1995, c. 647, s. 32.

A supplier is not liable for tax a license holder listed in this subsection owes the supplier but fails to pay. If a listed license holder pays tax owed to a supplier after the supplier deducts the amount on a return, the supplier must promptly remit the payment to the Secretary.

(b) Administrative Discount. — A supplier that files a timely return and sends a timely payment may deduct from the amount of tax payable with the return an administrative discount of one-tenth of one percent (0.1%) of the amount of tax payable to this State as the trustee, not to exceed eight thousand dollars ($8,000) a month. The discount covers expenses incurred in collecting taxes on motor fuel.

(c) **(Effective until January 1, 2009)** Percentage Discount. — A supplier that sells motor fuel directly to an unlicensed distributor or to the bulk-end user, the retailer, or the user of the fuel may take the same percentage discount on the fuel that a licensed distributor may take under G.S. 105-449.93(b) when making deferred payments of tax to the supplier.

(c) **(Effective January 1, 2009)** Percentage Discount. — A supplier that sells motor fuel directly to an unlicensed distributor or to the bulk end-user, the retailer, or the user of the fuel may take the same percentage discount on the fuel that a licensed distributor may take under G.S. 105-449.93(b) when making deferred payments of tax to the supplier.

(d) Taxes Paid on Exempt Retail Sales. — When filing a return, a supplier that issues or authorizes the issuance of an exempt card or code to a person that enables the person to buy motor fuel without paying tax on the fuel may deduct the amount of excise tax imposed on fuel purchased with the exempt card or code. The amount of excise tax imposed on fuel purchased with an exempt card or code is the amount that was imposed on the fuel when it was delivered to the retailer of the fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 31, 32; 1997-60, s. 15; 1999-438, s. 23; 2000-173, s. 14(c); 2006-162, s. 14(f); 2008-134, s. 42.)

Subsection (c) Set Out Twice. — The first version of subsection (c) set out above is effective until January 1, 2009. The second version of subsection (c) set out above is effective January 1, 2009.

Effect of Amendments. —

Session Laws 2008-134, s. 42, effective January 1, 2009, substituted "bulk end-user" for "bulk-end user" in subsection (c).

§ 105-449.100. (Effective January 1, 2009) Terminal operator to file informational return showing changes in amount of motor fuel at the terminal.

(a) Requirement. — A terminal operator must file a monthly informational return with the Secretary that shows the amount of motor fuel received or removed from the terminal during the month. A terminal operator must report all motor fuel removed from an out-of-state terminal that has this State as its destination state.

(b) Content. — The return is due on the date a monthly return is due under G.S. 105-449.90. The return must contain the following information and any other information required by the Secretary:

(1) The number of gallons of motor fuel received in inventory at the terminal during the month and each position holder for the fuel, sorted by type of fuel.

(2) The number of gallons of motor fuel removed from inventory at the terminal during the month and, for each removal, the position holder for the fuel and the destination state of the fuel, sorted by type of fuel.

(3) The number of gallons of motor fuel gained or lost at the terminal during the month.

(4) The number of gallons of motor fuel in inventory at the beginning of each month and at the end of each month.

(c) Due Date. — The return is due on the date a monthly return is due under G.S. 105-449.90. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 34; 2006-162, s. 15(a); 2008-134, s. 43.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. —

Session Laws 2008-134, s. 43, effective January 1, 2009, designated the former first sentence as present subsection (a) and the former second sentence as present subsection (b); in subsection (a), added "Requirement. —" and the second sentence; in subsection (b), added "Content. —" and substituted "date a monthly return is due" for "same date as a monthly return due," added "sorted by type of fuel" to the end of both subdivisions (b)(1) and (b)(2), and added subdivision (b)(4); and added subsection (c).

§ 105-449.101. Motor fuel transporter to file informational return showing deliveries of motor fuel.

(a) **(Effective until January 1, 2009)** Requirement. — A motor fuel transporter must file a monthly informational return with the Secretary that shows motor fuel transported in this State by the transporter during the month.

(a) **(Effective January 1, 2009)** Requirement. — A motor fuel transporter that is required to be licensed under this Article must file a monthly informational return with the Secretary that shows motor fuel transported in this State by the transporter during the month.

(b) Content. — The return required by this section must contain the following information and any other information required by the Secretary:

(1) The name and address of each person from whom the transporter received motor fuel outside the State for delivery in the State, the amount of motor fuel received, the date the motor fuel was received, and the destination state of the fuel.

(2) The name and address of each person from whom the transporter received motor fuel in the State for delivery outside the State, the amount of motor fuel delivered, the date the motor fuel was delivered, and the destination state of the fuel.

(3) The name and address of each person from whom the transporter received motor fuel in the State for delivery in the State, the amount of motor fuel received, the date the motor fuel was received, and the destination state of the fuel.

(c) **(Effective until January 1, 2009)** Due Date. — The return required by this section is due on the same date as a monthly return due under G.S. 105-449.90.

(c) **(Effective January 1, 2009)** Due Date. — The return required by this section is due on the date a monthly return is due under G.S. 105-449.90. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 35; 2002-108, s. 12; 2006-162, ss. 13(b), 15(b); 2008-134, s. 44.)

Subsections (a) and (c) Set Out Twice. — The first versions of subsections (a) and (c) set out above are effective until January 1, 2009. The second versions of subsections (a) and (c) set out above are effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 44, effective January 1, 2009, in subsection (a), inserted “that is required to be licensed under this Article”; and in subsection (c), substituted “date a monthly return is due” for “same date as a monthly return due.”

§ 105-449.102. Distributor to file return showing exports from a bulk plant.

(a) **(Effective until January 1, 2009)** Return. — A distributor that exports motor fuel from a bulk plant located in this State must file a monthly return with the Secretary that shows the exports. The return is due on the same date as a monthly return due under G.S. 105-449.90. The return serves as a claim for refund by the distributor for tax paid to this State on the exported motor fuel.

(a) **(Effective January 1, 2009)** Requirement. — A distributor that exports motor fuel from a bulk plant located in this State must file a monthly return with the Secretary that shows the exports. The return serves as a claim

G.S. 105-449.102(a) is set out twice. See note.

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for refund by the distributor for tax paid to this State on the exported motor fuel.

(b) Content. — The return must contain the following information and any other information required by the Secretary:

(1) The number of gallons of motor fuel exported during the month.
(2) The destination state of the motor fuel exported during the month.
(3) A certification that the distributor has paid to the destination state of the motor fuel exported during the month, or will pay on a timely basis, the amount of tax due that state on the fuel.

(c) **(Effective January 1, 2009)** Due Date. — The return is due on the date a monthly return is due under G.S. 105-449.90. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 36; 2006-162, s. 15(c); 2008-134, s. 45.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until January 1, 2009. The second version of subsection (a) set out above is effective January 1, 2009.

Effect of Amendments. —

Session Laws 2008-134, s. 45, effective January 1, 2009, in subsection (a), substituted "Requirement" for "Return" at the beginning, and deleted the former second sentence, which read: "The return is due on the same date as a monthly return due under G.S. 105-449.90"; and added subsection (c).

Part 5. Refunds.

§ 105-449.105. (Effective January 1, 2009) Monthly refunds for tax paid on exempt fuel, lost fuel, and accidental mixes that result in fuel unsuitable for highway use.

(a) Exempt Fuel. — An entity whose use of motor fuel is exempt from tax may obtain a monthly refund of any motor fuel excise tax the entity pays on its motor fuel. A person who sells motor fuel to an entity whose use of motor fuel is exempt from tax may obtain a monthly refund of any motor fuel excise tax the person pays on motor fuel it sells to the entity. A credit card company that issues a credit card to an entity whose use of motor fuel is exempt from tax may obtain a monthly refund of any motor fuel excise tax the company pays on motor fuel the entity purchases using the credit card.

A person may obtain a monthly refund of tax paid by the person on exported fuel, including fuel whose shipping document shows this State as the destination state but was diverted to another state in accordance with the diversion procedures established by the Secretary. An out-of-state bulk end-user is not allowed a refund on fuel exported from a bulk plant unless the bulk end-user is licensed as an exporter.

(b) Lost Fuel. — A supplier, an importer, or a distributor that loses tax-paid motor fuel due to damage to a conveyance transporting the motor fuel, fire, a natural disaster, an act of war, or an accident may obtain a monthly refund for the tax paid on the fuel.

(c) Accidental Mixes. — A person that accidentally combines any of the following may obtain a monthly refund for the amount of tax paid on the fuel:

(1) Dyed diesel fuel with tax-paid motor fuel.
(2) Gasoline with diesel fuel.
(3) Undyed diesel fuel with dyed kerosene.

(d) Repealed by Session Laws 1998-98, s. 29.

G.S. 105-449.105 is set out twice. See notes.

(e) Refund Amount. — The amount of a refund allowed under this section is the amount of excise tax paid, less the amount of any discount allowed on the fuel under G.S. 105-449.93. (1995, c. 390, s. 3; c. 523, ss. 32.1, 32.2; 1995 (Reg. Sess., 1996), c. 647, s. 38; 1997-6, s. 12; 1997-60, s. 17; 1998-98, s. 29; 2000-173, s. 16; 2001-205, s. 3; 2008-134, s. 46.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-134, s. 46, effective January 1, 2009, rewrote the section heading, which formerly read: "Refunds upon application for tax paid on exempt fuel, lost fuel, and fuel unsalable for highway use"; in subsection (a), inserted "monthly" preceding "refund" throughout, and added the last sentence; and in subsections (b) and (c), inserted "monthly" preceding "refund" both times it appears.

§ 105-449.105A. Monthly refunds for kerosene.

(a) **(Effective until January 1, 2009)** Refund. — A distributor who sells kerosene to any of the following may obtain a refund for the excise tax the distributor paid on the kerosene, less the amount of any discount allowed on the kerosene under G.S. 105-449.93:

(1) The end user of the kerosene, if the distributor dispenses the kerosene into a storage facility of the end user that contains fuel used only for one of the following purposes and the storage facility is installed in a manner that makes use of the fuel for any other purpose improbable:
  a. Heating.
  b. Drying crops.
  c. A manufacturing process.

(2) A retailer of kerosene, if the distributor dispenses the kerosene into a storage facility that meets both of the following conditions:
  a. It is marked with the phrase "Undyed, Untaxed Kerosene, Nontaxable Use Only" or a similar phrase that clearly indicates that the fuel is not to be used to operate a highway vehicle.
  b. It either has a dispensing device that is not suitable for use in fueling a highway vehicle or is kept locked by the retailer and must be unlocked by the retailer for each sale of kerosene.

(3) An airport, if the distributor dispenses the kerosene into a storage facility that contains fuel used only for fueling airplanes and that meets at least one of the following conditions:
  a. It is marked with the phrase "Undyed, Untaxed Kerosene, Nontaxable Use Only" or a similar phrase that clearly indicates that the fuel is not to be used to operate a highway vehicle.
  b. It has a dispensing device that is not suitable for use in fueling a highway vehicle.

(a) **(Effective January 1, 2009)** Refund. — A distributor who sells kerosene to any of the following may obtain a monthly refund for the excise tax the distributor paid on the kerosene, less the amount of any discount allowed on the kerosene under G.S. 105-449.93:

(1) The end-user of the kerosene, if the distributor dispenses the kerosene into a storage facility of the end-user that contains fuel used only for one of the following purposes and the storage facility is installed in a manner that makes use of the fuel for any other purpose improbable:
  a. Heating.
  b. Drying crops.
  c. A manufacturing process.

(2) A retailer of kerosene, if the distributor dispenses the kerosene into a storage facility that meets both of the following conditions:

a. It is marked with the phrase "Undyed, Untaxed Kerosene, Nontaxable Use Only" or a similar phrase that clearly indicates that the fuel is not to be used to operate a highway vehicle.
b. It either has a dispensing device that is not suitable for use in fueling a highway vehicle or is kept locked by the retailer and must be unlocked by the retailer for each sale of kerosene.

(3) An airport, if the distributor dispenses the kerosene into a storage facility that contains fuel used only for fueling airplanes and that meets at least one of the following conditions:
a. It is marked with the phrase "Undyed, Untaxed Kerosene, Nontaxable Use Only" or a similar phrase that clearly indicates that the fuel is not to be used to operate a highway vehicle.
b. It has a dispensing device that is not suitable for use in fueling a highway vehicle.

(b) Liability. — If the Secretary determines that the Department overpaid a distributor by refunding more tax to the distributor than is due under this section, the distributor is liable for the amount of the overpayment. This liability applies regardless of whether the actions of a retailer of kerosene contributed to the overpayment. (1998-146, s. 8; 2000-173, s. 17; 2001-205, s. 6; 2006-162, s. 14(g); 2008-134, ss. 47, 48.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until January 1, 2009. The second version of subsection (a) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, ss. 47 and 48, effective January 1, 2009, in the introductory paragraph of subsection (a), inserted "monthly" preceding "refund"; and in subdivision (a)(1), substituted "end-user" for "end user" twice.

§ 105-449.108. When an application for a refund is due.

(a) **(Effective until January 1, 2009)** Due Dates. — The due dates of applications for refunds are as follows:

Refund Period	Due Date
Annual	April 15 after the end of the year
Quarterly	Last day of the month after the end of the quarter
Monthly	22nd day after the end of the month
Upon Application	Last day of the month after the month in which tax was paid or the event occurred that is the basis of the refund.

(a) **(Effective January 1, 2009)** Due Dates. — The due dates of applications for refunds are as follows:

Refund Period	Due Date
Annual	April 15 after the end of the year
Quarterly	Last day of the month after the end of the quarter
Monthly	22nd day after the end of the month

(b) Requirements. — An application for an annual refund must state whether or not the applicant has filed a North Carolina income tax return for the preceding taxable year. An application for a refund allowed under this Part must state that the applicant has paid for the fuel for which a refund is claimed or that payment for the fuel has been secured to the seller's satisfaction.

(c) Repealed by Session Laws 1998-146, s. 10, effective September 18, 1998.

(d) Late Application. — A refund applied for more than three years after the date the application is due is barred. (1995, c. 390, s. 3; 1997-6, s. 15; 1998-146, s. 10; 1998-212, s. 29A.14(r); 2008-134, s. 49.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until January 1, 2009. The second version of subsection (a) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 49, effective January 1, 2009, in subsection (a), deleted "Upon Application" from the "Refund Period" column, and deleted "Last day of the month after the month in which tax was paid or the event occurred that is the basis of the refund" from the "Due Date" column.

Part 6. Enforcement and Administration.

§ 105-449.115. Shipping document required to transport motor fuel by railroad tank car or transport truck.

(a) Issuance. — A person may not transport motor fuel by railroad tank car or transport truck unless the person has a shipping document for its transportation that complies with this section. A terminal operator and the operator of a bulk plant must give a shipping document to the person who operates a railroad tank car or a transport truck into which motor fuel is loaded at the terminal rack or bulk plant rack.

(b) Content. — A shipping document issued by a terminal operator or the operator of a bulk plant must contain the following information and any other information required by the Secretary:

(1) Identification, including address, of the terminal or bulk plant from which the motor fuel was received.
(1a) **(Effective January 1, 2009)** The type of motor fuel loaded.
(2) The date the motor fuel was loaded.
(3) The gross gallons loaded.
(3a) **(Effective January 1, 2009)** The motor fuel transporter for the motor fuel.
(4) The destination state of the motor fuel, as represented by the purchaser of the motor fuel or the purchaser's agent.
(5) If the document is issued by a terminal operator, the document must be machine printed and it must contain the following information:
  a. The net gallons loaded.
  b. A tax responsibility statement indicating the name of the supplier that is responsible for the tax due on the motor fuel.

(c) Reliance. — A terminal operator or bulk plant operator may rely on the representation made by the purchaser of motor fuel or the purchaser's agent concerning the destination state of the motor fuel. A purchaser is liable for any tax due as a result of the purchaser's diversion of fuel from the represented destination state.

(d) Duties of Transporter. — A person to whom a shipping document was issued must do all of the following:

(1) Carry the shipping document in the conveyance for which it was issued when transporting the motor fuel described in it.
(2) Show the shipping document to a law enforcement officer upon request when transporting the motor fuel described in it.
(3) Deliver motor fuel described in the shipping document to the destination state printed on it unless the person does all of the following:
  a. Notifies the Secretary before transporting the motor fuel into a state other than the printed destination state that the person has

received instructions since the shipping document was issued to deliver the motor fuel to a different destination state.

b. Receives from the Secretary a confirmation number authorizing the diversion.

c. Writes on the shipping document the change in destination state and the confirmation number for the diversion.

(4) Give a copy of the shipping document to the distributor or other person to whom the motor fuel is delivered.

(e) Duties of Person Receiving Shipment. — A person to whom motor fuel is delivered by railroad tank car or transport truck may not accept delivery of the motor fuel if the destination state shown on the shipping document for the motor fuel is a state other than North Carolina. To determine if the shipping document shows North Carolina as the destination state, the person to whom the fuel is delivered must examine the shipping document and must keep a copy of the shipping document. The person must keep a copy at the place of business where the motor fuel was delivered for 90 days from the date of delivery and must keep it at that place or another place for at least three years from the date of delivery. A person who accepts delivery of motor fuel in violation of this subsection is jointly and severally liable for any tax due on the fuel.

(f) Sanctions Against Transporter. — The following acts are grounds for a civil penalty:

(1) Transporting motor fuel in a railroad tank car or transport truck without a shipping document or with a false or an incomplete shipping document.

(2) Delivering motor fuel to a destination state other than that shown on the shipping document.

The penalty is payable to the agency that assessed the penalty and is payable by the person in whose name the conveyance is registered, if the conveyance is a transport truck, and is payable by the person responsible for the movement of motor fuel in the conveyance, if the conveyance is a railroad tank car. The amount of the penalty is five thousand dollars ($5,000). A penalty imposed under this subsection is in addition to any motor fuel tax assessed.

(g) Penalty Defense. — Compliance with the conditions set out in this subsection is a defense to a civil penalty imposed under subsection (f) of this section as a result of the delivery of fuel to a state other than the destination state printed on the shipping document for the fuel. The Secretary must waive a penalty imposed against a person under that subsection if the person establishes a defense under this subsection. The conditions for the defense are:

(1) The person notified the Secretary of the diversion and received a confirmation number for the diversion before the imposition of the penalty.

(2) Tax was timely paid on the diverted fuel, unless the person is a motor fuel transporter.

(h) Sanctions Against Terminal Operator. — The Secretary may assess a civil penalty of five thousand dollars ($5,000) against a terminal operator who intentionally issues a shipping document that does not satisfy the requirements of subsection (b) of this section. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 39, 40; 2002-108, s. 15; 2003-349, s. 10.9; 2005-435, s. 16; 2007-527, ss. 16(b), 18(a); 2008-134, s. 50.)

Effect of Amendments. — Session Laws 2008-134, s. 50, effective January 1, 2009, added subdivisions (b)(1a) and (b)(3a).

§ 105-449.117. Penalties for highway use of dyed diesel or other non-tax-paid fuel.

(a) **(Effective until January 1, 2009)** Violation. — It is unlawful to use dyed diesel fuel in a highway vehicle that is licensed or required to be licensed under Chapter 20 of the General Statutes unless that use is allowed under section 4082 of the Code. It is unlawful to use undyed diesel fuel in a highway vehicle that is licensed or required to be licensed under Chapter 20 of the General Statutes unless the tax imposed by this Article has been paid. A person who violates this section is guilty of a Class 1 misdemeanor and is liable for a civil penalty.

(a) **(Effective January 1, 2009)** Violation. — It is unlawful to use dyed diesel fuel or other non-tax-paid fuel in a highway vehicle that is licensed or required to be licensed under Chapter 20 of the General Statutes unless that use is allowed under section 4082 of the Code. It is unlawful to use motor fuel or alternative fuel in a highway vehicle that is licensed or required to be licensed under Chapter 20 of the General Statutes unless the tax imposed by this Article or Article 36D of this Chapter and the tax imposed by Article 3 of Chapter 119 of the General Statutes have been paid. A person who violates this section is guilty of a Class 1 misdemeanor and is liable for a civil penalty.

(b) Civil Penalty. — The civil penalty is payable to the agency that assessed the penalty and is payable by the person in whose name the highway vehicle is registered. The amount of the penalty depends on the amount of fuel in the supply tank of the highway vehicle. The penalty is the greater of one thousand dollars ($1,000) or five times the amount of motor fuel tax payable on the fuel in the supply tank. A penalty imposed under this section is in addition to any motor fuel tax assessed.

(c) Enforcement. — The Secretary or a person designated by the Secretary may conduct investigations to identify violations of this Article. It is not a valid defense to a violation of this Article that the State is exempt from the tax imposed by this Article. (1995, c. 390, s. 3; 1997-60, s. 19; 2003-349, s. 10.10; 2007-527, s. 16(d); 2008-134, s. 51.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until January 1, 2009. The second version of subsection (a) set out above is effective January 1, 2009.

Effect of Amendments. —

Session Laws 2008-134, s. 51, effective January 1, 2009, in subsection (a), inserted "or other non-tax-paid fuel" in the first sentence, and in the second sentence, substituted "motor fuel or alternative" for "undyed diesel" and "Article or Article 36D of this Chapter and the tax imposed by Article 3 of Chapter 119 of the General Statutes have been paid" for "Article has been paid."

§ 105-449.121. Record-keeping requirements; inspection authority.

(a) What Must Be Kept. — A person who is subject to audit under subsection (b) of this section must keep a record of all shipping documents or other documents used to determine information the person provides in a return or to determine the person's motor fuel transactions. The records must be kept for three years from the due date of the return to which the records apply or, if the records apply to a transaction not required to be reported in a return, for three years from the date of the transaction.

(b) Inspection. — The Secretary or a person designated by the Secretary may do any of the following to determine tax liability under this Article:

(1) **(Effective until January 1, 2009)** Audit a distributor or a person who is required to have or elects to have a license under this Article.

G.S. 105-449.121(b)(1) is set out twice. See note.

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(1) **(Effective January 1, 2009)** Audit a person who is required to have or elects to have a license under this Article.
(2) Audit a distributor, a retailer, a bulk-end user, or a motor fuel user that is not licensed under this Article.
(3) Examine a tank or other equipment used to make, store, or transport motor fuel, diesel dyes, or diesel markers.
(4) Take a sample of a product from a vehicle, a tank, or another container in a quantity sufficient to determine the composition of the product.
(5) Stop a vehicle for the purpose of taking a sample of motor fuel from the vehicle. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 43; 2000-173, s. 18; 2008-134, s. 52.)

Subdivision (b)(1) Set Out Twice. — The first version of subdivision (b)(1) set out above is effective until January 1, 2009. The second version of subdivision (b)(1) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 52, effective January 1, 2009, deleted "a distributor or" preceding "a person who" in subdivision (b)(1).

ARTICLE 36D.

Alternative Fuel.

§ 105-449.130. Definitions.

The following definitions apply in this Article:
(1) Alternative fuel. — A combustible gas or liquid that can be used to generate power to operate a highway vehicle and that is not subject to tax under Article 36C of this Chapter.
(1a) **(Effective until January 1, 2009)** Bulk-end user. — A person who maintains storage facilities for alternative fuel and uses part or all of the stored fuel to operate a highway vehicle.
(1a) **(Effective January 1, 2009)** Bulk end-user. — A person who maintains storage facilities for alternative fuel and uses part or all of the stored fuel to operate a highway vehicle.
(2) **(Effective until January 1, 2009)** Highway. — Defined in G.S. 20-4.01(13).
(2) **(Effective January 1, 2009)** Highway. — Defined in G.S. 105-449.60.
(3) Highway vehicle. — Defined in G.S. 105-449.60.
(4) Motor fuel. — Defined in G.S. 105-449.60.
(5) Motor fuel rate. — Defined in G.S. 105-449.60.
(6) **(Effective until January 1, 2009)** Provider of alternative fuel. — A person who does one or more of the following:
  a. Acquires alternative fuel for sale or delivery to a bulk-end user or a retailer.
  b. Maintains storage facilities for alternative fuel, part or all of which the person uses or sells to someone other than a bulk-end user or a retailer to operate a highway vehicle.
  c. Sells alternative fuel and uses part of the fuel acquired for sale to operate a highway vehicle by means of a fuel supply line from the cargo tank of the vehicle to the engine of the vehicle.
  d. Imports alternative fuel to this State, by a means other than the usual tank or receptacle connected with the engine of a highway vehicle, for use by that person to operate a highway vehicle.
(6) **(Effective January 1, 2009)** Provider of alternative fuel. — A person who does one or more of the following:

G.S. 105-449.130(1a), (2) and (6) are set out twice. See note.

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a. Acquires alternative fuel for sale or delivery to a bulk end-user or a retailer.
b. Maintains storage facilities for alternative fuel, part or all of which the person uses or sells to someone other than a bulk end-user or a retailer to operate a highway vehicle.
c. Sells alternative fuel and uses part of the fuel acquired for sale to operate a highway vehicle by means of a fuel supply line from the cargo tank of the vehicle to the engine of the vehicle.
d. Imports alternative fuel to this State, by a means other than the usual tank or receptacle connected with the engine of a highway vehicle, for use by that person to operate a highway vehicle.

(7) Retailer. — A person who maintains storage facilities for alternative fuel and who sells the fuel at retail or dispenses the fuel at a retail location to operate a highway vehicle. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 44; 2008-134, s. 53.)

Subdivisions (1a), (2), and (6) Set Out Twice. — The first version of subdivisions (1a), (2), and (6) set out above are effective until January 1, 2009. The second version of subdivisions (1a), (2), and (6) set out above are effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 53, effective January 1, 2009, in subdivisions (1a) and (6), substituted "bulk end-user" for "bulk-end user" throughout; and in subdivision (2), substituted "G.S. 105-449.60" for "G.S. 20-4.01(13)."

§ 105-449.131. List of persons who must have a license.

A person may not engage in business in this State as any of the following unless the person has a license issued by the Secretary authorizing the person to engage in that business:

(1) A provider of alternative fuel.
(2) **(Effective until January 1, 2009)** A bulk-end user.
(2) **(Effective until January 1, 2009)** A bulk end-user.
(3) A retailer. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 45; 2008-134, s. 54.)

Subdivision (2) Set Out Twice. — The first version of subdivision (2) set out above is effective until January 1, 2009. The second version of subdivision (2) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 54, effective January 1, 2009, substituted "bulk end-user" for "bulk-end user" in subdivision (2).

§ 105-449.133. Bond or letter of credit required as a condition of obtaining and keeping certain licenses.

(a) Who Must Have Bond. — The following applicants for a license must file with the Secretary a bond or an irrevocable letter of credit:

(1) An alternative fuel provider.
(2) **(Effective until January 1, 2009)** A retailer or a bulk-end user that intends to store highway and nonhighway alternative fuel in the same storage facility.
(2) **(Effective January 1, 2009)** A retailer or a bulk end-user that intends to store highway and nonhighway alternative fuel in the same storage facility.

(b) Amount. — The amount of the bond is the amount that would be required if the fuel the applicant intended to provide or store was motor fuel rather than alternative fuel. An applicant that is also required to file a bond or an irrevocable letter of credit under G.S. 105-449.72 to obtain a license as a distributor of motor fuel may file a single bond or irrevocable letter of credit under that section for the combined amount.

A bond filed under this subsection must be conditioned upon compliance with this Article, be payable to the State, and be in the form required by the Secretary. The Secretary may require a bond issued under this subsection to be adjusted in accordance with the procedure set out in G.S. 105-449.72 for adjusting a bond filed by a distributor of motor fuel. (1995, c. 390, s. 3; 1997-60, s. 23; 2008-134, s. 55.)

Subdivision (a)(2) Set Out Twice. — The first version of subdivision (a)(2) set out above is effective until January 1, 2009. The second version of subdivision (a)(2) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 55, effective January 1, 2009, substituted "bulk end-user" for "bulk-end user" in subdivision (a)(2).

§ 105-449.137. Liability for and payment of the tax.

(a) **(Effective until January 1, 2009)** Liability. — A bulk-end user or retailer that stores highway and nonhighway alternative fuel in the same storage facility is liable for the tax imposed by this Article. The tax payable by a bulk-end user or retailer applies when fuel is withdrawn from the storage facility. The alternative fuel provider that sells or delivers alternative fuel is liable for the tax imposed by this Article on all other alternative fuel.

(a) **(Effective January 1, 2009)** Liability. — A bulk end-user or retailer that stores highway and nonhighway alternative fuel in the same storage facility is liable for the tax imposed by this Article. The tax payable by a bulk end-user or retailer applies when fuel is withdrawn from the storage facility. The alternative fuel provider that sells or delivers alternative fuel is liable for the tax imposed by this Article on all other alternative fuel.

(b) Payment. — The tax imposed by this Article is payable when a return is due. A return is due on the same date as a monthly return due under G.S. 105-449.90. A monthly return covers liabilities that accrue in the calendar month preceding the date the return is due. A return must be filed with the Secretary and must be in the form and contain the information required by the Secretary. (1995, c. 390, s. 3; 1997-60, s. 24; 2006-162, s. 15(d); 2008-134, s. 56.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until January 1, 2009. The second version of subsection (a) set out above is effective January 1, 2009.

Effect of Amendments. —

Session Laws 2008-134, s. 56, effective January 1, 2009, substituted "bulk end-user" for "bulk-end user" twice in subsection (a).

§ 105-449.138. (Effective January 1, 2009) Requirements for bulk end-users and retailers.

(a) Informational Return. — A bulk end-user and a retailer must file a quarterly informational return with the Secretary. A quarterly return covers a calendar quarter and is due by the last day of the month that follows the quarter covered by the return.

The return must give the following information and any other information required by the Secretary:

(1) The amount of alternative fuel received during the quarter.

(2) The amount of alternative fuel sold or used during the quarter.

(b) Storage. — A bulk end-user or a retailer may store highway and nonhighway alternative fuel in separate storage facilities or in the same

G.S. 105-449.138 is set out twice. See notes.

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storage facility. If highway and nonhighway alternative fuel are stored in separate storage facilities, the facility for the nonhighway fuel must be marked in accordance with the requirements set by G.S. 105-449.123 for dyed diesel storage facilities. If highway and nonhighway alternative fuel are stored in the same storage facility, the storage facility must be equipped with separate metering devices for the highway fuel and the nonhighway fuel. If the Secretary determines that a bulk end-user or retailer used or sold alternative fuel to operate a highway vehicle when the fuel was dispensed from a storage facility or through a meter marked for nonhighway use, all fuel delivered into that storage facility is presumed to have been used to operate a highway vehicle. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 48; 1997-60, s. 25; 2008-134, s. 57.)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-134, s. 57, effective January 1, 2009, substituted "bulk end-user" for "bulk-end user" in the section heading and throughout the section.

§ 105-449.139. Miscellaneous provisions.

(a) Records. — A license holder must keep a record of all documents used to determine the information provided in a return filed under this Article. The records must be kept for three years from the due date of the return to which the records apply. The records are open to inspection during business hours by the Secretary or a person designated by the Secretary.

(b) Violations. — The offenses listed in subdivisions (1) through (9) of G.S. 105-449.120 apply to this Article. In applying those offenses to this Article, references to "this Article" are to be construed as references to Article 36D and references to "motor fuel" are to be construed as references to alternative fuel.

(c) **(Effective until January 1, 2009)** Lists. — The Secretary must give a list of licensed alternative fuel providers to each licensed bulk-end user and licensed retailer. The Secretary must also give a list of licensed bulk-end users and licensed retailers to each licensed alternative fuel provider. A list must state the name, account number, and business address of each license holder on the list. The Secretary must send an annual update of a list to each license holder, as appropriate.

(c) **(Effective January 1, 2009)** Lists. — The Secretary must give a list of licensed alternative fuel providers to each licensed bulk end-user and licensed retailer. The Secretary must also give a list of licensed bulk end-users and licensed retailers to each licensed alternative fuel provider. A list must state the name, account number, and business address of each license holder on the list. The Secretary must send an annual update of a list to each license holder, as appropriate. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 49; 2008-134, s. 58.)

Subsection (c) Set Out Twice. — The first version of subsection (c) set out above is effective until January 1, 2009. The second version of subsection (c) set out above is effective January 1, 2009.

Effect of Amendments. — Session Laws 2008-134, s. 58, effective January 1, 2009, substituted "bulk end-user" for "bulk-end user" twice in subsection (c).

SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

ARTICLE 39.

First One-Cent (1¢) Local Government Sales and Use Tax.

§ 105-467. Scope of sales tax.

(a) Sales Tax. — The sales tax that may be imposed under this Article is limited to a tax at the rate of one percent (1%) of the transactions listed in this subsection. The sales tax authorized by this Article does not apply to sales that are taxable by the State under G.S. 105-164.4 but are not specifically included in this subsection.

(1) The sales price of tangible personal property subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(1) and (a)(4b).

(2) The gross receipts derived from the lease or rental of tangible personal property when the lease or rental of the property is subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(2).

(3) The gross receipts derived from the rental of any room or other accommodations subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(3).

(4) The gross receipts derived from services rendered by laundries, dry cleaners, and other businesses subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(4).

(5) The sales price of food that is not otherwise exempt from tax pursuant to G.S. 105-164.13 but is exempt from the State sales and use tax pursuant to G.S. 105-164.13B.

(5a) The sales price of a bundled transaction that includes food subject to tax under subdivision (5) of this subsection, if the price of the food exceeds ten percent (10%) of the price of the bundle. A retailer must determine the price of food in a bundled transaction in accordance with G.S. 105-164.4D.

(5b) The sales price of bread, rolls, and buns that are sold at a bakery thrift store and are exempt from State tax under G.S.105-164.13(27a).

(6) The sales price of prepaid telephone calling service taxed as tangible personal property under G.S. 105-164.4(a)(4d).

(7) The gross receipts derived from providing satellite digital audio radio service subject to the general rate of tax under G.S. 105-164.4(a)(6a).

(b) Exemptions and Refunds. — The State exemptions and exclusions contained in G.S. 105-164.13, the State sales and use tax holidays contained in G.S. 105-164.13C and G.S. 105-164.13D, and the State refund provisions contained in G.S. 105-164.14 apply to the local sales and use tax authorized to be levied and imposed under this Article. Except as provided in this subsection, a taxing county may not allow an exemption, exclusion, or refund that is not allowed under the State sales and use tax. A local school administrative unit and a joint agency created by interlocal agreement among local school administrative units pursuant to G.S. 160A-462 to jointly purchase food service-related materials, supplies, and equipment on their behalf is allowed an annual refund of sales and use taxes paid by it under this Article on direct purchases of tangible personal property and services, other than electricity, telecommunications service, and ancillary service. Sales and use tax liability indirectly incurred by the entity on building materials, supplies, fixtures, and equipment that become a part of or annexed to any building or structure that is owned or leased by the entity and is being erected, altered, or repaired for use by the entity is considered a sales or use tax liability incurred on direct purchases by the entity for the purpose of this subsection. A request for a refund shall be in writing and shall include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the entity's fiscal year. Refunds applied for more than three years after the due date are barred.

(c) Sourcing. — The local sales tax authorized to be imposed and levied under this Article applies to taxable transactions by retailers whose place of business is located within the taxing county. The sourcing principles in G.S. 105-164.4B apply in determining whether the local sales tax applies to a transaction. (1971, c. 77, s. 2; 1983 (Reg. Sess., 1984), c. 1097, s. 9; 1987, c. 557, s. 7; c. 832, s. 4; 1989, c. 692, s. 3.7; 1991, c. 689, s. 316; 1996, 2nd Ex. Sess., c. 13, s. 1.3; 1998-98, s. 30.1; 1998-171, s. 9; 2001-347, s. 2.15; 2001-414, s. 29; 2001-424, s. 34.16(b); 2001-430, s. 13; 2001-487, s. 67(e); 2002-16, s. 12; 2002-159, s. 61; 2005-276, s. 33.23; 2006-66, s. 7.20(a); 2006-162, s. 32; 2007-244, s. 6; 2007-368, s. 2; 2008-107, s. 28.12(c).)

Editor's Note. —

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. —

Session Laws 2008-107, s. 28.12(c), effective July 16, 2008, and applicable to sales made on or after that date, substituted "tax holidays contained in G.S. 105-164.13C and G.S. 105-164.13D" for "tax holiday contained in G.S. 105-164.13C" in the first sentence of subsection (b).

§ 105-472. Disposition and distribution of taxes collected.

(a) County Allocation. — The Secretary shall, on a monthly basis, allocate to each taxing county for which the Secretary collects the tax the net proceeds of the tax collected in that county under this Article. For the purpose of this section, "net proceeds" means the gross proceeds of the tax collected in each county under this Article less taxes refunded, the cost to the State of collecting and administering the tax in the county as determined by the Secretary, and other deductions that may be charged to the county. If the Secretary collects local sales or use taxes in a month and the taxes cannot be identified as being attributable to a particular taxing county, the Secretary shall allocate the taxes among the taxing counties in proportion to the amount of taxes collected in each county under this Article during that month and shall include them in the monthly distribution. Amounts collected by electronic funds transfer payments are included in the distribution for the month in which the return that applies to the payment is received.

(b) Distribution Between Counties and Cities. — The Secretary shall divide the amount allocated to each taxing county among the county and its municipalities in accordance with the method determined by the county. The board of county commissioners shall, by resolution, choose one of the following methods of distribution:

(1) Per Capita Method. — The net proceeds of the tax collected in a taxing county shall be distributed to that county and to the municipalities in the county on a per capita basis according to the total population of the taxing county, plus the total population of the municipalities in the county. In the case of a municipality located in more than one county, only that part of its population living in the taxing county is considered its "total population". In order to make the distribution, the Secretary shall determine a per capita figure by dividing the

amount allocated to each taxing county by the total population of that county plus the total population of all municipalities in the county. The Secretary shall then multiply this per capita figure by the population of the taxing county and by the population of each municipality in the county; each respective product shall be the amount to be distributed to the county and to each municipality in the county. To determine the population of each county and each municipality, the Secretary shall use the most recent annual estimate of population certified by the State Budget Officer.

(2) Ad Valorem Method. — The net proceeds of the tax collected in a taxing county shall be distributed to that county and the municipalities in the county in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding the distribution. For purposes of this section, the amount of the ad valorem taxes levied by a county or municipality includes ad valorem taxes levied by the county or municipality in behalf of a taxing district and collected by the county or municipality. In addition, the amount of taxes levied by a county includes ad valorem taxes levied by a merged school administrative unit described in G.S. 115C-513 in the part of the unit located in the county. In computing the amount of tax proceeds to be distributed to each county and municipality, the amount of any ad valorem taxes levied but not substantially collected shall be ignored. Each county and municipality receiving a distribution of the proceeds of the tax levied under this Article shall in turn immediately share the proceeds with each district in behalf of which the county or municipality levied ad valorem taxes in the proportion that the district levy bears to the total levy of the county or municipality. Any county or municipality that fails to provide the Department of Revenue with information concerning ad valorem taxes levied by it adequate to permit a timely determination of its appropriate share of tax proceeds collected under this Article may be excluded by the Secretary from each monthly distribution with respect to which the information was not provided in a timely manner, and those tax proceeds shall then be distributed only to the remaining counties or municipalities, as appropriate. For the purpose of computing the distribution of the tax under this subsection to any county and the municipalities located in the county for any month with respect to which the property valuation of a public service company is the subject of an appeal and the Department of Revenue is restrained by law from certifying the valuation to the county and the municipalities in the county, the Department shall use the last property valuation of the public service company that has been certified.

The board of county commissioners in each taxing county shall, by resolution adopted during the month of April of each year, determine which of the two foregoing methods of distribution shall be in effect in the county during the next succeeding fiscal year. In order for the resolution to be effective, a certified copy of it must be delivered to the Secretary in Raleigh within 15 calendar days after its adoption. If the board fails to adopt a resolution choosing a method of distribution not then in effect in the county, or if a certified copy of the resolution is not timely delivered to the Secretary, the method of distribution then in effect in the county shall continue in effect for the following fiscal year. The method of distribution in effect on the first of July of each fiscal year shall apply to every distribution made during that fiscal year.

(b1) Repealed by Session Laws 2008-134, s. 14(b), effective July 28, 2008.

(c) Municipality Defined. — As used in this Article, the term "municipality" means "city" as defined in G.S. 153A-1.

(d) No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets are open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999. (1971, c. 77, s. 2; 1973, c. 476, s. 193; c. 752; 1979, c. 12, s. 1; 1979, 2nd Sess., c. 1137, s. 49; 1981, c. 4, s. 2; 1985 (Reg. Sess., 1986), c. 934, s. 2; 1991, c. 325, s. 8; 1993, c. 485, s. 24; 1999-458, s. 6; 2001-427, s. 13(a); 2001-487, s. 118(b); 2002-72, s. 5; 2003-349, s. 5; 2004-203, s. 5(j); 2007-323, s. 31.16.3(d); 2008-134, s. 14(b).)

Editor's Note. —

Session Laws 2007-323, s. 31.16.3(d), which added subsection (b1), effective October 1, 2008, and applicable to distributions for months beginning on or after that date, was repealed by Session Laws 2008-134, s. 14(b), effective July 28, 2008.

ARTICLE 42.

Second One-Half Cent (½¢) Local Government Sales and Use Tax.

§ 105-502. (Effective October 1, 2009) Use of additional tax revenue by counties.

(a) Restriction. — For the first 25 fiscal years in which taxes levied under this Article by a county are in effect, the county must use sixty percent (60%) of the amount of revenue specified in this subsection for public school capital outlay purposes as defined in G.S. 115C-426(f) or to retire any indebtedness incurred by the county for these purposes during the period beginning five years prior to the date the taxes took effect:

(1) The amount of revenue the county receives under this Article.

(2) If the amount allocated to the county under G.S. 105-486 is greater than the amount allocated to the county under G.S. 105-501(a), the difference between the two amounts.

(b) Exception. — The Local Government Commission may, upon petition by a county, authorize a county to use part or all of the revenue, otherwise required by subsection (a) to be used for public school capital outlay purposes, for any lawful purpose. The petition must be in the form of a resolution adopted by the Board of County Commissioners and transmitted to the Local Government Commission. The petition must demonstrate that the county can provide for its public school capital needs without restricting the use of part or all of the specified revenue for these purposes.

In making its decision, the Local Government Commission must consider information in the petition concerning not only the public school capital needs but also the other capital needs of the petitioning county. The Commission may consider information from sources other than the petition. The Commission must issue a written decision on each petition stating the findings of the Commission concerning the public school capital needs of the petitioning county and the percentage of revenue otherwise restricted by subsection (a) that may be used by the petitioning county for any lawful purpose.

Decisions of the Commission allowing counties to use a percentage of the revenue that would otherwise be restricted under subsection (a) for any lawful purpose are final and continue in effect until the restrictions expire. A county whose petition is denied, in whole or in part, by the Commission may subsequently submit a new petition to the Commission.

G.S. 105-502 is set out twice. See notes.

(c) Reserve Fund. — A county may expend part or all of the revenue restricted for public school capital needs pursuant to subsection (a) in the fiscal year in which the revenue is received, or the county may place part or all of this revenue in a capital reserve fund. A county must specifically identify revenue placed in a reserve fund in accordance with Chapter 159 of the General Statutes.

(d) Taxes in Effect. — For purposes of this section in determining the number of fiscal years in which one-half percent (1/2%) sales and use taxes levied under this Article have been in effect in a county, these taxes are considered to be in effect only from the effective date of the levy of these taxes and are considered to be in effect for a full fiscal year during the first year in which these taxes were in effect, regardless of the number of months in that year in which the taxes were actually in effect. (1985 (Reg. Sess., 1986), c. 906, s. 1; 1987, c. 622, s. 11; 1993, c. 255, ss. 2, 4; 1998-186, s. 2; 2008-134, s. 13(a).)

Section Set Out Twice. — The section above is effective October 1, 2009. For the section as in effect until October 1, 2009, see the main volume.

Effect of Amendments. — Session Laws 2008-134, s. 13(a), effective October 1, 2009, and applicable to distributions for months beginning on or after that date, rewrote the section.

ARTICLE 44.

Third One-Half Cent (1/2¢) Local Government Sales and Use Tax.

(Effective until October 1, 2009)

§ 105-522. (Effective until October 1, 2009) City hold harmless for repealed local taxes.

(a) Definitions. — The following definitions apply in this section:

(1) Eligible municipality. — A municipality that was incorporated on or before October 1, 2008, and receives a distribution of sales and use taxes under G.S. 105-472.

(2) Hold harmless amount. — Fifty percent (50%) of the amount of sales and use tax revenue allocated under G.S. 105-486 for distribution to a municipality.

(b) Requirement. — A county is required to hold the eligible municipalities in the county harmless from the repeal of the local sales and use taxes formerly imposed under this Article. The Secretary must add an eligible municipality's hold harmless amount to the amount otherwise allocated to the municipality for distribution under this Subchapter. To obtain the revenue for the hold harmless distribution, the Secretary must reduce the amount otherwise allocated to a county for distribution under Article 39 of this Subchapter or under Chapter 1096 of the 1967 Session Laws by the hold harmless amounts for the municipalities in that county. (2007-323, s. 31.16.3(f); 2008-134, s. 14(a).)

Article 44 Set Out Twice. — This Article is effective until October 1, 2009. For the Article as effective October 1, 2009, see the following Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. —

Session Laws 2007-323, s. 31.16.3(g), which was repealed by Session Laws 2008-134, s. 15(b), effective July 28, 2008, provided: "For fiscal year 2008-2009, the repealed sales tax amount determined under G.S. 105-522 and G.S. 105-523, as enacted by this section, is calculated based on fifty percent (50%) of the amount distributed to a municipality or county under Article 40 of Chapter 105 of the General Statutes on or after October 2, 2008, less the amount distributed to the municipality or county on a per capita basis under repealed G.S. 105-520(b) in October, November, and December of 2008."

Session Laws 2008-134, s. 15(i), provides: "For fiscal year 2008-2009, the hold harmless amount determined for a municipality under G.S. 105-522 and the repealed sales tax amount determined for a county under G.S. 105-523 is reduced by the amount distributed in October, November, and December of 2008 to the municipality or county on a per capita basis under repealed G.S. 105-520(b).

"For fiscal year 2009-2010, the hold harmless amount determined for a municipality under G.S. 105-522 and the repealed sales tax amount determined for a county under G.S. 105-523 is reduced by the amount distributed in October, November, and December of 2009 to the municipality or county on the basis of point of origin under repealed G.S. 105-520(a)."

Effect of Amendments. — Session Laws 2008-134, s. 14(a), effective October 1, 2008, and applicable to distributions for months beginning on or after that date, in subdivision (a)(2), substituted "allocated under G.S. 105-486 for distribution to a municipality" for "distributed under Article 40 of this Chapter to the municipality for a month, other than revenue from the sale of food that is subject to local tax but is exempt from State tax under G.S. 105-164.13B"; and in subsection (b), substituted "otherwise allocated to the municipality for distribution under" for "distributed to the municipality under" in the second sentence, and substituted "the amount otherwise allocated to a county for distribution under Article 39 of this Subchapter" for "each county's monthly allocation under G.S. 105-472(b)" in the third sentence.

§ 105-523. (Effective until October 1, 2009) County hold harmless for repealed local taxes.

(a) Intent. — It is the intent of the General Assembly that each county benefit by at least five hundred thousand dollars ($500,000) annually from the exchange of a portion of the local sales and use taxes for the State's agreement to assume the responsibility for the non-administrative costs of Medicaid.

(b) Definitions. — The following definitions apply in this section:

(1) City hold harmless amount. — The hold harmless amount determined under G.S. 105-522 for the eligible municipalities in a county.

(2) Hold harmless threshold. — The amount of a county's Medicaid service costs and Medicare Part D clawback payments assumed by the State under G.S. 108A-54 for the fiscal year, less five hundred thousand dollars ($500,000).

(3) Repealed sales tax amount. — Fifty percent (50%) of the amount of sales and use tax revenue allocated under G.S. 105-486 for distribution to a county.

(c) Requirement. — If a county's repealed sales tax amount plus its city hold harmless amount for a fiscal year exceeds the county's hold harmless threshold for that fiscal year, the State is required to hold the county harmless for the difference by paying the amount of the difference to the county. The Secretary must withhold from sales and use tax collections under Article 5 of this Chapter the amount needed to make the county hold harmless payments required by this section.

(d) Method. — The Secretary must estimate a county's repealed sales tax amount, city hold harmless amount, and hold harmless threshold for a fiscal year to determine if the county is eligible for a hold harmless payment. The Secretary must send to an eligible county with the distribution made under G.S. 105-472 for March of that year an amount equal to ninety percent (90%) of its estimated hold harmless payment. At the end of each fiscal year, the Secretary must determine each county's hold harmless payment for that year. The Secretary must send by August 15 the remainder of the county's hold harmless payment for the fiscal year that ended on June 30. The Secretary of the Department of Human Resources must give the Secretary of Revenue the data needed to determine a county's hold harmless threshold. (2007-323, s. 31.16.3(f); 2008-134, s. 15(a).)

Article 44 Set Out Twice. — This Article is effective until October 1, 2009. For the Article as effective October 1, 2009, see the following Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. —

Session Laws 2007-323, s. 31.16.3(g), which was repealed by Session Laws 2008-134, s. 15(b), effective July 28, 2008, provided: "For fiscal year 2008-2009, the repealed sales tax amount determined under G.S. 105-522 and G.S. 105-523, as enacted by this section, is calculated based on fifty percent (50%) of the amount distributed to a municipality or county under Article 40 of Chapter 105 of the General Statutes on or after October 2, 2008, less the amount distributed to the municipality or county on a per capita basis under repealed G.S. 105-520(b) in October, November, and December of 2008."

Session Laws 2008-134, s. 15(i), provides: "For fiscal year 2008-2009, the hold harmless amount determined for a municipality under G.S. 105-522 and the repealed sales tax amount determined for a county under G.S. 105-523 is reduced by the amount distributed in October, November, and December of 2008 to the municipality or county on a per capita basis under repealed G.S. 105-520(b).

"For fiscal year 2009-2010, the hold harmless amount determined for a municipality under G.S. 105-522 and the repealed sales tax amount determined for a county under G.S. 105-523 is reduced by the amount distributed in October, November, and December of 2009 to the municipality or county on the basis of point of origin under repealed G.S. 105-520(a)."

Effect of Amendments. — Session Laws 2008-134, s. 15(a), effective October 1, 2008, and applicable to distributions for months beginning on or after that date, rewrote subsection (b); in subsection (c), inserted "plus its city hold harmless amount" near the beginning, and inserted "county" near the end of the second sentence; and in subsection (d), substituted "tax amount, city hold harmless amount" for "tax amount" in the first sentence, and substituted "each county's hold harmless payment" for "the difference between a county's repealed sales tax amount and its hold harmless threshold" near the end of the third sentence.

ARTICLE 44.

Local Government Hold Harmless Provisions.

(Effective October 1, 2009)

§ 105-522. (Effective October 1, 2009) City hold harmless for repealed local taxes.

(a) Definitions. — The following definitions apply in this section:

(1) Eligible municipality. — A municipality that was incorporated on or before October 1, 2008, and receives a distribution of sales and use taxes under G.S. 105-472.

(2) Hold harmless amount. — The sum of the following amounts allocated for distribution to a municipality for a month:

a. The amount of sales and use tax revenue allocated under G.S. 105-486. This calculation determines the effect of repealing a one-half percent (1/2%) sales and use tax distributed on a per capita basis.

b. An amount determined by subtracting twenty-five percent (25%) of the amount of sales and use tax revenue allocated under G.S. 105-472 or Chapter 1096 of the 1967 Session Laws from fifty percent (50%) of the amount of sales and use tax revenue allocated under G.S. 105-486. This calculation determines the effect of distributing a one-quarter percent (.25%) tax on the basis of point of origin instead of on a per capita basis.

(b) Requirement. — A county is required to hold the eligible municipalities in the county harmless from the repeal of the local sales and use taxes formerly imposed under this Article. The Secretary must add an eligible municipality's hold harmless amount to the amount distributed to the municipality under this Subchapter. To obtain the revenue for the hold harmless distribution, the Secretary must reduce each county's monthly allocation under G.S. 105-472(b) or under Chapter 1096 of the 1967 Session Laws by the hold harmless amounts for the municipalities in that county. (2007-323, ss. 31.16.3(f), 31.16.4(c); 2007-345, s. 14.4(a); 2008-134, ss. 14(a), 15(c), (f), (g).)

Article 44 Set Out Twice. — This Article is effective October 1, 2009. For the Article as effective before October 1, 2009, see the preceding Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. — Session Laws 2007-323, s. 31.16.4(c), which amended subsection (a), effective October 1, 2009, and applicable to distributions for months beginning on or after that date, was repealed by Session Laws 2008-134, s. 15(c), effective July 28, 2008.

Session Laws 2007-323, s. 31.16.4(e), which was repealed by Session Laws 2008-134, s. 15(e), effective July 28, 2008, provided: "For fiscal year 2009-2010, the repealed sales tax amount determined under G.S. 105-522(2)(a)(2)b, as enacted by this section, and G.S. 105-523(a)(2)b, as enacted by this section, is calculated based on twenty-five percent (25%) of the amount distributed to a municipality or county under Article 39 of Chapter 105 of the General Statutes or Chapter 1096 of the 1967 Session Laws on or after October 1, 2009, less the amount distributed to the municipality or county on the basis of point of origin under repealed G.S. 105-520(a) in October, November, and December of 2009."

Session Laws 2007-345, s. 14.4(a), which amended subdivision (a)(2), effective October 1, 2009, and applicable to distributions for months beginning on or after that date, was repealed by Session Laws 2008-134, s. 15(f), effective July 28, 2008.

Session Laws 2008-134, s. 15(i), provides: "For fiscal year 2008-2009, the hold harmless amount determined for a municipality under G.S. 105-522 and the repealed sales tax amount determined for a county under G.S. 105-523 is reduced by the amount distributed in October, November, and December of 2008 to the municipality or county on a per capita basis under repealed G.S. 105-520(b).

"For fiscal year 2009-2010, the hold harmless amount determined for a municipality under G.S. 105-522 and the repealed sales tax amount determined for a county under G.S. 105-523 is reduced by the amount distributed in October, November, and December of 2009 to the municipality or county on the basis of point of origin under repealed G.S. 105-520(a)."

Effect of Amendments. —

Session Laws 2008-134, s. 14(a), effective October 1, 2008, and applicable to distributions for months beginning on or after that date, in subdivision (a)(2), substituted "allocated under G.S. 105-486 for distribution to a municipality" for "distributed under Article 40 of this Chapter to the municipality for a month, other than revenue from the sale of food that is subject to local tax but is exempt from State tax under G.S. 105-164.13B"; and in subsection (b), substituted "otherwise allocated to the municipality for distribution under" for "distributed to the municipality under" in the second sentence, and substituted "the amount otherwise allocated to a county for distribution under Article 39 of this Subchapter" for "each county's monthly allocation under G.S. 105-472(b)" in the third sentence.

Session Laws 2008-134, s. 15(g), effective October 1, 2009, and applicable to distributions for months beginning on or after that date, rewrote subdivision (a)(2).

§ 105-523. (Effective October 1, 2009) County hold harmless for repealed local taxes.

(a) Intent. — It is the intent of the General Assembly that each county benefit by at least five hundred thousand dollars ($500,000) annually from the exchange of a portion of the local sales and use taxes for the State's agreement to assume the responsibility for the non-administrative costs of Medicaid.

(b) Definitions. — The following definitions apply in this section:

(1) City hold harmless amount. — The hold harmless amount determined under G.S. 105-522 for the eligible municipalities in a county.

(2) Hold harmless threshold. — The amount of a county's Medicaid service costs and Medicare Part D clawback payments assumed by the

State under G.S. 108A-54 for the fiscal year, less five hundred thousand dollars ($500,000).

(3) Repealed sales tax amount. — The sum of the following amounts allocated for distribution to a county for a month:

a. The amount of sales and use tax revenue allocated under G.S. 105-486. This calculation determines the effect of repealing a one-half percent (1/2%) sales and use tax distributed on a per capita basis.

b. An amount determined by subtracting twenty-five percent (25%) of the amount of sales and use tax revenue allocated under G.S. 105-472 or Chapter 1096 of the 1967 Session Laws from fifty percent (50%) of the amount of sales and use tax revenue allocated under G.S. 105-486. This calculation determines the effect of distributing a one-quarter percent (.25%) tax on the basis of point of origin instead of on a per capita basis.

(c) Requirement. — If a county's repealed sales tax amount plus its city hold harmless amount for a fiscal year exceeds the county's hold harmless threshold for that fiscal year, the State is required to hold the county harmless for the difference by paying the amount of the difference to the county. The Secretary must withhold from sales and use tax collections under Article 5 of this Chapter the amount needed to make the county hold harmless payments required by this section.

(d) Method. — The Secretary must estimate a county's repealed sales tax amount, city hold harmless amount, and hold harmless threshold for a fiscal year to determine if the county is eligible for a hold harmless payment. The Secretary must send to an eligible county with the distribution made under G.S. 105-472 for March of that year an amount equal to ninety percent (90%) of its estimated hold harmless payment. At the end of each fiscal year, the Secretary must determine each county's hold harmless payment for that year. The Secretary must send by August 15 the remainder of the county's hold harmless payment for the fiscal year that ended on June 30. The Secretary of the Department of Human Resources must give the Secretary of Revenue the data needed to determine a county's hold harmless threshold. (2007-323, s. 31.16.4(d); 2007-345, s. 14.4(b); 2008-134, s. 15(a), (d), (f), (h).)

Article 44 Set Out Twice. — This Article is effective October 1, 2009. For the Article as effective before October 1, 2009, see the preceding Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. — Session Laws 2007-323, s. 31.16.4(d), which amended subdivision (b)(2), effective October 1, 2009, and applicable to distributions for months beginning on or after that date, was repealed by Session Laws 2008-134, s. 15(d), effective July 28, 2008.

Session Laws 2007-323, s. 31.16.4(e), which was repealed by Session Laws 2008-134, s.15(e), effective July 28, 2008, provided: "For fiscal year 2009-2010, the repealed sales tax amount determined under G.S. 105-522(2)(a)(2)b, as enacted by this section, and G.S. 105-523(a)(2)b, as enacted by this section, is calculated based on twenty-five percent(25%) of the amount distributed to a municipality or county under Article 39 of Chapter 105 of the General Statutes or Chapter 1096 of the1967 Session Laws on or after October 1, 2009, less the amount distributed to the municipality or county on the basis of point of origin under repealed G.S. 105-520(a) in October, November, and December of 2009."

Session Laws 2007-345, s. 14.4(a), which amended subdivision (a)(2), effective October 1, 2009, and applicable to distributions for months beginning on or after that date, was repealed by Session Laws 2008-134, s. 15(f), effective July 28, 2008.

Session Laws 2008-134, s. 15(i), provides: "For fiscal year 2008-2009, the hold harmless amount determined for a municipality under G.S. 105-522 and the repealed sales tax amount determined for a county under G.S. 105-523 is reduced by the amount distributed in October, November, and December of 2008 to the municipality or county on a per capita basis under repealed G.S. 105-520(b).

"For fiscal year 2009-2010, the hold harmless amount determined for a municipality under G.S. 105-522 and the repealed sales tax amount determined for a county under G.S. 105-523 is reduced by the amount distributed in October, November, and December of 2009 to the municipality or county on the basis of point of origin under repealed G.S. 105-520(a)."

Effect of Amendments. —

Session Laws 2008-134, s. 15(a), effective October 1, 2008, and applicable to distributions for months beginning on or after that date, rewrote subsection (b); in subsection (c), inserted "plus its city hold harmless amount" near the beginning, and inserted "county" near the end of the second sentence; and in subsection (d), substituted "tax amount, city hold harmless amount" for "tax amount" in the first sentence, and substituted "each county's hold harmless payment" for "the difference between a county's repealed sales tax amount and its hold harmless threshold" near the end of the third sentence.

Session Laws 2008-134, s. 15(h), effective October 1, 2009, and applicable to distributions for months beginning on or after that date, rewrote subdivision (b)(3).

ARTICLE 46.

One-Quarter Cent (1/4¢) County Sales and Use Tax.

§ 105-538. Administration of taxes.

Except as provided in this Article, the adoption, levy, collection, administration, and repeal of these additional taxes must be in accordance with Article 39 of this Chapter. G.S. 105-468.1 is an administrative provision that applies to this Article. A tax levied under this Article does not apply to the sales price of food that is exempt from tax pursuant to G.S. 105-164.13B. The Secretary shall not divide the amount allocated to a county between the county and the municipalities within the county. Notwithstanding the provisions of G.S. 105-466(c), during the 2008 calendar year a tax levied under this Article may become effective on the first day of any calendar quarter so long as the county gives the Secretary at least 60 days' advance notice of the new tax levy. (2007-323, s. 31.17(b); 2007-345, s. 14.5(a); 2008-134, s. 75.)

Effect of Amendments. —

Session Laws 2008-134, s. 75, effective July 28, 2008, substituted "G.S. 105-466(c)" for "G.S. 105-467(c)" in the last sentence.

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